In one sense no reported case can ever be obsolete while the laws and judicial usages of English-speaking countries are what they are : that is, no man can say beforehand that any given case, however antiquated or trifling it may appear in itself to be, may not at some time have its use for the modern practitioner or text-writer. Every decision in the books is part of the history of the law, and no part of that history can be absolutely insignificant.—(Sir Frederick Pollock, Bart., LL.D., Corpus Professor of Jurisprudence in the University of Oxford.)

Accurate knowledge of the present state of the law upon any subject involves necessarily the history of the development of the law upon that subject, which can only be attained by following down the decisions touching upon it. — (Francis M. Scott, Justice, Supreme Court, New York.)

The law is the last interpretation of the law given by the last Judge.

The enunciation of the most elementary principle of law is frequently met by a demand for "an authority in support of that proposition . . . ." No time spent upon providing oneself with a precedent is ever wasted even though the book may have to be judiciously hidden from view until required.—(The Hon'ble Sir Cecil Walsh, Kt., K. C., Ex-Offg., Chief Justice, Allahabad High Court.)

The last Judicial Interpretation of the law is the Law on which your case hangs.

To correctly appraise a Judicial decision, it is important to know later applications of its rules to varying states of facts by way of extension or qualification .— (S. Shepard, Chief Justice, Court of Appeal, Washington (U. S. A).)

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Complete Library of Central Statute Law

SPECIAL FEATURES

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3. After all the Acts, the existing non-temporary Central Ordinances are given and arranged also alphabetically.
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11. A statement showing how an Act is affected by subsequent amendment, adaptation or repeal in part is given.
12. Wherever possible cognate provisions are indicated.
13. Important case-law given in the form of Notes with appropriate headings under the respective statutory provisions.
14. Comparative table showing the parallel provisions of the present and past Acts is given wherever necessary.
15. Central Acts enacted during the period intervening between the publications of the first and the last volumes of the series will be included in the last volume.
16. A complete list of all the Acts and Ordinances included in the series will be given in the last volume.
17. A consolidated Subject Index will form the last item of this series.

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A. I. R. PUBLICATION

THE

A. I. R. MANUAL

UNREPEALED CENTRAL ACTS

(CIVIL AND CRIMINAL)

2nd Edition

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to

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(2) Each of the Acts included is brought up to the date mentioned below the title of that Act where such title first occurs.

(3) The case-law is complete till 31st December, 1961.

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PREFACE

(Reprinted from First Volume)

We have great pleasure to place before the public the second edition of the A. I. R. Manual containing all the unrepealed Central Acts of India (of all-India importance), amended up-to-date, together with the case-law relating to each Act.

Since the last edition was published in 1946-1948, vast additions and changes have taken place in the statute law of this country.

Out of the 502 Central Acts included in the first edition, 145 Acts have been repealed, and 236 new Acts have been passed besides 331 repealing and amending Acts, 69 Acts of provincial application and 76 Appropriation Acts. Though the Acts of provincial application and the Appropriation Acts have not been included in this edition, all the amendments have been incorporated and all the 236 new Acts above mentioned have been included in this edition. In addition, there have been 16 Adaptation Orders passed in consequence of Independence and the new Constitution and the adaptations made by all these Adaptation Orders have had to be incorporated.

These figures are by themselves enough to show the importance of this edition to the legal profession as well as to the Courts in India.

The scheme of the publication is given at the beginning of this volume. It will be seen that the main features of the first edition have been retained in this edition. The Preface to the first edition (which is reprinted in volume I) may be read as part of this Preface, in this connection.

In conclusion we wish to place on record our sincere thanks to the following gentlemen for their assistance in bringing out this edition: Messrs. D. W. Chitaley, B.A., LL.B., W. W. Chitaley, B.A., LL.B., V. S. Balkundi, B.A., LL.B., R. G. Dhoble, B.A., LL.B., V. B. Bakhale, M.A., LL.B., D. H. Zadgaonkar, B.A., LL.B., K. S. Bakre, B.Sc., LL.B., D. R. Rajandekar, B.A., LL.B., V. R. Buche, B.A., LL.B., G. M. Jatar, B.A., LL.B., M. Kuppuswami, B.A., B.L., H. G. Pathak, B.A., LL.B., P. A. Bakre, B.A., LL.B., G. B. Shidhaye, B.A., LL.B., Advocate, and J. G. Patankar.

13th July, 1959.

D. V. C.
S. A. R.

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ABBREVIATIONS

(i) Relating to Journals and Reports.

A.I.R. 1914 All., Bom., etc. ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
Agra. H.C.R.... Agra High Court Reports.
A. M. L. J. ... Ajmer-Merwara Law Journal.
All. or I.L.R. All. ... Indian Law Reports, Allahabad Series.
All. L. Jour. ... Allahabad Law Journal.
All. W. N. ... Allahabad Weekly Notes.
All. W.R. ... Allahabad Weekly Reporter.
All E. R. ... All England Law Reports.
I. L. R. Andhra (Andh. Pra.) ... Indian Law Reports, Andhra (Andhra Pradesh) Series.
Andh. L. T. ... Andhra Law Times.
Andhra (or Andh.) W. R. ... Andhra Weekly Reporter.
I. L. R. Assam ... Indian Law Reports, Assam Series.
Avadh W. N. ... Avadh (or Oudh) Weekly Notes.
App. Cas. ... Law Reports, Appeal Cases (England).
Beng. L. R. ... Bengal Law Reports.
B. L. J. R. or Bihar L. J. R. ... Bihar Law Journal Reports.
B. R. ... Bihar Reports.
Bom. or I. L. R. Bom. ... Indian Law Reports, Bombay Series.
Bom. H. C. R. ... Bombay High Court Reports.
Bom. L. R. ... Bombay Law Reporter.
Bom. P. J. ... Bombay Printed Judgments.
Bur. L. Jour. ... Burma Law Journal.
Bur. L. R. ... Burma Law Reports.
Bur. L. Tim. ... Burma Law Times.
Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.
Cal. L. Jour. ... Calcutta Law Journal.
Cal. L. R. ... Calcutta Law Reports.
Cal. W. N. ... Calcutta Weekly Notes.
Cal. W. N. (D. R.) ... Calcutta Weekly Notes (Dacca Reports).
C. P. L. R. ... Central Provinces Law Reports.
Ch. ... Law Reports, Chancery (England).
Cor. ... Coryton's Reports.
Cr. or Cri. L. Jour. ... Criminal Law Journal.
I. L. R. Cut. ... Indian Law Reports, Cuttack Series.
Cut. L. T. ... Cuttack Law Times.
E. P. or East Punj. ... East Punjab.
I. L. R. E. P. or East Punj. ... Indian Law Reports, East Punjab Series.
E. R. ... English Reports (England).
F. C. R. ... Federal Court Reports.
F. L. J. ... Federal Law Journal.
Hay ... Hay's Reports.
Him. Pra. ... Himachal Pradesh.
Hyde ... Hyde's Reports.
Hyd. ... Hyderabad.
I. L. R. Hyd. ... Indian Law Reports, Hyderabad Series.
Ind. App. ... Law Reports, Indian Appeals.
Ind. Cas. ... Indian Cases.
Ind. Jur. (N. S.) ... Indian Jurist (New Series).
Ind. Jur. (O. S.) ... Indian Jurist (Old Series).
Ind. Rul. ... Indian Rulings.
I. T. C. ... Income Tax Cases.
I. T. R. ... Income Tax Reports.
J. & K. ... Jammu & Kashmir.
J. & K. L. R. ... Jammu & Kashmir Law Reports.
J. L. R. or Jaipur L. R. ... Jaipur Law Reports.
Jab. L. J. ... Jabalpur Law Journal.
I. L. R. Kar. ... Indian Law Reports, Karachi Series.
I. L. R. Ker. (or Kerala) ... Indian Law Reports, Kerala Series.
K. L. T. or Ker. L. T. ... Kerala Law Times.
K. B. ... Law Reports, King's Bench (England).
Knapp ... Knapp's Reports.
Lab. A. C. ... Labour Appeal Cases.
Lab. L. J. ... Labour Law Journal.
I. L. R. Lah. ... Indian Law Reports, Lahore Series.
Lah. L. Jour. ... Lahore Law Journal.
Lah. L. T. ... Lahore Law Times.
L. J. ... Law Journal (England).
L. R. ... Law Reports (England).
Law Ed. ... Lawyers' Edition.
L. R. A. ... Law Reporter, Allahabad.
Low. Bur. Rul. or L. B. R. ... Lower Burma Rulings.

Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.
Madh. B. or M. B. ... Madhya Bharat.
I. L. R. Madh. B. ... Indian Law Reports, Madhya Bharat Series.
Madh. B. L. J. ... Madhya Bharat Law Journal.
Madh. B. L. R. ... Madhya Bharat Law Reporter.
I. L. R. Madh. Pra. or M. P. ... Indian Law Reports, Madhya Pradesh Series.
M. P. C. ... Madhya Pradesh Cases.
M. P. L. J. ... Madhya Pradesh Law Journal.
Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.
Mad. H. C. R. ... Madras High Court Reports.
Mad. L. Jour. ... Madras Law Journal.
Mad. L. Tim. ... Madras Law Times.
Mad. L. W. ... Madras Law Weekly.
Mad. W. N. ... Madras Weekly Notes.
Marsh ... Marshall's Reports.
M. L. R. or Marwar L. R. ... Marwar Law Reporter.
Moo. Ind. App. ... Moore's Indian Appeals.
Moo. P. C. C. ... Moore's Privy Council Cases.
Mys. ... Mysore.
I. L. R. Mys. ... Indian Law Reports, Mysore Series.
Mys. H. C. R. ... Mysore High Court Reports.
Mys. L. J. ... Mysore Law Journal.
I. L. R. Nag. ... Indian Law Reports, Nagpur Series.
Nag. L. Jour. ... Nagpur Law Journal.
Nag. L. R. ... Nagpur Law Reports.
N.-W. P. H. C. R. ... North-West Provinces High Court Reports.
Oudh Cas. ... Oudh Cases.
Oudh L. Jour. ... Oudh Law Journal.
Oudh L. R. ... Oudh Law Reports.
Oudh S. C. ... Oudh Select Cases.
Oudh W. N. ... Oudh Weekly Notes.
Pak. L. R. Lahore ... Pakistan Law Reports, Lahore.
I. L. R. Patiala ... Indian Law Reports, Patiala Series.
Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.
Pat. H. C. C. ... Patna High Court Cases.
Pat. L. Jour. ... Patna Law Journal.
Pat. L. R. ... Patna Law Reporter.
Pat. L. Tim. ... Patna Law Times.
Pat. L. W. ... Patna Law Weekly.
Pat. W. N. ... Patna Weekly Notes.
Pepsu L. R. ... Pepsu Law Reports.
I. L. R. Punj. ... Indian Law Reports, Punjab Series.
Pun. L. R. ... Punjab Law Reporter.
Pun. Re. ... Punjab Records.
Pun. W. R. ... Punjab Weekly Reporter.
Q. B. ... Law Reports, Queen's Bench (England).
Raj ... Rajasthan.
I. L. R. Raj. ... Indian Law Reports, Rajasthan Series.
R. L. W. or Raj. L. W. ... Rajasthan Law Weekly.
Rang. or I. L. R. Rang. ... Indian Law Reports, Rangoon Series.
Rang. L. R. ... Rangoon Law Reports.
Rat. or Rat. Un. Cr. C. ... Ratanlal's Unreported Criminal Cases.
R. D. ... Revenue Decisions.
R. R. ... Revised Reports (England).
R. S. C. ... Rules of the Supreme Court of England.
Sar. ... Saraswati's Privy Council Judgments.
Sau. ... Saurashtra.
Sau. L. R. ... Saurashtra Law Reporter.
Shome L. R. ... Shome's Law Reports.
Sind L. R. ... Sind Law Reporter.
S. C. A. ... Supreme Court Appeals.
S. C. C. ... Supreme Court Cases.
S. C. J. ... Supreme Court Journal.
S. C. R. ... Supreme Court Reports.
Suther. ... Sutherland's Privy Council Judgments.
Suth. W. R. ... Sutherland's Weekly Reporter.
Times L. R. ... Times Law Reports.
Trav.-Co. or T. C. ... Travancore-Cochin.
I. L. R. Trav.-Co. or T. C. ... Indian Law Reports, Travancore-Cochin Series.
T. C. L. R. or Trav.-Co. L. R. ... Travancore-Cochin Law Reports.
T. L. J. or Trav. L. J. ... Travancore Law Journal.
U.P.B.R...United Provinces Board of Revenue.
U. P. L. R. ... United Provinces Law Reports.
Upp. Bur. Rul. or U. B. R. ... Upper Burma Rulings.
U. S. ... Supreme Court of the United States Reports.
Vindh. Pra. or V. P. ... Vindhya Pradesh.
Weir. ... Weir's Criminal Rulings.
W. L. R. ... Weekly Law Reports (England).
W. R. (Eng.) ... Weekly Reporter (England).

(ii) Relating to Adaptation Orders.

A. C. A. O., 1948	... Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.
A. L. O., 1950	... Adaptation of Laws Order, 1950.
1 A. L. O., 1956	... Adaptation of Laws (No. 1) Order, 1956.
2 A. L. O., 1956	... Adaptation of Laws (No. 2) Order, 1956.
3 A. L. O., 1956	... Adaptation of Laws (No. 3) Order, 1956.
4 A. L. O., 1957	... Adaptation of Laws (No. 4) Order, 1957.
5 A. L. O., 1957	... Adaptation of Laws (No. 5) Order, 1957.
Andhra A. L. O., 1953	... Andhra Adaptation of Laws Order, 1953.
An. P. A. L. O., 1957	... Andhra Pradesh Adaptation of Laws Order, 1957.
A. O., 1937	... Government of India (Adaptation of Indian Laws) Order, 1937, as modified by the Government of India (Adaptation of Indian Laws) Supplementary Order, 1937.
A. O. (P), 1937	... The Government of India (Adaptation of Acts of Parliament) Order, 1937.
Bih. A. L. O., 1957	... Bihar Adaptation of Laws Order, 1957.
Bom. A. L. O., 1957	... Central Acts on State and Concurrent Subjects (Bombay Adaptation) Order, 1957.
Fr. Est. A. L. O., 1954	... French Establishments (Application of Laws) Order, 1954.
Guj. A. L. O., 1960	... Gujarat Adaptation of Laws (State and Concurrent Subjects) Order, 1960.
Kerala A. L. O., 1956	... Kerala Adaptation of Laws Order, 1956.
Kerala A. L. O., 1957	... Kerala Adaptation of Laws (No. 2) Order, 1957.
M. P. A. L. O., 1956	... Madhya Pradesh Adaptation of Laws (State and Concurrent Subjects) Order, 1956.
Madras A. L. O., 1954	... Madras Adaptation of Laws Order, 1954.
Madras A. L. O., 1957	... Madras (Adaptation of Laws) (Central Acts) Order, 1957.
Mah. A. L. O., 1960	... Maharashtra Adaptation of Laws (State and Concurrent Subjects) Order, 1960.

(iii) Other Abbreviations.

A.	... Superior A placed above the word or words in a square bracket indicates that the word or words is or are the last in the series of general adaptations directed to be made by one or more of the Adaptation Orders published in the Gazette of India from 1937 to 1957.
A. C.	... Appellate Jurisdiction, Civil.
A. Cr.	... Appellate Jurisdiction, Criminal.
App.	... Appendix or Appeal.
Appr.	... Approved.
Art. or A.	... Article.
B. R.	... Board of Revenue.
C. A.	... Court of Appeal.
Civ.	... Civil.
Cl.	... Clause.
Cons.	... Considered.
Cr.	... Criminal.
Cr. L.	... Criminal Letters.
Cr. Cir.	... Criminal Circulars.
Diss.	... Dissented.

Dist.	...	Distinguished.
D. B.	...	Division Bench.
E.	...	Entry.
Expl.	...	Explained.
F. A.	...	First Appeal.
F. B.	...	Full Bench.
F. C.	...	Federal Court.
F. N.	...	Foot Note.
Foll.	...	Followed.
G. I.	...	Government of India.
I. O.	...	The India (Adaptation of Existing Indian Laws) Order, 1947.
Illus.	...	Illustrations.
J. C. R.	...	Joint Committee Report.
Jour.	...	Journal.
L.	...	List.
L. P.	...	Letters Patent.
N.	...	Note.
No.	...	Number.
O.	...	Order.
O. C.	...	Original Jurisdiction, Civil.
O. Cr.	...	Original Jurisdiction, Criminal.
Over.	...	Overruled.
P.	...	Page.
Pr. or P.	...	Para.
Pt.	...	Point.
P. C.	...	Privy Council.
Pre.	...	Preamble.
R.	...	Rule.
Ref.	...	Referred or Reference.
Rel. on.	...	Relied on.
R. S. C.	...	Rules of Supreme Court.
Rev.	...	Revenue.
S.	...	Section.
S. A.	...	Second Appeal.
S. B.	...	Special Bench.
S. C.	...	Supreme Court.
S. C. R.	...	Select Committee Report.
S. O. R.	...	Statement of Objects and Reasons.
S. N.	...	Short Notes of Cases.
w.e.f.	...	With effect from.
w.r.e.f.	...	With retrospective effect from.

IN FOOT-NOTES.—

('66) means (1866); ('04) means (1904); ('27) means (1927); ('39) means (1939).

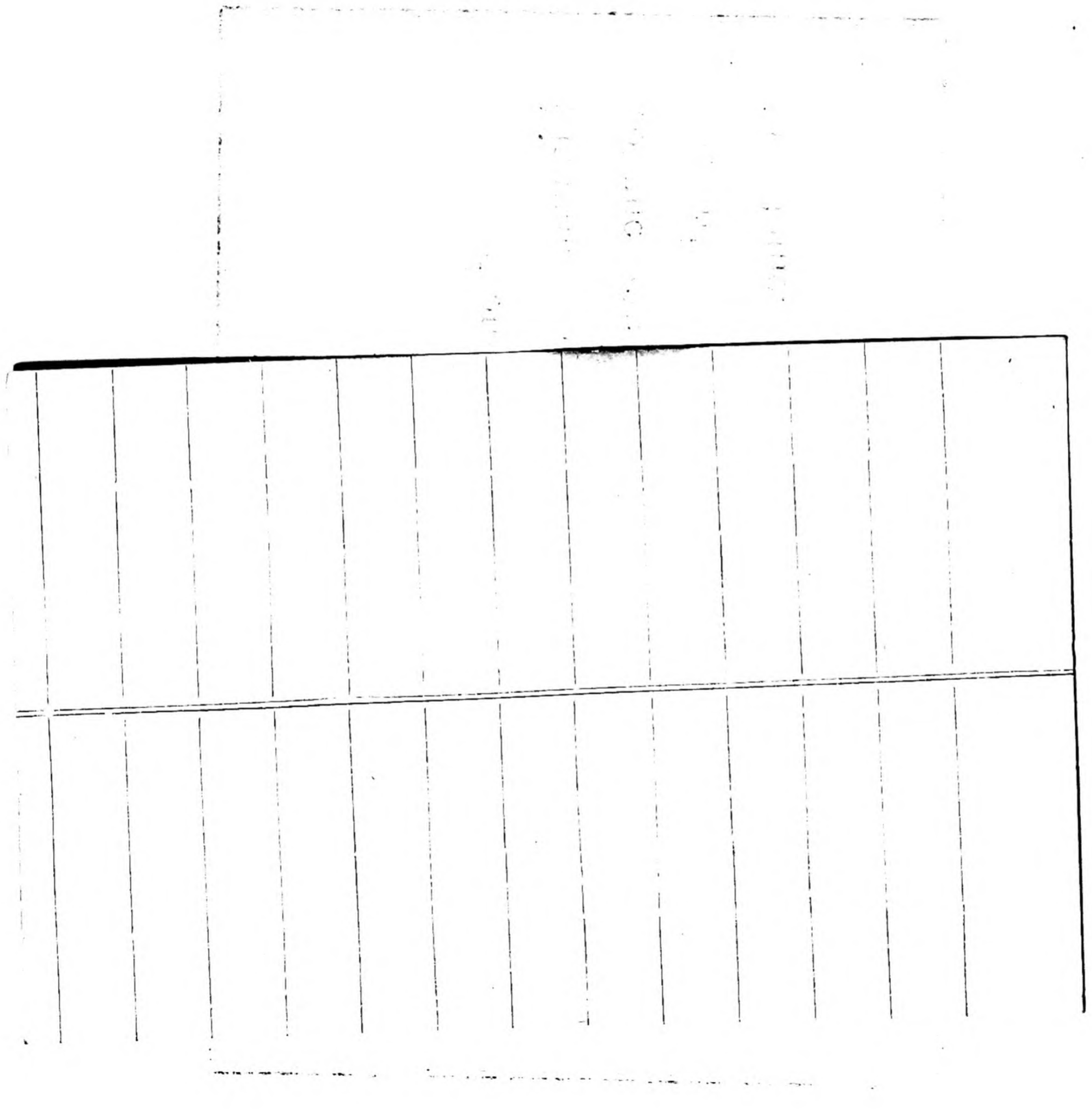
Full year reference is given prior to 1866, like (1818) and *not* ('18); (1865) and *not* ('65) and so on, and to all Foreign cases.

(S) Before the letters 'A. I. R.' indicates that the case is included in the Select Edition of A. I. R. also.

⁜ Indicates that citation of a different case begins.

NOTE

From volume 7 of the A. I. R. Manual, 2nd Edition, the pages of each volume are numbered separately from 1 onwards, instead of continuously from volume to volume.



CORRECTION

Vol. V. The Displaced Persons (Claims) Supplementary Act, 1954.

Page 5742—Preamble : Foot-note (b).

For the figures and words "17th May, 1952" *read* "17th May, 1953".

Page 5743—Foot-note (a) under section 2—

In the first line of this foot-note *after* the brackets, figures and the word "(XLIV of 1950)" *add* the words and figures "as amended by Act XL of 1952".

In the second line of the same foot-note for the words "two years" *substitute* the words "three years".

In the fourth line of the same foot-note for the figures and words "17th of May, 1952" *substitute* the figures and words "17th of May, 1953".

A. I. R. MANUAL

UNREPEALED CENTRAL ACTS

(CIVIL & CRIMINAL)

VOLUME XIII

[THE] PRESIDENTIAL AND VICE-PRESIDENTIAL ELECTIONS ACT, 1952

(Act XXXI of 1952)

[The Act printed here is as on 1-2-1961.]

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STATEMENT OF OBJECTS AND REASONS

"Article 54 of the Constitution provides that the President of India shall be elected by the members of an electoral college consisting of (a) the elected members of both Houses of Parliament and (b) the elected members of the Legislative Assemblies of the States, and Article 55 prescribes the manner in which the election shall be held. Article 66 provides

that the Vice-President shall be elected by the members of both Houses of Parliament assembled at a joint meeting. Article 71 (1) lays down that doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court. Article 71 (3) authorises Parliament to regulate by law, subject to the provisions of the Constitution, any matter relating to or connected with the election of a President or Vice-President.

The Bill seeks to provide for the conduct of elections to the offices of President and Vice-President, the decision of disputes arising out of or in connection with such elections, the corrupt practices and other offences at or in connection with such elections and other ancillary matters."

—Gaz. of Ind., 1952, Pt. II-Sec. 2, p. 9.

[THE] PRESIDENTIAL AND VICE-PRESIDENTIAL ELECTIONS ACT, 1952

(ACT XXXI OF 1952)[a]

[14th March, 1952.]

An Act to regulate certain matters relating to or connected with elections to the offices of President and Vice-President of India

BE it enacted by Parliament as follows : —

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1952, Pt. II-Sec. 2, p. 9.

PART I

PRELIMINARY

1. Short title.

This Act may be called THE PRESIDENTIAL AND VICE-PRESIDENTIAL ELECTIONS ACT, 195 .

2. Definitions.

In this Act, unless the context otherwise requires,—

(a) "article" means an article of the Constitution;

(b) "election" means a Presidential election or Vice-Presidential election;

(c) "Election Commission" means the Election Commission appointed by the President under article 324;

(d) "Elector", in relation to a Presidential election, means a member of the electoral college referred to in article 54, and in relation to a Vice-Presidential election, means a member of either House of Parliament;

(e) "prescribed" means prescribed by rules made under this Act;

(f) "Presidential election" means an election to fill the office of the President of India;

(g) "Returning Officer" includes an Assistant Returning Officer performing any function which he is authorised to perform under sub-section *(2)* of section 3;

(h) "Vice-Presidential election" means an election to fill the office of the Vice-President of India.

PART II

CONDUCT OF PRESIDENTIAL AND VICE-PRESIDENTIAL ELECTIONS

3. Returning Officer and his assistants.

(1) For the purposes of each election the Election Commission shall, in consultation with the Central Government, appoint a Returning Officer who shall have his office in New Delhi and may also appoint one or more Assistant Returning Officers.

(2) Subject to rules made under this Act, every Assistant Returning Officer shall be competent to perform all or any of the functions of the Returning Officer.

4. Appointment of dates for nominations, etc.

(1) The Election Commission shall, by notification in the Official Gazette, appoint for every election—

(a) the last date for making nominations which shall be a date not later than the fourteenth day and not earlier than the eighth day after the date of publication of the notification under this sub-section ;

(b) a date for the scrutiny of nominations which shall be a date not later than the third day after the last date for making nominations ;

(c) the last date for the withdrawal of candidatures which shall be the third day after the date for the scrutiny of nominations ;

(d) the date on which a poll shall, if necessary, be taken, which shall be a date not earlier than the fifteenth day after the last date for the withdrawal of candidatures.

(2) In the case of the first Presidential and Vice-Presidential elections, the notifications under sub-section *(1)* shall be issued as soon as may be after both Houses of Parliament have been constituted.

(3) In the case of an election to fill a vacancy caused by the expiration of the term of office of the President or Vice-President, the notification under sub-section *(1)* shall be issued on, or as soon as conveniently may be after, the sixtieth day before the expiration of the term of office of the outgoing President or Vice-President, as the case may be, and the dates shall be so appointed under the said sub-section that the election will be completed at such time as will enable the President or the Vice-President thereby elected to enter upon his office on the day following the expiration of the term of office of the outgoing President or Vice-President, as the case may be.

(4) In the case of an election to fill a vacancy in the office of President or Vice-President occurring by reason of his death, resignation or removal or otherwise, the notification under sub-section *(1)* shall be issued as soon as may be after the occurrence of such vacancy.

5. Nomination of candidates.

(1) Any person may be nominated as a candidate for election to the office of President or Vice-President if he is qualified to be elected to that office under the Constitution.

(2) Each candidate shall be nominated by a nomination paper completed in the prescribed form and subscribed by the candidate himself as assenting to the nomination and by two electors as proposer and seconder.

6. Withdrawal of candidature.

(1) Any candidate may withdraw his candidature by a notice in writing in the prescribed form subscribed by him and delivered before three o'clock in the afternoon on the date fixed under clause *(c)* of sub-section *(1)* of section 4, to the Returning Officer either by such candidate in person or by his proposer or seconder who has been authorised in this behalf in writing by such candidate.

(2) No person who has given a notice of withdrawal of his candidature under sub-section *(1)* shall be allowed to cancel the notice.

(3) The Returning Officer shall, on receiving a notice of withdrawal under sub-section *(1)*, as soon as may be thereafter, cause a notice of the withdrawal to be affixed in some conspicuous place in his office.

7. Death of candidate before poll.

If a candidate, whose nomination has been made and is found to be in order on scrutiny, dies after the time fixed for nomination and a report of his death is received by the Returning Officer before the commencement of the poll, the Returning Officer shall, upon being satisfied of the fact of the death of the

candidate, countermand the poll and report the fact to the Election Commission, and all proceedings with reference to the election shall be commenced anew in all respects as if for a new election:

Provided that no further nomination shall be necessary in the case of a candidate whose nomination was valid at the time of the countermanding of the poll :

Provided further that no person who has under sub-section *(1)* of section 6 given a notice of withdrawal of his candidature before the countermanding of the poll shall be ineligible for being nominated as a candidate for the election after such countermanding.

8. Procedure in contested and uncontested elections.

If after the expiry of the period within which candidatures may be withdrawn under sub-section *(1)* of section 6—

(a) there is only one candidate who has been validly nominated and has not withdrawn his candidature in the manner and within the time specified in that sub-section, the Returning Officer shall forthwith declare such candidate to be duly elected to the office of President or Vice-President, as the case may be;

(b) the number of candidates who have been duly nominated but have not so withdrawn their candidatures exceeds one, the Returning Officer shall forthwith publish in such form and manner as may be prescribed a list containing the names in alphabetical order and addresses of candidates as given in the nomination papers, together with such other particulars as may be prescribed, and a poll shall be taken ;

(c) there is no candidate who has been duly nominated and has not so withdrawn his candidature, the Returning Officer shall report the fact to the Election Commission and thereafter all the proceedings in relation to the election shall be commenced afresh and for that purpose the Election Commission shall cancel the notification issued under sub-section *(1)* of section 4 in respect of such election and issue another notification under that sub-section appointing the dates referred to in that sub-section for the purposes of such fresh election.

9. Manner of voting at elections.

At every election where a poll is taken, votes shall be given by ballot in such manner as may be prescribed, and no votes shall be received by proxy.

10. Counting of votes.

At every election where a poll is taken, votes shall be counted by, or under the supervision of, the Returning Officer, and each candidate and one representative of each candidate authorised in writing by the candidate, shall have a right to be present at the time of counting.

11. Declaration of results.

When the counting of the votes has been completed, the Returning Officer shall forthwith declare the result of the election in the manner provided by this Act or the rules made thereunder.

12. Report of the result.

As soon as may be after the result of an election has been declared, the Returning Officer shall report the result to the Central Government and the Election Commission, and the Central Government shall cause to be published in the Official Gazette the declaration containing the name of the person elected to the office of President or Vice-President, as the case may be.

PART III

DISPUTES REGARDING ELECTIONS

13. Definitions.

In this Part, unless the context otherwise requires—

(a) "candidate" means a person who has been or claims to have been duly nominated as a candidate at an election, and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate;

(b) "costs" means all costs, charges and expenses of, or incidental to, a trial of an election petition;

(c) "returned candidate" means a candidate whose name has been published under section 12 as duly elected.

14. Election petitions.

(1) No election shall be called in question except by an election petition presented to the Supreme Court in accordance with the provisions of this Part and of the rules made by the Supreme Court under article 145.

(2) An election petition calling in question an election may be presented on one or more of the grounds specified in sub-section *(1)* of section 18 and section 19 to the Supreme Court by any candidate at such election or by ten or more electors joined together as petitioners.

(3) Any such petition may be presented at any time after the date of publication of the declaration containing the name of the returned candidate at the election under section 12 but not later than thirty days from the date of such publication.

15. Form of petitions, etc., and procedure.

Subject to the provisions of this Part, rules made by the Supreme Court under article 145 may regulate the form of election petitions, the manner in which they are to be presented, the persons who are to be made parties thereto, the procedure to be adopted in connection therewith and the circumstances in which petitions are to abate, or may be withdrawn, and in which new petitioners may be substituted, and may require security to be given for costs.

16. Relief that may be claimed by the petitioner.

A petitioner may claim either of the following declarations : —

(a) that the election of the returned candidate is void;

(b) that the election of the returned candidate is void and that he himself or any other candidate has been duly elected.

17. Orders of the Supreme Court.

(1) At the conclusion of the trial of the election petition, the Supreme Court shall make an order—

(a) dismissing the election petition; or

(b) declaring the election of the returned candidate to be void; or

(c) declaring the election of the returned candidate to be void and the petitioner or any other candidate to have been duly elected.

(2) At the time of making an order under sub-section *(1)*, the Supreme Court

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Section 14 — Note 1

[1] When once an election has been held, any doubt concerning its validity is material only as a ground for setting aside the election. Where in substance the petition is one calling the election in question it must satisfy the requirements of the Act and of the Rules in O. 37A of the Supreme Court Rules which it does not do when the petitioner is not a person entitled to apply under S. 14 of the Act and the petition does not comply with the requirements of Rr. 3 and 12 of O. 37A. 1958 S. C. 139 (140) [A I R V 45 C 22] : 1958 S C R 658.

shall also make an order fixing the total amount of costs payable and specifying the persons by and to whom costs shall be paid.

18. Grounds for declaring the election of a returned candidate to be void.

(1) If the Supreme Court is of opinion—

(a) that the offence of bribery or undue influence at the election has been committed by the returned candidate or by any person with the connivance of the returned candidate ; or

(b) that the result of the election has been materially affected—

(i) by reason that the offence of bribery or undue influence at the election has been committed by any person who is neither the returned candidate nor a person acting with his connivance, or

(ii) by the improper reception or refusal of a vote, or

(iii) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act ; or

(c) that the nomination of any candidate has been wrongly rejected or the nomination of the successful candidate or of any other candidate who has not withdrawn his candidature has been wrongly accepted ;

the Supreme Court shall declare the election of the returned candidate to be void.

(2) For the purposes of this section, the offences of bribery and undue influence at an election have the same meaning as in Chapter IX-A of the Indian Penal Code.

19. Grounds for which a candidate other than the returned candidate may be declared to have been elected.

If any person who has lodged an election petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the Supreme Court is of opinion that in fact the petitioner or such other candidate received a majority of the valid votes, the Supreme Court shall, after declaring the election of the returned candidate to be void, declare the petitioner or such other candidate, as the case may be, to have been duly elected :

Provided that the petitioner or such other candidate shall not be declared to be duly elected if it is proved that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election.

Section 18 — Note 1

[1] In exercise of powers conferred on it by Art. 71 (3) of the Constitution Parliament has enacted the Presidential and Vice-Presidential Elections Act to regulate certain matters relating to or connected with elections to the office of President and Vice-President of India. A glance through the provisions of this Act will indicate that in the view of the Parliament the time for the exercise of jurisdiction by the Supreme Court to inquire into and decide doubts and disputes arising out of or in connection with the Presidential election is after the entire election process is completed. 1957 S C 694 (697, 698) [(S) A I R V 44 C 106] : 1957 S C R 1081.

[2] Elections have to be held in numerous constituencies and different dates have to be fixed for holding the actual elections in different constituencies according to the various exigencies relating to the particular localities in which the constituencies are situate. In so far as the alleged discrimination, if any, in breach of the equal protection clause of the Constitution may be said to be calculated to raise any doubt in connection with the election of the president, it will, at best, be a non-compliance with the provisions of the Constitution which may or may not, after the conclusion of the entire election, be made a ground under S. 18 of the Act calling the election in question. 1957 S C 694 (699) [(S) AIR V 44 C 106] : 1957 S C R 1081.

[3] Section 18 and the Rules in O. 37A of the Supreme Court Rules do not derogate from the jurisdiction of the Supreme Court under Art. 71 (1) of the Constitution and are not ultra vires; and a petitioner has no right to move for setting aside an election except in accordance with the provisions of the Act. 1958 S C 139 (140) [AIR V 45 C 22] : 1958 S C R 648.

20. Transmission of orders to the Central Government and its publication.
The Supreme Court shall, after announcing the orders made under section 17, send a copy thereof to the Central Government, and on receipt of such copy the Central Government shall forthwith cause the order to be published in the Official Gazette.

PART IV

MISCELLANEOUS

21. Power to make rules.
(1) The Central Government may, after consulting the Election Commission, by notification in the Official Gazette, make [a]rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) the maintenance of a list of members of the electoral college referred to in article 54 with their addresses corrected up to date for the purposes of Presidential elections ;

(b) the maintenance of a list of members of both Houses of Parliament with their addresses corrected up to date for the purposes of Vice-Presidential elections ;

(c) the powers and duties of a Returning Officer and the performance by any officer appointed to assist the Returning Officer of any function of the Returning Officer ;

(d) the form and manner in which nominations may be made and the procedure to be followed in respect of the presentation of nomination papers ;

(e) the scrutiny of nominations and, in particular, the manner in which such scrutiny shall be conducted and the conditions and circumstances under which any person may be present or may enter objections thereat ;

(f) the publication of a list of valid nominations ;

(g) the place and hours of polling, the manner in which votes are to be given and the procedure as to voting to be followed at elections ;

(h) the scrutiny and counting of votes including cases in which a re-count of the votes may be made before the declaration of the result of the election ;

(i) the safe custody of ballot boxes, ballot papers and other election papers, the period for which such papers shall be preserved and the inspection and production of such papers ;

(j) any other matter required to be prescribed by this Act.

[a] For Presidential and Vice-Presidential Election Rules, 1952, *see* Gaz. of Ind., Extra., Pt. II, S. 3, page 429.

22. Maintenance of secrecy of voting.
(1) Every officer, clerk or other person who performs any duty in connection with the recording or counting of votes at an election shall maintain, and aid in maintaining, the secrecy of the voting and shall not (except for some purpose authorised by or under any law) communicate to any person any information calculated to violate such secrecy.

(2) Any person who contravenes the provisions of sub-section *(1)* shall be punishable with imprisonment for a term which may extend to three months, or with fine, or with both.

23. Jurisdiction of Civil Courts barred.
Save as provided in Part III, no Civil Court shall have jurisdiction to question the legality of any action taken or of any decision given by the

Returning Officer or by any other person appointed under this Act in connection with an election.

[THE] PRESIDENT'S PENSION ACT, 1951
(ACT XXX of 1951)

[The Act printed here is as on 1-2-1961.]

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1. Short title.
2. Pension to retiring Presidents.
3. Pension to the last Governor-General.
4. Pensions to be charged on the Consolidated Fund of India.

STATEMENT OF OBJECTS AND REASONS

"Whereas it is desirable that some suitable financial provision should be made for Presidents after their retirement, this Bill is introduced to provide for a pension of Rs. 15,000 per annum, which will be subject to income-tax. The pension will be given to all Presidents after they vacate their office. It will also be allowed to the last Governor-General. The expenditure involved will be a charge on the Consolidated Fund of India."

—Gaz. of Ind., 1950, Pt. II-S. 2, p. 385.

[THE] PRESIDENT'S PENSION ACT, 1951
(ACT XXX OF 1951)[a]

[13th May, 1951.]

An Act to provide for the payment of pensions to retiring Presidents

BE it enacted by Parliament as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1950, Pt. II-S. 3, page 385.

1. Short title.

This Act may be called THE PRESIDENT'S PENSION ACT, 1951.

2. Pension to retiring Presidents.

There shall be paid to every person who ceases to hold office as President, either by the expiration of his term of office or by resignation of his office, a pension of fifteen thousand rupees per annum for the remainder of his life :

Provided that, where any such person is re-elected to that office, no pension shall be payable for the period during which he again holds office as President.

Note.—The provisions of this section also apply to the last incumbent of the Office of the Governor-General of India.

3. Pension to the last Governor-General.

The provisions of section 2 shall apply to the person who held office as the last Governor-General of India as they shall apply to any person who ceases to hold office as President.

4. Pensions to be charged on the Consolidated Fund of India.

Any pension payable under this Act shall be charged on the Consolidated Fund of India.

[THE] PRESS AND REGISTRATION OF BOOKS ACT, 1867
(ACT XXV of 1867)

[The Act printed here is as on 1-2-1961.]

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STATEMENT OF OBJECTS AND REASONS

"It has for many years been the endeavour of the authorities to make a collection of the books and other publications emanating from the various printing presses at work throughout the country.

It was an instruction of the late Court of Directors of the East India Company, that copies of every important and interesting work published should be despatched to England to be deposited in the library of the India House.

And again, on the urgent requisition of the Royal Asiatic Society in London, the Secretary of State for India repeated the instructions of the late Court of Directors, and desired also that catalogues of all works published in India should be sent to England.

The above instructions had special reference to the province of Lower Bengal, and the local authorities of this province were set in motion, and on a plan suggested by Mr. Talboys Wheeler of the Home Office, and matured by Mr. Robinson, Bengalee Translator to the Government of Bengal, a system of registration of books on terms advantageous to publishers was notified, and a catalogue of books published in the province of Lower Bengal was prepared.

But this catalogue had necessarily to be prepared by its editor, not with the books before him, but from such imperfect and scattered notices and advertisements of such books as he could collect from newspapers and other such sources, and was found therefore to be to a great extent, and essentially, incorrect, and the registration system completely broke down, there having been but three applications for registration in the course of some nine months.

To send to England catalogues essentially and to a considerable extent incorrect, of only such books as can be routed out by private and perfunctory enquiries, is manifestly of no sort of use.

Yet the catalogue prepared in 1852, imperfect as it was, showed a list of some one thousand and five hundred books of more or less interest and importance, all published within the last ten or fifteen years, and it is notorious that, in the province of Lower Bengal at least, there has been of late years very great activity in the literary world and every year shows no inconsiderable increase in the number of works, original or reprinted, published, and in the number of printing presses established.

The literature of a country is no doubt an index of the opinions and condition of the people and such an index it is essential to good government that the rulers of country should possess.

In the interest, too, of history and of the scholars of Europe, it is undoubtedly wise to provide that a complete collection of the publications of the press of this country should be made as well in this country as in England.

It cannot but be of benefit to authors and publishers that catalogues of their works, and to a very limited extent copies of the works themselves, should be accessible to the public in certain well-known places.

Systems of voluntary registrations of publications have been found to fail and it is therefore proposed by this Bill to establish a system of compulsory sale to Government of three copies of each book or similar work printed in India. These copies will be paid for at the rate at which the book is bona fide sold for cash to the public.

One copy of the work will be sent to England, and the two others, after the book has been registered, will be kept in this country to be deposited in places — the proposed new Museum for instance — where they will be carefully preserved.

A list of works registered will be published each quarter in the official Gazette.

It is not quite clear that the provisions of the proposed Bill are as yet required in any province other than that of Lower Bengal, but inasmuch as the said provisions are reasonable and simple and inasmuch as it is certain that with the spread of education there will arise in the other provinces of the Empire, as there has arisen in Bengal, a corresponding activity in literature, it is provided that the Bill may be extended by notification to any part of the Empire."

—Gazette of India, 1867, page 191.

THE PRESS AND REGISTRATION OF BOOKS (AMENDMENT) ACT, 1955

STATEMENT OF OBJECTS AND REASONS

"The Press Laws Inquiry Committee which was set up by the Government to enquire into the Press laws made certain recommendations in 1948 for amending the Press and Registration of Books Act, 1867. Based partly on these recommendations and partly on recommendations made by State Governments, who had experienced practical difficulties in the working of the Act, the Press and Registration of Books (Amendment) Bill, 1952 was introduced in Parliament. The Press Commission, which was appointed shortly thereafter, reviewed the entire position in respect of the working of the Act. They substantially endorsed the provisions of the above Bill and made certain further recommendations for the amendment of the Act. The present Bill incorporates the provisions of the earlier Bill and makes certain further provisions in order to give effect to the recommendations of the Press Commission.

2. The Bill makes certain provisions for practical contingencies like temporary changes in the place of printing or publication. It also provides that a declaration in respect of a newspaper shall cease to have effect if the newspaper does not commence publication within a specified period or if it

ceases publication for a year or more or if it publishes issues the number of which is less than half of what should have been published in accordance with the declaration made in respect thereof.

3. The Act was intended to apply to all papers printed (including posters, etc.) and, as recommended by the Press Commission this intention has been clarified by removing the doubt which judicial decisions seem to have created.

4. In accordance with the recommendations of the Press Commission, it is proposed to set up an organisation under a Press Registrar for the purpose of registration of all newspapers published in India and for the collection, maintenance and publication of information concerning them."

—Gaz. Ind., 1955. Extra., Pt. II-sec. 2, p. 276.

PREVIOUS LEGISLATION

Printing-presses : XI of 1835—Repealed by the Press and Registration of Books Act, 1867 (XXV of 1867), S. 2.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937 ; A. C. A. O., 1948; A. L. O., 1950.

—Amended by Acts XI of 1916 ; XXXVIII of 1920 ; XIV of 1922 ; XI of 1923 ; XXXV of 1950 ; III of 1951 ; LVI of 1951 ; LV of 1955; XXVI of 1960.

—Amended in its application to—

Maharashtra : Bom. Acts LXI of 1948; VI of 1951 ; VIII of 1954 ; Mah. Act VII of 1961.

Madras : Madras Acts XXIV of 1948; XIV of 1960.

Punjab : Punj. Acts XIV of 1942 ; XXV of 1950 ; XV of 1957.

—Applied to Lushai Hills District by Assam Act XVI of 1954.

—Extended by Acts LIX of 1949 ; XXX of 1950.

—Extended in Bombay by Bom. Act IV of 1950; Punjab by Punjab Act V of 1960.

—Repealed in part and amended by Acts X of 1890; XII of 1891; X of 1914.

—Repealed in part by Acts XIV of 1870 ; III of 1914.

[THE] PRESS AND REGISTRATION OF BOOKS ACT, 1867

(ACT XXV OF 1867)[a]

[22nd March, 1867.]

An Act for the regulation of Printing-presses and Newspapers, for the preservation of copies of books [b][and newspapers] printed in [c][India], and for the registration of such books [b][and newspapers].

WHEREAS it is expedient to provide for the regulation of printing-presses and of [d][newspapers], for the preservation of [e][*] copies of [f][every book and newspaper printed in India and for the registration of such books and newspapers] ; It is hereby enacted as follows :—

[a] The short title was given by the Indian Short Titles Act, 1897 (14 of 1897).

This Act was declared by the Laws Local Extent Act, 1874 (15 [XV] of 1874), S. 3, to be in force in the whole of British India, except the Scheduled Districts.

It has been applied to the Santhal Parganas by the Santhal Parganas Settlement Regulation (3 [III] of 1872), S. 3; to the Khondmals District by the Khondmals Laws Regulation, 1936 (4 [IV] of 1936), S. 3 and Sch.; and to the Angul District by the Angul Laws Regulation, 1936 (5 [V] of 1936), S. 3 and Sch.

It has been applied, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (14 [XIV] of 1874), to the following Scheduled Districts, namely :—

the Territory of Peint, *see* Gazette of India, 1887, Pt. I, p. 144 (Peint is now no longer a Scheduled District, and all the enactments in force in the Nasik District of the Bombay Presidency, among them Act 25 [XXV] of 1867, are now in force in this territory, *see* the Peint Laws Act, 1894 (Bom. Act 2 [II] of 1894);

Preamble — Note 1

[1] The Act is meant only for the regulation of printing presses and of newspapers and not for the control of presses and newspapers which was the object of the Indian Press (Emergency Powers) Act. The two legislations should not be confounded. To regulate means to direct according to rule, or more narrowly, to bring under law or continued authority, or to reduce to order, method or uniformity. The whole system of printing presses, newspapers and collections of books and their registration was to be regulated. ('55) Madh B L J 1955 H C R 392 (398, 399) (DB).

[2] It is clear from the short note and the preamble that the primary concern of the legislature was to enact a measure which would help in the preservation of the copies of the books. 1955 All 524 (525) [(S) AIR V 42 C 148] : 1955 Cri L Jour 1308 (DB).

the Island of Perim, *see* Gazette of India, 1887, Pt. I, p. 5 ;

that portion of the Jalpaiguri District which was formerly the Jalpaiguri Sub-division and now forms the western portion of the District of Jalpaiguri and extends as far east as the Teesta River, the hills west of the Teesta River in the District of Darjiling, the Darjiling Tarai, the Damson Sub-division of the Darjiling District, the Districts of Hazaribagh, Lohardaga (now the Ranchi District , *see* Calcutta Gazette 1899, Pt. I, p. 44), and Manbhum, and Pargana Dalbhum and the Kolhan in the District of Singbhum, *see* Gazette of India, 1881, Pt. I, pp. 74 and 504 ; the Western Duars of the Jalpaiguri District, *see ibid*, 1910, Pt. I, p. 1160 ;

the Districts of Kumaon and Garhwal, *see* Gazette of India, 1876, Pt. I, p. 605 ;

the scheduled portion of the Mirzapur District, *see* Gazette of India, 1879, Pt. I, p. 383 ;

Pargana Jaunsar Bawar in Dehra Dun District, *see* Gazette of India, 1879, Pt. I, p. 382.

the Districts of Kamrup, Nowgong, Darrang, Sibsagar, Lakhimpur, Goalpara (excluding the Eastern Duars) and Cachar (excluding the North Cachar Hills), *see* Gazette of India, 1878, Pt. I, p. 533 ;

the Garo Hills, the Khasi and Jaintia Hills, the Naga Hills, the North Cachar Hills in the Cachar District, and the Eastern Duars in the Goalpara District, *see* Gazette of India, 1897, Pt. I, p. 299;

It has been declared, by notification under S. 3 (b) of the same Act, 1874 (14 [XIV] of 1874), not to be in force in the Scheduled District of Lahaul in the Punjab, *see* Gazette of India, 1886, Pt. I, p. 301.

It has been extended, by notification under S. 5 of the same Act, to the Tarai District of the Province of Agra, *see* Gazette of India, 1876, Pt. I, p. 506; to the District of Coorg, *see ibid*, 1918 Pt. II, p. 1730 ;

This Act has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (LIX of 1949), S. 3 [1-1-1950] and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (XXX of 1950), S. 3 [16-4-1950].

The Act has been extended to the States merged in the State of—

Bombay : *see* Bom. Act IV of 1950 ;

Punjab : *see* Punj. Act V of 1950.

All the provisions of this Act as amended from time to time and the rules made thereunder, subject to any amendments to which they are for the time being subject in the rest of Assam, have been applied to the Lushai Hills (now Mizo) District : *see* Assam Act XVI of 1954, S. 2 [12-5-1954].

[b] *Inserted* by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 2 [w. e. f. 1-7-1956]. [c] *Substituted* for the words "the whole of India except Part B States" by the Part B States (Laws) Act, 1951 (III of 1951), S. 3 & Sch. [1-4-1951]. [d] *Substituted* for "periodicals containing news" by the Repealing and Amending Act, 1950 (XXXV of 1950), S. 3 & Sch. II [19-4-1950]. [e] The word "three" was *omitted* by the Press and Registration of Books Act (1867) Amendment Act, 1890 (X of 1890), S. 1. [f] *Substituted* for the words "every book printed or lithographed in India and for the registration of such books" by Act, LV of 1955, S. 3 [w. e. f. 1-7-1956].

PART I

PRELIMINARY

1. Interpretation-clause.

In this Act, unless there shall be something repugnant in the subject or context,—

"Book" includes every volume, part or division of a volume, and pamphlet, in any language, and every sheet of music, map, chart or plan separately printed [a][* *].

[b][* * * * * *]

Section 1 — Note 1

[1] Definition of 'book' contained in the section is exhaustive and does not include documents other than those specifically mentioned in the definition. 1940 Pat 613 (614) [AIR V 27] : 42 Cri L Jour 78.

[2] A defamatory leaflet of 4 pages which were not stitched is a pamphlet and is therefore a book. 1958 Raj 350 (351) [AIR V 45 C 116] : I L R (1958) 8 Raj 1104 : 1958 Cri L Jour 1547.

[3] In view of the definition of 'paper' inserted in S. 1 by Act (LV of 1955), it is no longer open to say that the word 'paper' in S. 3 is synonymous with 'newspaper' or must contain matter which is of literary or historical or cultural value. It is true that every printed invitation to a dinner or to a party of any sort and even every printed visiting card would now be a 'paper', which if printed in this country has to conform to S. 3 of the Act. 1960 Andh Pra 176 (177) [AIR V 47 C 60] : 1960 Cri L Jour 452.

[c]["Editor" means the person who controls the selection of the matter that is published in a newspaper :]

[d]["India" means the territory of India excluding the State of Jammu and Kashmir :]

"Magistrate" means any person exercising the full powers of a Magistrate[e] and includes a Magistrate of Police[f] [g][* * *] :

[h]["Newspaper" means any printed periodical work containing public news or comments on public news :]

[i][* * * * * *]

[j]["paper" means any document, including a newspaper, other than a book ;

"prescribed" means prescribed by rules made by the Central Government under section 20A ;

"Press Registrar" means the Registrar of newspapers for India appointed by the Central Government under section 19A and includes any other person appointed by the Central Government to perform all or any of the functions of the Press Registrar ;

"printing" includes cyclostyling and printing by lithography ;

"Register" means the Register of newspapers maintained under section 19B.]

[k][* * * * * *]

[a] The words "or lithographed" were *omitted* by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 4 [w. e. f. 1-7-1956]. [b] Definition of "British India" was *omitted* by A. O., 1937 [1-4-1937]. [c] *Inserted* by the Press Law Repeal and Amendment Act, 1922 (XIV of 1922), S. 3 & Sch. I. [d] *Inserted* by the Part B States (Laws) Act, 1951 (III of 1951), S. 3 and Sch. [1-4-1951]. [e] Now Magistrate of the first class; *see* the Code of Criminal Procedure, 1898, S. 3. [f] Now Presidency Magistrate; *see ibid*. [g] The words "and a Justice of the Peace" were *repealed* by the Press and Regulation of Books Act (1867) Amendment Act, 1890 (X of 1890), S. 2. [h] *Inserted* by Act XIV of 1922, S. 3 & Sch. I. [i] Paragraphs relating to 'Number' and 'Gender' were *repealed* by the Repealing and Amending Act, 1914 (X of 1914), S. 3 & Sch. II. Definition of "Local Government" was *omitted* by A. O., 1937. [j] *Inserted* by Act LV of 1955, S. 4 [w. e. f. 1-7-1956]. [k] The definition of "States" *inserted* by A.L.O., 1950 was *omitted* by Act III of 1951, S. 3 & Sch, [1-4-1951].

STATE AMENDMENT

MAHARASHTRA

In its application to the State of Maharashtra, the definition of the expression "Magistrate" shall be deleted. — Bom. Act VIII of 1954, S. 2 & Sch., Part II [10-2-1954].

2. Repeal of Act XI of 1835. *[Repealed by the Repealing Act, 1870 (XIV of 1870), S. 1 and Sch. II, Pt. II.]*

PART II

OF PRINTING-PRESSES AND NEWSPAPERS

3. Particulars to be printed on books and papers.

Every book or paper printed within [a][India] shall have printed legibly on it the name of the printer and the place of printing, and (if the book or paper be published) [b][the name] of the publisher and the place of publication.

[a] *Substituted* for "the States" by the Part B States (Laws) Act, 1951 (III of 1951), S. 3 & Sch. [1-4-1951]. [b] *Inserted* by the Amending Act, 1891 (XII of 1891), S. 2 & Sch. II.

Section 3 — Note 1

[1] The intention of S. 3 requiring that the name of the printer and the place of printing and the name of the publisher and the place of publication should be printed legibly on every book or paper is to inform the public who the responsible printer or publisher was and to convey that information on the face of the paper. 1957 Mad 427 (429) [(S) AIR V 44 C 129] ✠ 1960 All 450 (452) [AIR V 47 C 114] : 1960 Cri L Jour 1037.

[2] Section 3 requires the names of the human beings who print and publish the book and not the names of shops which can be changed at will. 'Published by Kuttubkhan' without mentioning the name of the

Section 3 — Note 1 (*contd.*)

human being is not enough. 1960 All 450 (452) [AIR V 47 C 114] : 1960 Cri L Jour 1037.

[3] Any decipherable information which is set down in a lasting form would be a document and if it is printed within India it is hit by S. 3. In view of the definition of paper, it is no longer open to say that the word paper in S. 3 is synonymous with newspaper or must contain matter which is of literary or historical or cultural value. It is true that every printed invitation to a dinner to a party of any sort and every printed visiting card would now be paper which if printed in this country has to conform to S. 3 of the Act. 1960 Andh Pra 176 (177) [AIR V 47 C 60] : 1960 Cri L Jour 452.

[4] Section 3 covers the case of a newspaper and an omission to print on it legibly the name of the printer is made a penal offence. But it is not essential that the actual name of the printer should be given. So long as a name or style which sufficiently designates the printer is given, it does not matter that it is not the actual name of the man. It is sufficient if it is the name under which he has chosen to do business and is generally known. ('93) 16 Mad 443 (445, 447). (Newspaper printed and published with the words "Printed and published at Cochin for the Malabar Economic Company's Goshree Vilasam Press"—*Held* this was not sufficient compliance with S. 3.)

[5] The duty of a publisher is not merely to give his name and place of publication for being printed. It is also his duty to see that the book or paper complies with S. 3 and to refrain from publishing it if the requirements are not satisfied. 1960 Andh Pra 176 (178) [A I R V 47 C 60] : 1960 Cri L Jour 452. (Printed leaflet containing appeal to policemen — Names of printer and publisher and place of printing and of publication not printed. No compliance with S. 3.)

[6] Printers and publishers cannot be allowed to select for themselves the description to be used in professing to comply with the Act. They must use the description prescribed by the Act and a publisher cannot be described as 'manager' instead of as publisher merely because the manager and publisher of many papers are identical. ('09) 10 Cri L Jour 195 (198) : 1909 Pun Re (Cr) No. 5.

[7] The publisher of a paper referred to in Ss. 3 and 5 is the person who publishes it, in the ordinary sense of the term, by arranging with the proprietor for its distribution and not a mere seller or distributor of the paper. 1937 Bom 28 (30) [AIR V 24] : 38 Cri L Jour 145 (DB) ✣ ('96) 23 Cal 414 (415) (DB). (Bookseller not a publisher.)

[8] The word 'publisher' has been used in the Act in a restricted sense and does not include the vendor of the newspaper or books. Section 12 read with S. 3 clearly indicates that such persons are not included in 'publishers'. But a man who causes a book to be printed and offers it to the public for sale is a publisher within the meaning of S. 3 and S. 12 of the Act. 1957 Mad 427 (429) [(S) AIR V 44 C 129].

[9] The publisher is a person who both arranges with the printer for a book or paper to be produced and causes it to be offered to the public. 1960 Andh Pra 176 (177) [AIR V 47 C 60] : 1960 Cri L Jour 452.

[10] Section 3 only refers to the printing of a book and not its publication. Hence, the words in S. 12 'or publish any book otherwise than in conformity with the rule contained in S. 3' make no meaning. The words 'or publish' in S. 12 must therefore be ignored. Hence the publication of a book which is not printed in conformity with the rule contained in S. 3 is not an offence under S. 3 read with S. 12. 1960 All 450 (453) [AIR V 47 C 114] : 1960 Cri L Jour 1037.

[11] Names of author and publisher printed on book — There is no presumption that they are publishers. 1960 Orissa 126 (127, 128) [AIR V 47 C 37] : ILR (1959) Cut 685 : 1960 Cri L Jour 1116.

[12] Applicability — Ss. 3, 12 — Printer of book not printing his name and place of printing on the book, but printing somebody else's name and some other place — Printer commits offence under S. 12. 1960 All 450 (452) [A I R V 47 C 114] : 1960 Cri L Jour 1037.

[13] Publishing a book even though it did not comply with the requirement of S. 3 in the matter of printing the name of the printer cannot amount to abetting the infringement of the provisions of S. 3 already done by the other printer. 1960 All 450 (453) [AIR V 47 C 114] : 1960 Cri L Jour 1037.

[14] If the whole of a volume is printed by one man at one place the whole is one book, and if the names of the printer and the place of printing are printed legibly at any place of it S. 3 is fully complied with. The names are required to be printed at only one place of a book and not at two or more places. The definition of 'book' includes a part of a volume but that applies only when different parts of a volume are printed by different men or at different places. Every volume or every part of a volume printed by one man at one place is a book. Where the outer cover and the inner cover are both printed by the applicant at his press, it cannot be said that they form two books and that the former should have contained an imprint separate from the imprint on the latter. The fact that the outer cover contains names of the printer and the press different from the names printed in the inner cover, might convey to the public the idea that the outer cover was printed at the place and by the person mentioned thereon. The printer might be guilty of cheating the public by so conveying the idea but he cannot be guilty under S. 3. 1960 All 450 (452) [A I R V 47 C 114] : 1960 Cri L Jour 1037.

[15] The word 'printing' must be construed in its strict and narrow sense to mean typography. The word cannot be construed to include process such as cyclostyling. 1931 Nag 177 (178) [AIR V 18] : 27 Nag L R 270 : 32 Cri L Jour 1266.

4. Keeper of printing-press to make declaration.

[a][*'1)*] No person shall, within [b][India], keep in his possession any press for the printing of books or papers, who shall not have made and subscribed the following declaration before [c][the District, Presidency or Sub-Divisional Magistrate] within whose local jurisdiction such press may be :

"I, A. B., declare that I have a press for printing at——."

And this last blank shall be filled up with a true and precise description of the place where such press may be situate.

[d][*(2)* As often as the place where a press is kept is changed, a new declaration shall be necessary :

Provided that where the change is for a period not exceeding sixty days and the place where the press is kept after the change is within the local jurisdiction of the Magistrate referred to in sub-section *(1)*, no new declaration shall be necessary if—

(a) a statement relating to the change is furnished to the said Magistrate within twenty-four hours thereof ; and

(b) the keeper of the press continues to be the same.]

[a] Section 4 was *renumbered* as sub-section *(1)* of that section by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 5 [w.e.f. 1-7-1956]. [b] *Substituted* for "the States" by Act III of 1951. [c] *Substituted* for "the Magistrate" by the Press (Objectionable Matter) Act, 1951 (LVI of 1951), S. 36 [w.e.f. 1-2-1952]. [d] *Added* by Act LV of 1955, S. 5 [w.e.f. 1-7-1956].

Section 3 — Note 1 *(contd.)*

[16] Portion of pamphlet printed in one press and the other in another press—Name of keeper of former press not appearing as printer on the book—*Held*, that accused was liable under S. 3 to punishment. ('12) 13 Cri L Jour 139 (139) (DB) (Bom).

[17] Section 3 does not in any way restrict the freedom of expression. On the other hand, to maintain unimpaired that freedom of expression but at the same time to prevent that freedom from degenerating into licence without remedy both for the State as well as individual citizen in regard to defamatory, seditious, blasphemous, obscene and contempts of Courts, the State in the exercise of its police powers insists upon the furnishing of the information set out in S. 3. The section is not, therefore, inconsistent with the fundamental right guaranteed by Art. 19 (1) (a) of the Constitution. 1957 Mad 427 (430) [(S) AIR V 44 C 129].

Section 4 — Note 1

[1] Section 4 says that every keeper of a printing press shall make a statutory declaration before a competent Magistrate. 1960 Orissa 126 (127) [AIR V 47 C 37] : ILR (1959) Cut 685 : 1960 Cri L Jour 1116.

[2] No title or ownership can be recognised as entitling a person to keep a press in his possession in the absence of a declaration filed and authenticated under the Act. 1959 Andh Pra 530 (532) [AIR V 46 C 153] : 1959 Crj L Jour 1141.

[3] Section 4 appears to have double motive. First is that executive authorities shall note where the press is situated and the second that they shall know who is the person in charge. 1931 Oudh 81 (82) [AIR V 18]: 6 Luck 514 : 32 Cri L Jour 545.

[4] A Roneo duplicator is not a printing press on the ground that 'printing' does not include cyclostyling. 1931 Nag 177 (178) [AIR V 18] : 27 Nag L R 270 : 32 Cri L Jour 1266.

[5] The words "for the printing of books or papers" refer to the object of the possessor of the machine. The question whether the printing press is or is not within S. 4 is a question of the use to which the printing press is in fact put or intended to be put by the possessor. 1931 Pat 351 (352) [AIR V 18]: 10 Pat 492 : 32 Cri L Jour 1063 (DB).

[6] No fresh declaration need be filed in case of press which has once been declared and continues at the same address though there is change in person of keeper of press. 1931 Oudh 81 (82) [AIR V 18] : 6 Luck 514 : 32 Cri L Jour 545. (Press declared with *L* as manager — Subsequent resignation of *L* and accused intimating the same to the District Magistrate in letter signed by him as proprietor which was also recorded—*Held*, in this case that this letter amounted to a declaration.)

[7] Printing press for keeping which declaration under S. 4 was made—Subsequent change of place to new premises within the same local jurisdiction in respect of which change no declaration was made—*Held* that no fresh declaration was necessary as S. 4 did not require a new declaration with every change in the place and hence no conviction could be made under S. 13 for failure to file fresh declaration. ('89) 1889 Pun Re (Cr) No. 9 p. 49 (50).

[8] Per *Shah Ag. C. J.* — The declaration under S. 4 is not evidence of a person's knowledge of the contents of a pamphlet printed at the press though it should be considered along with other materials in deciding that question. No provision exists in the Act as to the presumption to be drawn from a declaration

STATE AMENDMENTS

MADRAS

In its application to the whole of the State of Madras, in section 4, after sub-section *(2)* *add* the following sub-section, namely,—

"(3) (a) Where any press in respect of which a declaration has been made under this section—

(i) does not commence the printing of books or papers, within a period of three months of such declaration, such declaration shall be void; or

(ii) having commenced such printing within the period mentioned in sub-clause (i), has ceased the printing of books and papers for a period exceeding three months, such declaration shall cease to have effect.

(b) No press in respect of which a declaration made under this section has, under clause *(a)* become void or ceased to have effect, shall commence, or as the case may be, recommence, the printing of books or papers, without a new declaration having been made." — Mad. Act XIV of 1960, S. 2 [14-9-1960].

PUNJAB

In section 4 the following sub-sections as renumbered by Punj. Act XV of 1957 shall be deemed to be *added*, namely,—

"(3) As often as a press for the printing of books and papers having ceased to function is restarted, a new declaration shall be necessary unless the cessation is due to non-compliance with an order under sub-section *(3)* of section 3 or sub section *(1)* of section 5 of the Indian Press (Emergency Powers) Act, 1931, or any other law for the time being in force.

(4) For the purposes of this Act a printing press shall be deemed to have ceased to function if no books or papers are printed therein for a period of six consecutive months". — Punj. Act XIV of 1942, S. 2 [1-1-1943].

SECTION 4-A

PUNJAB

After section 4, *add* the following new section, namely,—

"4 A. Where any declaration is made and subscribed under section 4 in respect of a printing press, the declaration shall not, save in the case of printing press kept by the same person, be so accepted unless the Magistrate is satisfied from an enquiry made in this behalf from the State Government or otherwise that the press purported to be started does not bear a title which is the same as, or similar to, that of any other press in existence in the State of Punjab." — Punj. Act XV of 1957, S. 4 [13-7-1957].

5. Rules as to publication of newspapers.

No [a][newspaper] shall be published in [b][India], except in conformity with the rules hereinafter laid down :

[c][*(1)* Without prejudice to the provisions of section 3, every copy of every such newspaper shall contain the names of the owner and editor thereof printed clearly on such copy and also the date of its publication:]

Section 4 — Note 1 *(contd.)*

made under S. 4. The knowledge of contents so far as necessary has to be proved like any other fact. Per *Crump J.*—A keeper of a considerable press may not know the contents of each and every book printed at his press. Without details as to his connection with the actual business it is impossible to make any such presumption. 1923 Bom 255 (258, 260) [AIR V 10]: 47 Bom 438: 25 Cri LJ 150 (DB).

[9] Declarant in jail long before and at time of publication of objectionable article—No control over press—He cannot be convicted for publication of article. 1951 Mad 714 (714) [AIR V 38 C 228] : 52 Cri L Jour 713.

Section 5 — Note 1

[1] Under S. 5 (2) of the Press and Registration of Books Act, 1867, as amended by Act LV of 1955, it is open to any person to declare his intention to start a newspaper. 1959 Mad 519 (521) [AIR V 46 C 165]: ILR (1959) Mad 978.

[2] The question whether the petitioner had a property in the name of a newspaper by reason of the public associating his publications with that name, cannot be considered in proceedings under S. 5 (2) which is not conceived with adjudication of rights. If the petitioner has acquired a right to use a particular name for his publication either by reputation or under the provisions of the Trade Marks Act, the remedy for him will be in the civil court. 1959 Mad 519 (521) [AIR V 46 C 165]: ILR (1959) Mad 978.

[3] If on the day when the petitioner applies to make a declaration with respect to his journal under a particular title, there is no published newspaper having the same or similar title, he would be entitled to make the declaration under S. 5 (2) and there would be no jurisdiction in the Magistrate to assess the comparative merits between him and a rival who applies later and decide as to which of them would be entitled to the name or title. 1959 Mad 519 (521) [AIR V 46 C 165]: I L R (1959) Mad 978.

[d][*(2)*] The printer and the publisher of every such [c][newspaper] shall appear [f][in person or by agent authorised in this behalf in accordance with rules made under section 20, before a District, Presidency or Sub-divisional Magistrate within whose local jurisdiction such newspaper shall be printed or published [g][* * *]], and shall make and subscribe, in duplicate, the following declaration :

"I, A. B., declare that I am the printer (*or* publisher *or* printer and publisher) of the [h][newspaper] entitled —— [i][and to be printed or published, or to be printed and published], *as the case may be* at————."

And the last blank in this form of declaration shall be filled up with a true and precise account of the premises where the printing or publication is conducted :

[j][*(2A)* Every declaration under rule *(2)* shall specify the title of the newspaper, the language in which it is to be published and the periodicity of its publication and shall contain such other particulars as may be prescribed.]

[k][*(2B)* Where the printer or publisher of a newspaper making a declaration under rule 2 is not the owner thereof, the declaration shall specify the name of the owner and shall also be accompanied by an authority in writing from the owner authorising such person to make and subscribe such declaration :

(2C) A declaration in respect of a newspaper made under rule *(2)* and authenticated under section 6 shall be necessary before the newspaper can be published :

(2D) Where the title of any newspaper or its language or the periodicity of its publication is changed, the declaration shall cease to have effect and a new declaration shall be necessary before the publication of the newspaper can be continued :

(2E) As often as the ownership of a newspaper is changed, a new declaration shall be necessary :]

[l][*(3)*] As often as the place of printing or publication is changed, a new declaration shall be necessary :

[j][Provided that where the change is for a period not exceeding thirty days and the place of printing or publication after the change is within the local jurisdiction of the Magistrate referred to in rule *(2)*, no new declaration shall be necessary if—

(a) a statement relating to the change is furnished to the said Magistrate within twenty-four hours thereof; and

(b) the printer or publisher or the printer and publisher of the newspaper continues to be the same.]

[m][*(4)* As often as the printer or the publisher who shall have made such declaration as is aforesaid shall leave India for a period exceeding ninety days or where such printer or publisher is by infirmity or otherwise rendered incapable of carrying out his duties for a period exceeding ninety days in circumstances not involving the vacation of his appointment, a new declaration shall be necessary :]

[*(5)* Every declaration made in respect of a newspaper shall be void, where the newspaper does not commence publication—

(a) within six weeks [n][of the authentication of the declaration under section 6], in the case of a newspaper to be published once a week or oftener; and

(b) within three months [n][of the authentication of the declaration under section 6], in the case of any other newspaper,

and in every such case, a new declaration shall be necessary before the newspaper can be published.

(6) Where, in any period of three months, and daily, tri-weekly, bi-weekly, weekly or fortnightly newspaper publishes issues the number of which is less than half of what should have been published in accordance with the declaration made in respect thereof, the declaration shall cease to have effect and a new declaration shall be necessary before the publication of the newspaper can be continued.

(7) Where any other newspaper has ceased publication for a period exceeding twelve months, every declaration made in respect thereof shall cease to have effect, and a new declaration shall be necessary before the newspaper can be re-published.

(8) Every existing declaration in respect of a newspaper shall be cancelled by the Magistrate before whom a new declaration is made and subscribed in respect of the same] :

°[Provided that no person ᵖ[who does not ordinarily reside in India, or] who has not attained majority in accordance with the provisions of the Indian Majority Act, 1875, or of the law to which he is subject in respect of the attainment of majority, shall be permitted to make the declaration prescribed by this section, nor shall any such person edit a newspaper.]

[a] *Substituted* for the words "printed periodical work containing public news or comments on public news" by the Press Law Repeal and Amendment Act, 1922 (XIV of 1922), S. 3 & Sch. I. [b] *Substituted* for 'States' by Act III of 1951. [c] *Substituted* for the original rule (1) by the Press and Registration of Books (Amendment) Act, 1960 (XXVI of 1960), S. 2 [1-10-1960]. [d] Rule (1) was *renumbered* as (2) by Act XIV of 1922, S. 3 & Sch. I. [e] *Substituted* for "periodical work", *ibid*. [f] *Substituted* for the words "before the Magistrate within whose local jurisdiction such work shall be published", *ibid*. [g] The words, "or such printer or publisher resides" were *omitted* by Act XXVI of 1960, S. 2 [1-10-1960]. [h] *Substituted* for "periodical work" by Act XIV of 1922, S. 3 & Sch. I. [i] *Substituted* for the words "and printed or published, or printed and published" by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955) S. 6 [w. e. f. 1-7-1956]. [j] *Inserted*, *ibid*. [k] Rules (2B) to (2E) were *inserted* by Act XXVI of 1960, S. 2 [1-10-1960]. [l] Rules (2) and (3) were *renumbered* as (3) and (4) respectively by Act XIV of 1922, S. 3 & Sch. I. [m] *Substituted* for the original rule (4) by Act XXVI of 1960, S. 2 [1-10-1960]. [n] *Substituted* for "of the declaration", *ibid*. [o] *Inserted* by Act XIV of 1922, S. 3 & Sch. I. [p] *Inserted* by Act XXVI of 1960, S. 2 [1-10-1960].

STATE AMENDMENT

PUNJAB

Note.—Sub-section (2-a) inserted in section 5 and section 5-A inserted by Punj. Act XIV of 1942 were repealed by Punj. Act XV of 1957, S. 3 [13-7-1957].

6. Authentication of declaration.

Each of the two originals of every declaration so made and subscribed as is aforesaid, shall be authenticated by the signature and official seal of the Magistrate before whom the said declaration shall have been made :

ª[Provided that where any declaration is made and subscribed under section 5 in respect of a newspaper, the declaration shall not, save in the case of newspapers owned by the same person, be so authenticated unless the Magistrate ᵇ[is on inquiry from the Press Registrar satisfied] that the newspaper proposed to be published does not bear a title which is the same as, or similar to, that of any other newspaper published either in the same language or in the same State.]

Section 6 — Note 1

[1] A District Magistrate in acting or purporting to act under S. 6 cannot be said to exercise jurisdiction as a Court Criminal or Civil, nor can his proceedings be said to be in any sense judicial. Where therefore a District Magistrate refused to authenticate a declaration, it was held that proceedings were purely ministerial and that the Chief Court had no power to interfere with his proceedings. 1918 Lah 302 (302) [AIR V 5]: 1918 Pun Re. (Cr) No. 21: 19 Cri L Jour 621 (DB).

[2] The proviso to the first para of S. 6 was evidently intended to prevent unfair competition between two newspapers published by different persons under the same name and title. The proviso would have the effect of protecting an existing newspaper in regard to its name. 1959 Mad 519 (521) [AIR V 46 C 165]: ILR (1959) Mad 978.

Deposit.

One of the said originals shall be deposited among the records of the office of the Magistrate, and the other shall be deposited among the records of the High Court of Judicature, or [c][other principal Civil Court of original jurisdiction for the place where] the said declaration shall have been made.

Inspection and supply of copies.

The Officer-in-Charge of each original shall allow any person to inspect that original on payment of a fee of one rupee, and shall give to any person applying a copy of the said declaration, attested by the seal of the Court which has the custody of the original, on payment of a fee of two rupees.

[d][A copy of the declaration attested by the official seal of the Magistrate, or a copy of the order refusing to authenticate the declaration, shall be forwarded as soon as possible to the person making and subscribing the declaration and also to the Press Registrar.]

[a] *Inserted* by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 7 [w. e. f. 1-7-1956]. [b] *Substituted* for the words "is satisfied from such inquiry as he thinks fit to make from the Press Registrar or otherwise", *ibid*, 1960 (XXVI of 1960), S. 3 [1-10-1960]. [c] *Substituted* for the words "other Courts within the local limits of whose ordinary original civil jurisdiction" by the Press and Registration of Books Act (1867) Amendment Act, 1890 (X of 1890), S. 3. [d] *Substituted* for the original fourth paragraph by Act (XXVI of 1960), S. 3 [1-10-1960].

7. Office copy of declaration to be prima facie evidence.

In any legal proceeding whatever, as well civil as criminal, the production of a copy of such declaration as is aforesaid, attested by the seal of some Court empowered by this Act to have the custody of such declarations, [a][or, in the case of the editor, a copy of the newspaper containing his name printed on it as that of the editor] shall be held (unless the contrary be proved) to be sufficient evidence, as against the person whose name shall be subscribed to such declaration, [a][or printed on such newspaper, as the case may be] that the said person was printer or publisher, or printer and publisher (according as the words of the said declaration may be) of every portion of every [b][newspaper] whereof the title shall correspond with the title of the [b][newspaper] mentioned in the declaration [a][or the editor of every portion of that issue of the newspaper of which a copy is produced].

[a] *Inserted* by the Press Law Repeal and Amendment Act, 1922 (XIV of 1922), S. 3 and Sch. I. [b] *Substituted* for "periodical work", *ibid*.

Section 7 — Note 1

[1] A declaration made by an editor of a newspaper under S. 5 is *prima facie* evidence of publication by him of an article in the absence of proof that it was published in his absence without his knowledge at a time, when he *bona fide* made over the temporary management to a suitable person. ('86) 9 Mad 387 (391) (DB)✠ ('11) 12 Cri L Jour 354 (354): 38 Cal 227 (DB)✠ ('09) 9 Cri L Jour 506 (513): 32 Mad 338 (DB). (The prosecution need not give any evidence that he is in fact the publisher. It is enough to produce his declaration.) ✠ 1935 Nag 90 (104) [A I R V 22] : 36 Cri L Jour 744. (The presumption does not extend to the proof of the fact that he was also the publisher at places not specified in the declaration.)

[2] Under S. 7 a registered printer should be held to be the printer of every portion of every periodical work whose title corresponds with the title of the periodical mentioned in the declaration until the contrary is proved. Temporary absence during which his subordinates carry on the work would not amount to proof of the contrary as the proof that is contemplated is that he has ceased to be printer. ('05) 2 Cri L Jour 31 (33): 1905 Pun Re (Cr) No. 1.

[3] The printer and publisher who has made a declaration under the Act must be presumed to be aware of whatever is printed and published by him. Unless he proves that he was not in fact so aware he would be liable for the matter. ('08) 7 Cri L Jour 10 (18): 35 Cal 141 (DB).

[4] Section 7 makes the printer responsible whoever may be the writer of an offending article. The onus is upon the accused to prove the contrary. ('08) 8 Cri L Jour 438 (444): 35 Cal 945.

[5] The initial presumption about knowledge under S. 7 in the case of periodicals does not arise in the case of pamphlets alleged to contain seditious matter. 1931 Lah 182 (183) [AIR V 18]: 12 Lah 483: 32 Cri L Jour 681.

[6] So far as newspapers are concerned, under S. 7 a copy of a declaration made under S. 6 shall be held (unless the contrary is pro-

8. New declaration by persons who have signed declaration and subsequently ceased to be printers or publishers.

[a][If any person has subscribed to any declaration in respect of a newspaper under section 5 and the declaration has been authenticated by a Magistrate under section 6 and subsequently that person ceases to be the printer or publisher of the newspaper mentioned in such declaration, he shall appear before any District, Presidency or Sub-Divisional Magistrate, and make and subscribe in duplicate the following declaration :—

"I, A.B., declare that I have ceased to be the printer or publisher or printer and publisher of the newspaper entitled————".]

Authentication and filing.

Each original of the latter declaration shall be authenticated by the signature and seal of the Magistrate before whom the said latter declaration shall have been made, and one original of the said latter declaration shall be filed along with each original of the former declaration.

Inspection and supply of copies.

The Officer-in-Charge of each original of the latter declaration shall allow any person applying to inspect that original on payment of a fee of one rupee, and shall give to any person applying a copy of the said latter declaration, attested by the seal of the Court having custody of the original, on payment of a fee of two rupees.

Putting copy in evidence.

In all trials in which a copy, attested as is aforesaid, of the former declaration shall have been put in evidence, it shall be lawful to put in evidence a copy, attested as is aforesaid, of the latter declaration, and the former declaration shall not be taken to be evidence that the declarant was at any period subsequent to the date of the latter declaration, printer or publisher of the [b][newspaper] therein mentioned.

[c][A copy of the latter declaration attested by the official seal of the Magistrate shall be forwarded to the Press Registrar.]

[a] *Substituted* for the first paragraph by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 8 [w. e. f. 1-7-1956]. [b] *Substituted* for "periodical work" by the Press Law Repeal and Amendment Act, 1922 (XIV of 1922), S. 3 and Sch. I. [c] *Inserted* by Act LV of 1955, S. 8.

Section 7 — Note 1 *(contd.)*

ved) to be sufficient as against the persons whose name shall be subscribed to such declaration, that the said person is the printer or publisher of every portion of the newspaper. There is no similar provision in the Act with regard to books. 1960 Orissa 126 (127) [AIR V 47 C 37]: ILR (1959) Cut 685: 1960 Cri L Jour 1116.

[7] Where in a statement about the ownership and other particulars of a newspaper published in its issue, *A* is shown as the owner of the newspaper, the statement is not binding on *A* under S. 7. According to S. 7 the printing of the name of the editor is sufficient evidence only against the editor to the extent that he was the editor of every portion of that issue of which a copy is produced. So far as *A* is concerned it has no such binding effect. 1959 Raj 280 (286) [AIR V 46 C 99]: ILR (1959) 9 Raj 524 (DB).

[8] Assuming that the presumption under S. 7 is attracted to election proceedings and that it is not rebutted, it has still to be established that the respondent to the election petition believed the statements to be false or did not believe them to be true. 1959 Ker 120 (124) [AIR V 46 C 41]: ILR (1958) Ker 795 (DB).

[9] Article scandalising High Court—Editor of newspaper filing affidavit that he had no knowledge of article as it was sent to press by the joint editor when he was out of station — Presumption arising under S. 7 that he was editor of every portion of the issue of the newspaper is not rebutted — Editor and joint editor who was author of article in question both held liable for contempt. 1949 Lah 266 (270) [AIR V 36 C 54]: Pak L R (1949) Lah 421: 51 Cri L Jour 35 (FB).

[10] Where the prosecution does not prove that the book was printed at a particular press, the keeper of that press cannot be convicted on the mere evidence of the printed statement on the book as to where it was printed, for it raises no presumption under S. 7 and is no evidence against him. The presumption under S. 7 however arises against the person who is shown as the printer and publisher. 1953 Mad 418 (419) [AIR V 40 C 157]: 1953 Cri L Jour 763.

Acc No 177804

[a][8A. Person whose name has been incorrectly published as editor may make a declaration before a Magistrate.

If any person, whose name has appeared as editor on a copy of a newspaper, claims that he was not the editor of the issue on which his name has so appeared, he may, within two weeks of his becoming aware that his name has been so published, appear before a District, Presidency or Sub-divisional Magistrate and make a declaration that his name was incorrectly published in that issue as that of the editor thereof, and if the Magistrate after making such inquiry or causing such inquiry to be made as he may consider necessary is satisfied that such declaration is true, he shall certify accordingly, and on that certificate being given the provisions of section 7 shall not apply to that person in respect of that issue of the newspaper.

The Magistrate may extend the period allowed by this section in any case where he is satisfied that such person was prevented by sufficient cause from appearing and making the declaration within that period.]

[a] *Inserted* by the Press Law Repeal and Amendment Act, 1922 (XIV of 1922), S. 3 and Schedule I.

[a][8B. Cancellation of declaration.

If, on an application made to him by the Press Registrar or any other person or otherwise, the Magistrate empowered to authenticate a declaration under this Act, is of opinion that any declaration made in respect of a newspaper should be cancelled, he may, after giving the person concerned an opportunity of showing cause against the action proposed to be taken, hold an inquiry into the matter and if, after considering the cause, if any, shown by such person and after giving him an opportunity of being heard, he is satisfied that—

(i) the newspaper, in respect of which the declaration has been made is being published in contravention of the provisions of this Act or rules made thereunder ; or

(ii) the newspaper mentioned in the declaration bears a title which is the same as, or similar to, that of any other newspaper published either in the same language or in the same State ; or

(iii) the printer or publisher has ceased to be the printer or publisher of the newspaper mentioned in such declaration ; or

(iv) the declaration was made on false representation or on the concealment of any material fact or in respect of a periodical work which is not a newspaper ;

the Magistrate may, by order, cancel the declaration and shall forward as soon as possible a copy of the order to the person making or subscribing the declaration and also to the Press Registrar.]

[a] *Inserted* by the Press and Registration of Books (Amendment) Act, 1960 (XXVI of 1960), S. 4 [1-10-1960].

[a][8C. Appeal.

(1) Any person aggrieved by an order of a Magistrate refusing to authenticate a declaration under section 6 or cancelling a declaration under section 8B may, within sixty days from the date on which such order is communicated to him, prefer an appeal to the Appellate Board to be called the Press and Registration Appellate Board consisting of a Chairman and another member to be appointed by the Central Government :

Provided that the Appellate Board may entertain an appeal after the expiry of the said period, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) On receipt of an appeal under this section, the Appellate Board may, after calling for the records from the Magistrate and after making such further enquiries as it thinks fit, confirm, modify or set aside the order appealed against.

(3) Subject to the provisions contained in sub-section *(2)*, the Appellate Board may, by order, regulate its practice and procedure.

(4) The decision of the Appellate Board shall be final.]

[a] *Inserted* by the Press and Registration of Books (Amendment) Act, 1960 (XXVI of 1960), S. 4 [1-10-1960].

PART III[a]

DELIVERY OF BOOKS

9. Copies of books printed after commencement of Act to be delivered gratis to Government.

Printed [b][* * *] copies of the whole of every book which shall be printed [b][* * *] in [c][India] after this Act shall come into force, together with all maps, prints or other engravings belonging thereto, finished and coloured in the same manner as the best copies of the same, shall, notwithstanding any agreement (if the book be published) between the printer and publisher thereof, be delivered by the printer at such place and to such officer as the State Government shall, by notification in the Official Gazette, from time to time direct, and free of expense to the Government, as follows, that is to say:—

(a) in any case, within one calendar month after the day on which any such book shall first be delivered out of the press, one such copy, and

(b) if within one calendar year from such day the State Government shall require the printer to deliver other such copies not exceeding two in number, then within one calendar month after the day on which any such requisition shall be made by the State Government on the printer, another such copy, or two other such copies, as the State Government may direct,

the copies so delivered being bound, sewed or stitched together and upon the best paper on which any copies of the book shall be printed [b][* * *].

The publisher or other person employing the printer shall, at a reasonable time before the expiration of the said month, supply him with all maps, prints and engravings finished and coloured as aforesaid, which may be necessary to enable him to comply with the requirements aforesaid.

Nothing in the former part of this section shall apply to—

(i) any second or subsequent edition of a book in which edition no additions or alterations either in the letter-press or in the maps, prints or other engravings belonging to the book have been made, and a copy of the first or some preceding edition of which book has been delivered under this Act, or

(ii) any [d][newspaper] published in conformity with the rules laid down in section 5 of this Act.

[a] *Substituted* for the original Part III (relating to the delivery to the Local Government of all published books, etc., and to the payment therefor and disposal of the copies) by the Press and Registration of Books Act (1867) Amendment Act, 1890 (X of 1890), S. 4. [b] The words "or lithographed" were *omitted* by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 9 [w. e. f. 1-7-1956]. [c] *Substituted* for "the States" by Act III of 1951. [d] *Substituted* for "periodical work" by the Press Law Repeal and Amendment Act, 1922 (XIV of 1922), S. 3 and Schedule I.

STATE AMENDMENTS

ANDHRA PRADESH

Same as that of Madras.

GUJARAT

Same as that of Maharashtra.

Section 9 — Note 1

[1] Single sheet of paper containing article relating to some current topic — *Held* it was not a book a copy of which was required to be delivered to the officer concerned under the Act. 1940 Pat 613 (614) [A I R V 27]: 42 Cri L Jour 78.

KERALA

MALABAR DISTRICT.—Section 19 of Madras Act XXIV of 1948 shall be *omitted*, and the Press and Registration of Books Act, 1867, in its application to the Malabar District, shall stand as if the said section had not been enacted. —Ker. A. L. O., 1956 [1-11-1956].

MAHARASHTRA

In its application to the State of Maharashtra, in section 9—

(a) to the marginal note, *add* the words "and to notified libraries" ; and

(b) after the first paragraph *insert* the following new paragraph, namely,—

"Such number of copies of the book not exceeding five shall also be delivered by the printer, free of expense, to such public libraries as the State Government may, by notification in the Official Gazette, from time to time specify, within one calendar month after the day on which any such book shall first be delivered out of the press." — Bom. Act LXI of 1948, S. 2 [3-12-1948] read with Mah. Act VII of 1961 [4-2-1961].

MADRAS

In its application to the State of Madras, in section 9—

(a) in clause (a) of the first paragraph for the words "one such copy" *substitute* the words "five such copies" ; and

(b) in clause (i) of the last paragraph for the words "a copy of the first" *substitute* the words "five copies of the first". —Mad. Act XXIV of 1948, S. 19.

10. Receipt for copies delivered under section 9.

The officer to whom a copy of a book is delivered under the last foregoing section shall give to the printer a receipt in writing therefor.

STATE AMENDMENTS

GUJARAT

Same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Maharashtra, in section 10 after the word "officer" *insert* the words "or the person in charge of the library, as the case may be".

— Bom. Act LXI of 1948, S. 3 [3-12-1948] read with Mah. Act VII of 1961 [4-2-1961].

11. Disposal of copies delivered under section 9.

The copy delivered pursuant to clause *(a)* of the first paragraph of section 9 of this Act shall be disposed of as the State Government shall from time to time determine.

Any copy or copies delivered pursuant to clause *(b)* of the said paragraph shall be [a][transmitted to the Central Government.]

[a] *Substituted* for the words "transmitted to the British Museum or the Secretary of State for India, or to the British Museum and the said Secretary of State, as the case may be" by A.C.A.O., 1948 [23-3-1948].

STATE AMENDMENTS

ANDHRA PRADESH

Same as that of Madras.

KERALA

See under "Kerala" in State Amendments under section 9.

MADRAS

In its application to the State of Madras, in section 11, for the first sentence *substitute* the following sentence, namely,—

"Out of the five copies delivered pursuant to clause *(a)* of the first paragraph of section 9 of this Act. four copies shall be sent to the central library referred to in section 4, clause *(a)*, of the Madras Public Libraries Act, 1948, and the fifth copy shall be disposed of in such manner as the State Government may, from time to time, determine."

— Mad. Act XXIV of 1948, S. 19.

[a][11A. Copies of newspaper printed in India to be delivered gratis to Government.

The printer of every newspaper in [b][India] shall deliver at such place and to such officer as the State Government may, by notification in the Official Gazette, direct, and free of expense to the Government, two copies of each issue of such newspaper as soon as it is published.]

[a] *Inserted* by the Press Law Repeal and Amendment Act, 1922 (XIV of 1922), S. 3 & Sch. I. [b] *Substituted* for "the States" by Act III of 1951.

STATE AMENDMENTS

GUJARAT

Same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Maharashtra, in section 11A for the word "two" *substitute* the word "three".

— Bom. Act VI of 1951, S. 2 [14-4-1951] read with Mah. Act VII of 1961 [4-2-1961].

[a][**11B. Copies of newspapers to be delivered to Press Registrar.**

Subject to any rules that may be made under this Act, the publisher of every newspaper in India shall deliver free of expense to the Press Registrar one copy of each issue of such newspaper as soon as it is published.]

[a] *Inserted* by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 10 [w.e.f. 1-7-1956].

PART IV

PENALTIES

12. Penalty for printing contrary to rule in section 3.

Whoever shall print or publish any book or paper otherwise than in conformity with the rule contained in section 3 of this Act shall, on conviction before a Magistrate, be punished by fine not exceeding [a][two thousand] rupees, or by simple imprisonment for a term not exceeding [b][six months] or by both.

[a] *Substituted* for "five thousand" by the Press Law Repeal and Amendment Act, 1922 (XIV of 1922), S. 3 & Sch. I. [b] *Substituted* for "two years", *ibid.*

13. Penalty for keeping press without making declaration required by section 4.

Whoever shall keep in his possession any such press as aforesaid, [a][in contravention of any of the provisions contained in section 4 of this Act] shall

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Section 12 — Note 1

[1] Sections 3 and 12 do not deal with intention. If rule contained in S. 3 is not complied with an offence has been committed and is punishable under S. 12. ('09) 10 Cri L Jour 195 (198): 1909 Pun Re. (Cr) No. 5 ✣ 1933 Rang 4 (4) [AIR V 20]: 34 Cri L Jour 262.

[2] For a conviction under S. 12 the prosecution must prove that the paper in respect of which there was charge was printed in British India. 1931 Cal 641 (642) [AIR V 18]: 33 Cri L Jour 91.

[3] Multiplying copies of a periodical newspaper with the aid of a cyclostyle machine — The copies not containing the publisher's name or place where they were printed — *Held*, conviction under S. 12 was proper. 1931 Pat 351 (352) [A I R V 18] : 10 Pat 492 : 32 Cri L Jour 1063 (DB).

[4] The owner of a press carrying on the business through his manager must be considered to have printed the books offending against S. 3 even though he had nothing to do with the management of the Press. 1933 Rang 4 (4) [AIR V 20] : 34 Cri L Jour 262.

[5] Where a person distributes in streets certain printed pamphlets or papers giving notice of certain meeting he cannot be held guilty under S. 12 on the ground that distribution of pamphlets amounts to publication of book or paper within the meaning of S. 12. 1937 Bom 28 (29, 30) [AIR V 24] : 38 Cri L Jour 145 (DB).

[6] Section 3 only refers to the printing of a book and not its publication. Hence the words "or publish any book otherwise than in conformity with the rule contained in S. 3" make no meaning. The words "or publish" in S. 12 must, therefore, be ignored. Hence the publication of a book which is not printed in conformity with the rule contained in S. 3 is not an offence under S. 3 read with S. 12. 1960 All 450 (452) [AIR V 47 C 114] : 1960 Cri L Jour 1037.

[7] The word "publisher" has been used in the Act in a restricted sense and does not include the vendor of the newspaper or books. Section 12 read with S. 3 clearly indicates that such persons are not included in publishers. But a man who causes a book to be printed and offers it to the public for sale is a publisher within the meaning of S. 3 and S. 12 of the Act. 1957 Mad 427 (429) [(S) AIR V 44 C 129].

[8] Outer cover showing name of different person as printer—Inner cover showing name of printer. who actually printed book including outer cover — No offence under Act is committed. 1960 All 450 (452) [AIR V 47 C 114] : 1960 Cri L Jour 1037.

[9] Printer of book not printing his name and place of printing on book but printing somebody else's name and some other place— Printer commits offence under S. 12. 1960 All 450 (452) [AIR V 47 C 114] : 1960 Cri L Jour 1037.

Section 13 — Note 1

[1] In order to sustain a conviction under S. 13, it is necessary to find that the press was in sufficiently fit condition to enable the printing of books or papers thereby. 1929 Cal

on conviction before a Magistrate, be punished by fine not exceeding [b][two thousand] rupees, or by simple imprisonment for a term not exceeding [c][six months], or by both.

[a] *Substituted* for the words and figure "without making such a declaration as is required by section 4 of this Act" by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 11 [w.e.f. 1-7-1956]. [b] *Substituted* for "five thousand" by the Press Law Repeal and Amendment Act, 1922 (XIV of 1922), S. 3 & Sch. I. [c] *Substituted* for "two years", *ibid.*

14. Punishment for making false statement.

Any person who shall, in making [a][any declaration or other statement] under the authority of this Act, make a statement which is false, and which he either knows or believes to be false or does not believe to be true, shall on conviction before a Magistrate, be punished by fine not exceeding [b][two thousand] rupees, and imprisonment for a term not exceeding [c][six months].

[a] *Substituted* for "any declaration" by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 12 [w.e.f. 1-7-1956]. [b] *Substituted* for "five thousand" by the Press Law Repeal and Amendment Act, 1922 (XIV of 1922), S. 3 & Sch. I [c] *Substituted* for "two years", *ibid.*

15. Penalty for printing or publishing newspaper without conforming to rules.

[a][*(1)*] Whoever shall [b][edit], print or publish any [c][newspaper] without conforming to the rules hereinbefore laid down, or whoever shall [b][edit], print or publish or shall cause to be [b][edited], printed or published, any [d][newspaper] knowing that the said rules have not been observed with respect to [e][that newspaper], shall, on conviction before a Magistrate, be punished with fine not exceeding [f][two thousand] rupees, or imprisonment for a term not exceeding [g][six months], or both.

[h][*(2)* Where an offence is committed in relation to a newspaper under sub-section *(1)*, the Magistrate may, in addition to the punishment imposed under the said sub-section, also cancel the declaration in respect of the newspaper.]

[a] Section 15 was *renumbered* as sub-section *(1)* thereof by the Press and Registration of Books (Amendment) Act, 1960 (XXVI of 1960), S. 5 [1-10-1960]. [b] *Inserted* by the Press Law Repeal and Amendment Act, 1922 (XIV of 1922), S. 3 & Sch I. [c] *Substituted* for the words "such periodical work as is hereinbefore described", *ibid.* [d] *Substituted* for "such periodical work", *ibid.* [e] *Substituted* for "that work", *ibid.* [f] *Substituted* for "five thousand", *ibid.* [g] *Substituted* for "two years", *ibid.* [h] *Inserted* by Act XXVI of 1960, S. 5 [1-10-1960].

[a][**15A. Penalty for failure to make a declaration under section 8.**

If any person who has ceased to be a printer or publisher of any newspaper fails or neglects to make a declaration in compliance with section 8, he shall, on conviction before a Magistrate, be punishable by fine not exceeding two hundred rupees.]

[a] *Inserted* by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 13 [w.e.f. 1-7-1956].

[a][**16. Penalty for not delivering books or not supplying printer with maps.**

If any printer of any such book as is referred to in section 9 of this Act shall neglect to deliver copies of the same pursuant to that section, he shall for

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Section 13 — Note 1 *(contd.)*

635 (636) [AIR V 16] : 57 Cal 460 : 31 Cri L Jour 672.

Section 14 — Note 1

[1] A false statement in a declaration which was not made and subscribed before a Magistrate as provided by S. 4 cannot be said to have been made in making a declaration. 1923 Lah 440 (440) [A I R V 10] : 24 Cri L Jour 657.

Section 16 — Note 1

[1] Delivery of book out of the press is not complete when the book is printed as the printing may be completed before any copy was actually delivered out of the press. 1927 All 237 (237) [AIR V 14] : 49 All 315 : 28 Cri L Jour 232.

[2] Section 16 does not provide for conviction and sentence. 1940 Pat 613 (614) [A I R V 27] : 42 Cri L Jour 78.

every such default forfeit to the Government such sum not exceeding fifty rupees as a Magistrate having jurisdiction in the place where the book was printed may, on the application of the officer to whom the copies should have been delivered or of any person authorised by that officer in this behalf, determine to be in the circumstances a reasonable penalty for the default, and, in addition to such sum, such further sum as the Magistrate may determine to be the value of the copies which the printer ought to have delivered.

If any publisher or other person employing any such printer shall neglect to supply him, in the manner prescribed in the second paragraph of section 9 of this Act, with the maps, prints or engravings which may be necessary to enable him to comply with the provisions of that section, such publisher or other person shall for every such default forfeit to the Government such sum not exceeding fifty rupees as such a Magistrate as aforesaid may, on such an application as aforesaid, determine to be in the circumstances a reasonable penalty for the default, and, in addition to such sum, such further sum as the Magistrate may determine to be the value of the maps, prints or engravings which such publisher or other person ought to have supplied.]

[a] *Substituted* for the original section 16 by the Press and Registration of Books Act (1867) Amendment Act, 1890 (X of 1890), S. 5.

STATE AMENDMENTS

GUJARAT

Same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Maharashtra, in section 16—

(a) in the first paragraph after the words "in this behalf" insert the words "or on the application of the person in charge of the library to whom a copy of the book should have been delivered" ; and

(b) in the second paragraph for the word "second" *substitute* the word "third."—Bom. Act LXI of 1948, S. 4 [3-12-1948] read with Mah. Act VII of 1961 [4-2-1961].

[a][**16A. Penalty for failure to supply copies of newspapers gratis to Government.**

If any printer of any newspaper published in [b][India] neglects to deliver copies of the same in compliance with section 11A, he shall, on the complaint of the officer to whom copies should have been delivered or of any person authorised by that officer in this behalf, be punishable, on conviction by a Magistrate having jurisdiction in the place where the newspaper was printed, with fine which may extend to fifty rupees for every default.]

[a] *Inserted* by the Press Law Repeal and Amendment Act, 1922 (XIV of 1922), S. 3 and Sch. I. [b] *Substituted* for "the States" by Act III of 1951.

[a][**16B. Penalty for failure to supply copies of newspapers to Press Registrar.**

If any publisher of any newspaper published in India neglects to deliver copies of the same in compliance with section 11B, he shall, on the complaint of the Press Registrar, be punishable, on conviction by a Magistrate having jurisdiction in the place where the newspaper was printed, by fine which may extend to fifty rupees for every default.]

[a] *Inserted* by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 14 [w. e. f. 1-7-1956].

[a][**17. Recovery of forfeitures and disposal thereof and of fines.**

Any sum forfeited to the Government under [b][section 16] may be recovered, under the warrant of the Magistrate determining the sum, or of his successor in office, in the manner authorised by the Code of Criminal Procedure[c] for the time being in force, and within the period prescribed by the Indian Penal Code for the levy of a fine.]

[d][* * * * * *]

[a] *Substituted* for the original section 17 by the Press and Registration of Books Act (1867) Amendment Act, 1890 (X of 1890), S. 5. [b] *Substituted* for the words "the last

foregoing section" by the Repealing and Amending Act, 1923 (XI of 1923), S. 2 and Sch. I. [c] This was Act X of 1882 ; now *see* Act V of 1898. [d] The words "All fines or forfeitures under this Part of this Act shall, when recovered, be disposed of as the Local Government shall from time to time direct" were *omitted* by A. O., 1937 [1-4-1937].

PART V

REGISTRATION OF BOOKS

18. Registration of Memoranda of books.

There shall be kept at such office, and by such officer as the State Government shall appoint in this behalf, a book to be called a Catalogue of Books printed in [a][India], wherein shall be registered a memorandum of every book which shall have been delivered [b][pursuant to clause *(a)* of the first paragraph of section 9] of this Act. Such memorandum shall (so far as may be practicable) contain the following particulars (that is to say) :—

(1) the title of the book and the contents of the title-page, with a translation into English of such title and contents, when the same are not in the English language ;

(2) the language in which the book is written ;

(3) the name of the author, translator or editor of the book or any part thereof ;

(4) the subject ;

(5) the place of printing and the place of publication ;

(6) the name or firm of the printer and the name or firm of the publisher ;

(7) the date of issue from the press or of the publication ;

(8) the number of sheets, leaves or pages ;

(9) the size ;

(10) the first, second or other number of the edition ;

(11) the number of copies of which the edition consists ;

(12) whether the book is printed [c][cyclostyled or lithographed] ;

(13) the price at which the book is sold to the public ; and

(14) the name and residence of the proprietor or the copyright or of any portion of such copyright.

such memorandum shall be made and registered in the case of each book as soon as practicable after the delivery of the [d][copy thereof pursuant to clause *(a)* of the first paragraph of section 9]. [e][* * *].

[a] *Substituted* for "the States" by Act III of 1951. [b] *Substituted* for "pursuant to section 9" by the Press and Registration of Books Act (1867) Amendment Act, 1890 (X of 1890), S. 6. [c] *Substituted* for "or lithographed" by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 15 [w. e. f. 1-7-1956]. [d] *Substituted* for the words "copies thereof in manner aforesaid", *ibid*. [e] The last sentence, relating to the effect of registration, was *repealed* by the Indian Copyright Act, 1914 (III of 1914), S. 15 and Sch. II.

19. Publication of memoranda registered.

The memoranda registered during each quarter in the said Catalogue shall be published in the Official Gazette as soon as may be after the end of such quarter, and a copy of the memoranda so published shall be sent [a][* *] to the Central Government [b][*].

[a] The words "to the said Secretary of State, and" were *omitted* by A. C. A. O., 1948 [23-3-1948]. [b] The word "respectively" was *omitted*, *ibid*.

PART VA[a]

REGISTRATION OF NEWSPAPERS

19A. Appointment of Press Registrar and other officers.

The Central Government may appoint a Registrar of newspapers for India and such other officers under the general superintendence and control of the

Press Registrar as may be necessary for the purpose of performing the functions assigned to them by or under this Act, and may, by general or special order, provide for the distribution or allocation of functions to be performed by them under this Act.

[a] Part VA containing sections 19A to 19L was *inserted* by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 16 [w. e. f. 1-7-1956].

19B. Register of newspapers.

(1) The Press Registrar shall maintain in the prescribed manner a Register of newspapers.

(2) The Register shall, as far as may be practicable, contain the following particulars about every newspaper published in India, namely :—

(a) the title of the newspaper;

(b) the language in which the newspaper is published;

(c) periodicity of the publication of the newspaper;

(d) the name of the editor, printer and publisher of the newspaper;

(e) the place of printing and publication;

(f) the average number of pages per week;

(g) the number of days of publication in the year;

(h) the average number of copies printed, the average number of copies sold to the public and the average number of copies distributed free to the public, the average being calculated with reference to such period as may be prescribed;

(i) retail selling price per copy;

(j) the names and addresses of the owners of the newspaper and such other particulars relating to ownership as may be prescribed;

(k) any other particulars which may be prescribed.

(3) On receiving information from time to time about the aforesaid particulars, the Press Registrar shall cause relevant entries to be made in the Register and may make such necessary alterations or corrections therein as may be required for keeping the Register up-to-date.

19C. Certificates of registration.

On receiving from the Magistrate under section 6 a copy of the declaration in respect of a newspaper, [a][and on the publication of such newspaper, the Press Registrar shall], as soon as practicable thereafter, issue a certificate of registration in respect of that newspaper to the publisher thereof.

[a] *Substituted* for the words "the Press Registrar shall cause relevant entries to be made in the Register in respect of the newspaper and shall" by the Press and Registration of Books (Amendment) Act, 1960 (XXVI of 1960), S. 6 [1-10-1960].

19D. Annual statement, etc., to be furnished by newspapers.

It shall be the duty of the publisher of every newspaper—

(a) to furnish to the Press Registrar an annual statement in respect of the newspaper at such time and containing such of the particulars referred to in sub-section *(2)* of section 19B as may be prescribed;

(b) to publish in the newspaper at such times and such of the particulars relating to the newspaper referred to in sub-section *(2)* of section 19B as may be specified in this behalf by the Press Registrar.

19E. Returns and reports to be furnished by newspapers.

The publisher of every newspaper shall furnish to the Press Registrar such returns, statistics and other information with respect to any of the particulars referred to in sub-section *(2)* of section 19B as the Press Registrar may from time to time require.

19F. **Right of access to records and documents.**

The Press Registrar or any gazetted officer authorised by him in writing in this behalf shall, for the purpose of the collection of any information relating to a newspaper under this Act, have access to any relevant record or document relating to the newspaper in the possession of the publisher thereof, and may enter at any reasonable time any premises where he believes such record or document to be and may inspect or take copies of the relevant records or documents or ask any question necessary for obtaining any information required to be furnished under this Act.

19G. **Annual report.**

The Press Registrar shall prepare, in such form and at such time each year as may be prescribed, an annular report containing a summary of the information obtained by him during the previous year in respect of the newspapers in India and giving an account of the working of such newspapers, and copies thereof shall be forwarded to the Central Government.

19H. **Furnishing of copies of extracts from register.**

On the application of any person for the supply of the copy of any extract from the register and on payment of such fee as may be prescribed, the Press Registrar shall furnish such copy to the applicant in such form and manner as may be prescribed.

19I. **Delegation of powers.**

Subject to the provisions of this Act and regulations made thereunder, the Press Registrar may delegate all or any of his powers under this Act to any officer subordinate to him.

19J. **Press Registrar and other officers to be public servants.**

The Press Registrar and all officers appointed under this Act shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

19K. **Penalty for contravention of section 19D or section 19E, etc.**

If the publisher of any newspaper—

(a) refuses or neglects to comply with the provisions of section 19D or section 19E; or

[a][*(b)* * * * * *]

(c) publishes in the newspaper in pursuance of clause *(b)* of section 19D any particulars relating to the newspaper which he has reason to believe to be false,

he shall be punishable with fine which may extend to five hundred rupees.

[a] Clause (b) was *omitted* by the Press and Registration of Books (Amendment) Act, 1960 (XXVI of 1960), S. 7 [1-10-1960].

19L. **Penalty for improper disclosure of information.**

If any person engaged in connection with the collection of information under this Act wilfully discloses any information or the contents of any return given or furnished under this Act otherwise than in the execution of his duties under this Act or for the purposes of the prosecution of an offence under this Act or under the Indian Penal Code, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

PART VI

MISCELLANEOUS

20. **Power to make rules.**

The State Government shall have power to make such rules [a][not inconsistent with the rules made by the Central Government under section 20A] as may be

necessary or desirable for carrying out the objects of this Act, and from time to time to repeal, alter and add to such rules.

Publication.

All such rules, and all repeals and alterations thereof, and additions thereto, shall be published in the Official Gazette.

[a] *Inserted* by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 17 [w. e. f. 1-7-1956].

[a]**[20A. Power of Central Government to make rules.**

(1) The Central Government may, by notification in the Official Gazette, make rules[aa]—

(a) prescribing the particulars which a declaration made and subscribed under section 5 may contain [b][and the form and manner in which the names of the printer, publisher, owner and editor of a newspaper and the place of its printing and publication may be printed on every copy of such newspaper;]

[c][*(b)* prescribing the manner in which copies of any declaration attested by the official seal of a Magistrate or copies of any order refusing to authenticate any declaration may be forwarded to the person making and subscribing the declaration and to the Press Registrar;]

(c) prescribing the manner in which copies of any newspaper may be sent to the Press Registrar under section 11B;

(d) prescribing the manner in which a Register may be maintained under section 19B and the particulars which it may contain;

(e) prescribing the particulars which an annual statement to be furnished by the publisher of a newspaper to the Press Registrar may contain;

(f) prescribing the form and manner in which an annual statement under clause *(a)* of section 19D, or any returns, statistics or other information under section 19E, may be furnished to the Press Registrar;

(g) prescribing the fees for furnishing copies of extracts from the Register and the manner in which such copies may be furnished ;

(h) prescribing the manner in which a certificate of registration may be issued in respect of a newspaper;

(i) prescribing the form in which, and the time within which, annual reports may be prepared by the Press Registrar and forwarded to the Central Government.

[d][*(2)* Every rule made under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule].]

[a] *Inserted* by the Press and Registration of Books (Amendment) Act, 1955 (LV of 1955), S. 18 [w. e. f. 1-7-1956]. [aa] For the Registration of Newspapers (Central) Rules, 1956. *see* S. R. O. 1519 published in Gaz. Ind., 1956, Extra., Part II-sec. 3, page 1537, as amended from time to time. [b] *Added* at the end of cl. (a), *ibid*, 1960 (XXVI of 1960), S. 8. [1-10-1960]. [c] *Substituted* for the original cl. (b), *ibid*. [d] *Substituted* for the original sub-sect. (2), *ibid*.

[a]**[20B. Rules made under this Act may provide that contravention thereof shall be punishable.**

Any rule made under any provision of this Act may provide that any

contravention thereof shall be punishable with fine which may extend to one hundred rupees.]

[a] *Inserted* by the Press and Registration of Books (Amendment) Act, 1960 (XXVI of 1960), S. 9 [1-10-1960].

21. Power to exclude any class of books from operation of Act.

[a][The State Government may, by notification in the Official Gazette], exclude any class of books [b][or papers] from the operation of the whole or any part or parts of this Act.

[c][Provided that no such notification in respect of any class of newspapers shall be issued without consulting the Central Government.]

[a] *Substituted* by A. O., 1937 [1-4-1937]. [b] *Inserted* by the Repealing and Amending Act, 1915 (XI of 1915), S. 2 & Sch. I. [c] Proviso was *added* by the Press and Registration of Books (Amendment) Act, 1960 (XXVI of 1960), S. 10 [1-10-1960].

[a][22. Extent.

This Act extends to the whole of India except the State of Jammu and Kashmir.]

[a] *Inserted* by the Press and Registration of Books (Amendment Act, 1955 (LV of 1955), S. 19 [w. e. f. 1-7-1956]. The original section 22, dealing with continuance of parts of Act, was *repealed* by the Press and Registration of Books Act (1867) Amendment Act, 1890 (X of 1890).

23. Commencement. *[Repealed by the Repealing Act, 1870 (14 of 1870), S. 1 and Sch., Pt. II.]*

[THE] PREVENTION OF CORRUPTION ACT, 1947

(ACT II of 1947)

[The Act printed here is as on 1-2-1961.]

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SECTIONS

1. Short title, extent and duration.
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5A. Investigation into cases under this Act.
6. Previous sanction necessary for prosecution.
7. Accused person to be competent witness.
8. Statement by bribe giver not to subject him to prosecution.

STATEMENT OF OBJECTS AND REASONS

"The scope for bribery and corruption of public servants had been enormously increased by war conditions and though the war is now over, opportunities for corrupt practices will remain for a considerable time to come. Contracts are being terminated; large amounts of Government surplus stores are being disposed of; there will, for some years, be shortages of various kinds requiring the imposition of controls and extensive schemes of post-war reconstruction, involving the disbursements of very large sums of Government money, have been and are being elaborated. All these activities offer wide scope for corrupt practices and the seriousness of the evil and the possibility of its continuance or extension in the future are such as to justify immediate and drastic action to stamp it out.

The existing law has proved inadequate for dealing with the problem which has arisen in recent years and the Bill is intended to render the Criminal Law more effective in dealing with cases of bribery and corruption of public servants." — Gaz. Ind., 1946, Pt. V, page 374.

Section 21 — Note 1

[1] Any decipherable information which is set down in a lasting form would be a document and if it is printed in India it is hit by S. 3 of the Act. The resulting general inconvenience is a matter calling for remedial action under S. 21 which empowers the State Government to exclude any class of books and papers from the operation of the Act. 1960 Andh Pra 176 (177) [A I R V 47 C 60] : 1960 Cri L Jour 452.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A.L.O., 1950.
—Amended by Acts XL of 1949; XVI of 1950; III of 1951; II of 1952; LIX of 1952; L of 1955; VII of 1957; II of 1958.
—Amended in Maharashtra by Bom. Act LVI of 1959.
—Extended by Acts LIX of 1949; XXX of 1950.
—Extended in Maharashtra by Bom. Act IV of 1950.

[THE] PREVENTION OF CORRUPTION ACT, 1947

(ACT II OF 1947)[a]

[11th March, 1947.]

An Act for the more effective prevention of bribery and corruption.

WHEREAS it is expedient to make more effective provision for the prevention of bribery and corruption ;

It is hereby enacted as follows :

[a] For Statement of Objects and Reasons, *see* Gaz. Ind., 1946, Pt. V, page.

The Act has been extended to the new provinces and merged States by the Merged States (Laws) Act, 1949 (LIX of 1949), S. 3 [1-1-1950] and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (XXX of 1950), S. 3 [16-4-1950].

The Act has been extended to the States merged in the former State of Bombay by Bom. Act IV of 1950.

1. Short title, extent and duration.

(1) This Act may be called THE PREVENTION OF CORRUPTION ACT, 1947.

[a][*(2)* It extends to the whole of India [b][except the State of Jammu and Kashmir]; and it applies also to all citizens of India outside India.]

[c][*(3)* * * * * * *]

[a] *Substituted* for the former sub-section *(2)* by A.L.O., 1950 [26-1-1950]. [b] *Substituted* for "except Part B States" by the Part B States (Laws) Act, 1951 (III of 1951), S. 3 & Sch. [1-4-1951]. [c] Sub-section *(3)* was *omitted* by the Prevention of Corruption (Amendment) Act, 1957 (VII of 1957), S. 2 [29-3-1957].

2. Interpretation.

For the purposes of this Act, "public servant" means a public servant as defined in section 21 of the Indian Penal Code.

Section 1 — Note 1

[1] Where, in a prosecution under the Act for an offence alleged to have been committed during the period from November 1947 to May 1948, the accused who was a permanent Way Inspector Western Railways, Mandsaur contended that, by virtue of the retrocession on 15-8-1947 of the Railway Lands at Mandsaur by the British Government to the Sovereign of the former. Gwalior State, the British Indian laws ceased to be in force in that area during the material period, the accused's contention was upheld and it was held that the general principles with regard to repeal by implication could not be called in aid to support the validity of the Prevention of Corruption Act in the Railway lands at Mandsaur, especially when the Act was not extended in pursuance of the power given in S. 5 of Gwalior Railway Lands Ordinance the object of which was to replace the pre-existing system of laws by the laws of the territory of Gwalior with a view to secure uniformity and homegeneity. 1957 Madh B 58 (62) [AIR V 44 C 26]: 1957 Cri L Jour 189 (DB).

Section 2 — Note 1

[1] What S. 137 (4) of the Railways Act provides is that if a railway servant is charged for an offence under the Penal Code and the said offence is outside Chap. IX of that Code he cannot be treated as a public servant. In respect of offences which are outside the Penal Code neither sub-s. (1) nor sub-s. (4) of S. 134 of the Railways Act would apply. The effect of S. 2 of the Prevention of Corruption Act is that status of accused persons has to be determined by the application of S. 21 of the Penal Code as if the said section had been included in the Act. Person employed by a Railway owned and managed by the Government of India is a public servant within the meaning of S. 21. Penal Code. 1959 S C 1310 (1312, 1313) [AIR V 46 C 183] : 1960-1 S C R 290 : ILR (1959) 2 All 336 : 1959 Cri L Jour 1497. (AIR 1954 Punj 189, *Overruled.*)

[2] Having regard to S. 2, Prevention of Corruption Act, read with S. 21, Penal Code, a railway servant is a public servant within the meaning of Act 2 of 1947, and proceedings may be taken against him under the Act. 1956 All 358 (361) [(S) AIR V 43 C 130] . 1956 Cri L Jour 687.

3. Offence under section 165A of the Penal Code to be cognizable offence.

An offence punishable under [a][* * *] [b][[a][*] section 165A] of the Indian Penal Code shall be deemed to be a cognizable offence for the purposes of the Code of Criminal Procedure, 1898, notwithstanding anything to the contrary contained therein :

[c][* * * * *]

[a] The words and figures "section 161 or section 165 or" were *omitted* by the Prevention of Corruption (Amendment) Act, 1955 (L of 1955), S. 2 [w.e.f. 1-1-1956]. [b] The words, figures and letter "or section 165A" were *inserted* by the Prevention of Corruption (Second Amendment) Act, 1952 (LIX of 1952), S. 2 [12-8-1952]. [c] Proviso was *omitted, ibid.*

4. Presumption where public servant accepts gratification other than legal remuneration.

[a][*(1)*] Where in any trial of an offence punishable under section 161 or section 165[b] of the Indian Penal Code, it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said section 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate:

[c][* * * * *]

Section 2 — Note 1 *(contd.)*

[3] By virtue of S. 137 (1) of the Railways Act as it stood before the amendment of the year 1955 every railway servant had to be deemed to be a public servant for the purposes of Chapter IX of the Penal Code. Thus a railway servant could be tried and convicted of the offence under S. 161, Penal Code. 1957 Ker 134 (139) [(S) AIR V 44 C 73] : ILR (1957) Ker 559 : 1957 Cri L Jour 1127 (DB).

[4] A person who is a Class III servant and is employed as a metal examiner known as Chaser in the Railway Carriage Workshops and is working under the Works Manager who is an officer of the Government and the duties which he performs are immediately auxiliary to those of the Works Manager who, besides being an officer of the Government is also armed with some authority or representative character qua the Government is an officer in the service or pay of the Government performing as such a public duty entrusted to him by the Government and is therefore a public servant within the meaning of S. 21 (9) of the Penal Code and being such public servant he falls within the definition contained in S. 2 of the Prevention of Corruption Act. 1957 S C 13 (17) [(S) AIR V 44 C 3] : 1956 S C R 682 : 1957 Cri L Jour 1.

[5] Public servant — Sar panch of Gram Panchayat holding an office under the provisions of M. B. Village Panchayat Act is a public servant. 1956 Madh B 51 (52) [AIR V 43 C 20] : 1956 Cri L Jour 227.

[6] A person employed as an Assistant in the laboratory of the Municipal Committee of Simla is a public servant within the meaning of S. 21, Penal Code and therefore within the meaning of S. 2 of the Act. ('53) 55 Pun L R 402 (403) (DB).

[7] The Chairman of the managing committee of a municipality is a public servant within the meaning of the section as he has power under R. 68 framed under the Bombay District Municipal Act, III of 1901 to expend money of the municipality on payment of bills for fixed recurring charges and therefore comes within the tenth Clause of S. 21 of the Penal Code. 1961 S C 785 (787) [A I R V 48 C 123] : 1961 (1) Cri L Jour 857.

Section 3 — Note 1

[1] Fact that investigation in presidency town of Bombay is to be by police officer not below Superintendent of Police does not make the offence non-cognizable. 1958 Bom 125 (132) [AIR V 45 C 36] : I L R (1958) Bom 96: 1958 Cri L Jour 481 (DB).

Section 4 — Note 1

Acceptance of gratification

[1] The expression 'gratification' must be held to have been used in the sense of anything which gives satisfaction to the recipient. Prima facie therefore voluntary acceptance of an amount of money or a valuable thing by a public servant will amount to acceptance of gratification. 1959 Bom 543 (547) [AIR V 46 C 167] : 1959 Cri L Jour 1421 (DB).

[2] The mere payment of money is gratification within the meaning of S. 4 (1); it does not mean a reward or recompense or gratuity. Under S. 4 (1), therefore, the prosecution has not to establish anything more than mere payment of money. 1960 All 470 (472) [AIR V 47 C 121] : 1960 Cri L Jour 1050 (DB).

[3] The word 'gratification' in S. 4 has been used as meaning 'satisfaction' and not in the sense of 'reward or recompense'. The presumption referred to in S. 4 arises as soon as the prosecution has proved that the accused person has accepted or obtained, or has agreed to accept or attempted to obtain,

[d][*(2)* Where in any trial of an offence punishable under section 165A[b] of the Indian Penal Code, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person. it shall be presumed unless the contrary is proved that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 161 of the Indian Penal Code or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-sections *(1)* and *(2)*, the Court may decline to draw the presumption referred to in either of the said sub sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no inference of corruption may fairly be drawn.]

[a] Section 4 was *renumbered* as sub section (1) of that section by the Prevention of Corruption (Second Amendment) Act, 1952 (LIX of 1952), S. 3 [12-8-1952]. [b] For a provision that statement by bribe giver not to subject him to prosecution, *see* section 8 of this Act. [c] Proviso was *omitted* by Act LIX of 1952, S. 3. [d] Sub-sections (2) and (3) were *inserted*, *ibid*.

Section 4 — Note 1 *(contd.)*

for himself or for any other person any gratification in the above sense or any valuable thing, from any person provided (however illogical it may be) that in the former case it has further proved that such gratification was not accepted or obtained, or agreed to be accepted or attempted to be obtained, by way of legal remuneration. 1951 All 546 (548) [AIR V 38 C 126] : I L R (1950) All 382 : 52 Cri L Jour 197 (DB).

[4] Paragraph 3 of S. 161 of the Code provides that the word 'gratification' is not restricted to pecuniary gratification or to gratifications estimable in money. What the prosecution has to prove before asking the Court to raise a presumption against an accused person is that the accused person has received a 'gratification other than legal remuneration'; if it is shown that the accused received the stated amount and that the said amount was not legal remuneration then the condition prescribed by the section is satisfied. Further, the relevant clause in S. 4 (1), which deals with the acceptance of any 'valuable thing' under S 165, I. P Code, plainly requires the presumption to be raised, whenever it is shown that the valuable thing has been received by the accused, without anything more. It would be unreasonable to hold that the word 'gratification' in the same clause imports the necessity to prove not only the payment of money but the incriminating character of the said payment. 1960 S C 548 (551, 552) [AIR V 47 C 86] : 1960-2 S C R 592 : 1960 Cri L Jour 729. (AIR 1957 Raj 138 and AIR 1959 Bom 30, *Overruled*.)

[5] Even if one accepts a gratification or a valuable thing for any other person he comes within the plain meaning of the words of the section, but an unconscious and unknowing transmitter or bearer would not come within the section. There must go along with the idea of acceptance a conscious mind that the gratification or the valuable thing is for another person before such acceptance can come within the operation of the section. 1951 Cal 524 (527) [AIR V 38 C 156] : I L R (1952) 2 Cal 243 : 52 Cri L Jour 1116 (DB) ✠ ('57) 1957 Cri L Jour 42 (44) (All).

[6] It is unnatural to expect that the accused would demand a bribe in the presence of a person about whom he was not sure. 1956 Madh-B 51 (54) [AIR V 43 C 20] : 1956 Cri L Jour 227.

[7] Decoy witness — Practice of supplying decoy witness with Government money for bringing about the completion of offence deprecated. 1956 Madh B 51 (54) [AIR V 43 C 20] : 1956 Cri L Jour 227.

Burden of proof on prosecution

[8] Before a presumption such as is mentioned in S. 4 (1) is raised the prosecution must establish by clear and cogent evidence that an accused willingly took the money or thing offered to him knowing full well that the gratification was meant for his benefit or for the use of somebody else. 1955 N U C (All) 2726 [AIR V 42].

[9] Section 4 of Act II of 1947 requires that the prosecution should prove that the accused accepted or agreed to accept the amount as a gratification. "Accept" means "to take or receive with a consenting mind". It is, therefore, upon the prosecution to prove not only the passing of the money into the hands of the accused, but also that he took it with a 'consenting mind'. This would necessitate proof of either an agreement to accept prior to the actual acceptance, or of his consent to accept the same as gratification at the time the money was offered 1952 Orissa 267 (273) [AIR V 39] : I L R (1952) Cut 364 : 1952 Cri L Jour 1393 (DB).

[10] Section 4 only lays down that, if it is proved by the prosecution that the accused did receive gratification, then there will be a presumption that the gratification was received by the accused as a motive or reward as mentioned in S. 161, I P. Code. Before relying upon the presumption laid down in S. 4 of Act (II of 1947), the prosecution must prove that the accused accepted or obtained any gratification other than legal remuneration ('57) 1957 Cri L Jour 42 (44) (All).

[11] Ordinarily, the prosecution would be liable to prove the motive or reward under S. 161, Penal Code or absence or inadequacy of consideration under S. 165, Penal Code

Section 4 — Note 1 *(contd.)*

because such motive or reward or such absence or inadequacy of consideration is part of the very offence under Ss. 161 or 165, Penal Code respectively. But now by reason of S. 4, Prevention of Corruption Act, 1947, that presumption will be made against the accused the moment the prosecution proves that the accused accepted or agreed to accept or obtained or attempted to obtain any gratification or valuable thing. This does not mean that the burden of proof on the prosecution to establish the acceptance or the agreement to accept or the obtaining or the agreement to obtain the gratification or the valuable thing is at all displaced by this section. That burden still remains on the prosecution. This proof must be in accordance with the standard of proof laid down by S. 3, Evidence Act. Any other standard of proof by percentage or plausibility cannot be accepted. 1951 Cal 524 (527) [AIR V 38 C 156] : I L R (1952) 2 Cal 243 : 52 Cri L Jour 1116 (DB).

[12] Section 4 does not dispense with the necessity to prove on the part of the prosecution that gratification or some valuable thing proceeded from the complainant to the accused. The burden of proving that rests on the prosecution under S. 4 as under S. 161, Penal Code. The moment, however, when the prosecution proves that the accusedaccepted or agreed to accept any gratification, the presumption will be raised against him that he received it as a motive or reward for exercising any official favour or disfavour and if the accused wants to suggest to the contrary it would be for him to establish that such was not the case. It is the bounden duty of the prosecution to prove beyond reasonable doubt that money received from the complainant was by way of a bribe and the mere passage of the money from the one to the other is not sufficient to raise any presumption that the accused obtained it as a bribe. ('55) 1955 Raj L W 51 (58).

[13] It is one of the essential ingredients of the offence under S. 161 to be established by the prosecution that gratification was accepted or agreed to be accepted or attempted to be obtained as a motive or reward for performing an official act. By enacting S. 4(1), the Legislature has not only dispensed with the proof of that ingredient by the prosecution but has imposed upon the person accused, when it is proved that he has accepted or obtained or agreed to accept or attempted to obtain gratification other than legal remuneration the burden of proving that it was not as a motive or reward that the gratification was obtained. 1959 Bom 543 (548) [A I R V 46 C 167] : 1959 Cri L Jour 1421 (DB).

Presumption under S. 4

[14] Public servant proved to have accepted gratification other than legal remuneration — Presumption is that he accepted it as motive or reward as is mentioned in S. 161, Penal Code. In the absence of rebuttal it could be held that the sum was accepted as bribe. ('54) ILR (1954) Madh-B 194 (202).

[*See also* 1951 Punj 424 (425) [A I R V 38 C 128] : 52 Cri L Jour 944.]

[15] The only presumption which can be drawn by virtue of S. 4 (1) is that the thing was obtained without consideration or for a consideration which the accused knew to be inadequate. A presumption that it was obtained from any person whom he knew to be interested in or related to the person so concerned, is not covered by this provision. It is for the prosecution to prove by positive evidence that the accused obtained the thing from a person who is known to be related to the concerned person. 1956 Orissa 201 (204) [AIR V 43 C 57] : ILR (1956) Cut 517 : 1956 Cri L Jour 1341 (DB).

[16] When there is no indication whatever that any public servant was to be approached or influenced by the accused there can be no question of making a presumption that the payment was as a motive or reward for rendering service with any public servant. 1959 S C 847 (850) [AIR V 46 C 116] : 1959 Supp 2 S C R 739 : 1959 Cri L Jour 1127.

[17] The presumption under S. 4 is also available in cases where the accused is charged under some other section than S. 161, I. P. Code. Section 5 (1) provides for the same type of offence—the gravamen of the charge being the same — as in S. 161, I P. Code and therefore where the accused is charged under S. 5 (1) of the Act, the Court is fully justified in relying upon the presumption available under S. 4. 1953 All 110 (113) [A I R V 40 C 46] : I L R (1954) 1 All 45 : 1953 Cri L Jour 340.

[18] The accused not having been charged under S. 5 (2) of the Prevention of Corruption Act but under some sections of the Penal Code, S. 4 could not be made applicable to him. 1952 All 35 (37) [AIR V 39] : ILR (1954) 1 All 1 : 1952 Cri L Jour 236 (DB).

[19] Neither S. 6 nor Ss. 4 and 7 make any mention of any other section of the Penal Code and if the accused is, therefore, not charged under S. 161 or 165 of the Penal Code but under certain other sections of the Penal Code, the provisions of the Prevention of Corruption Act would not apply to these sections. 1952 All 35 (38) [A I R V 39] : I L R (1954) 1 All 1 : 1952 Cri L Jour 236 (DB) (A I R 1932 All 18, *Relied on*; A I R 1925 All 230, *Overruled*.)

[20] The presumption under S. 4 can arise only when the trial is for an offence punishable under Ss 161, 165 Penal Code and not in the case of a prosecution under S. 5 (2). 1955 NUC (Punj) 4021 [AIR V 42]. (AIR 1953 All 110, *Diss. from.*)

[21] The presumption under S. 4, Prevention of Corruption Act, is a presumption of law and therefore it is obligatory on the Court to raise this presumption in every case brought under S. 4 of the Prevention of Corruption Act because unlike the case of presumption of fact, presumptions of law constitute a branch of jurisprudence. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused The legislature has chosen to use the words 'shall presume' and not 'may

Section 4 — Note 1 *(contd.)*

presume,' the former a presumption of law and latter of fact. 1958 S C 61 (65) [A I R V 45 C 9] : 1958 S C R 580 : 1958 Cri L Jour 232+('61) 1961 (1) Cri L Jour 544 (547) (DB) (Pat).

[22] Section 4 (1) raises a presumption of law, and it is for an accused person, positively to disprove the facts which the Court has to consider as proved by virtue of that presumption. 1950 All 470 (472) [A I R V 47 C 121] : 1960 Cri L Jour 1050 (DB).

[23] Under S. 4 of the Prevention of Corruption Act, the Court must presume that the accused under the circumstances, accepted the money as a motive or reward as contemplated under S. 161, I. P. Code. 1955 Him-Pra 51 (53) [A I R V 42 C 27] : 1955 Cri L Jour 1585.

[24] The term 'shall be presumed' means that the Court is bound to take the fact as proved until evidence is adduced to disprove it and the party interested in disproving it must produce such evidence if he can. 1959 Mad 166 (171) [A I R V 46 C 52] : 1959 Cri L Jour 484.

[25] Where in a trial for an offence under S. 161, Penal Code, the prosecution has proved the fact of payment of money to the accused but the trial Judge ignores the presumption which arises under S. 4 (1) and acquits the accused without examining the facts proved in the context of the statutory presumption, the judgment cannot be sustained. 1959 Bom 543 (549) [AIR V 46 C 167] : 1959 Cri L Jour 1421 (DB).

[26] Section 4 of Prevention of Corruption Act lays down that if the prosecution proves that the accused person has accepted, or agreed to accept, any gratification, it shall be presumed, "unless the contrary is proved," that he accepted or agreed to accept it with a corrupt motive. This raises a rebuttable presumption and the contrary may be proved to displace the presumption contained in the Section. The section purports to lay down that the Court shall draw a particular inference from a particular proved fact. It is only an inference and not evidence, and may be overcome by evidence. It would be an outrage on commonsense and reason to infer that the presumption of innocence of the accused has itself been displaced and that the offence of bribery must be held to be established the moment the money passed into the possession of the accused without further proof that the money was "accepted" or "agreed to be accepted" for corrupt purposes. When the law raises a presumption against the accused and calls upon him to prove the contrary, the quantum and degree of proof required to displace that presumption are just those required in a civil case; and the contrary can be said to be proved if the accused succeeds in establishing that the act attributed to him is capable of an interpretation other than that suggested by the prosecution. In such an event, the Court is bound to hold that the prosecution has failed to displace the presumption of innocence beyond reasonable doubt. 1952 Orissa 267 (272) [A I R V 39] : I L R (1952) Cut 364 : 1952 Cri L Jour 1393 (DB).

[27] Accused in his official capacity as supervisor recommending to his superior for retention of services of certain persons discharged from service—Accused receiving from such persons sums of money as a reward for his services—Accused is guilty under S. 161, Penal Code in view of presumption arising under S. 4, Prevention of Corruption Act. 1950 Mad 93 (94) [A I R V 37 C 47] : 51 Cri L Jour 386.

[28] The basis adopted by the Legislature in classifying one class of public servants who are brought within the mischief of S. 4 (1) is a perfectly rational basis. It is based on an intelligible differentia. The object which the Legislature wanted to achieve is the eradication of corruption from amongst public servants, and between the said object and the intelligible differentia on which the classification is based there is a rational and direct relation. Hence, S. 4 (1) is not ultra vires Art. 14 of the Constitution. 1960 S C 548 (550, 551) [AIR V 47 C 86] : 1960-2 S C R 592 : 1960 Cri L Jour 729.

[29] Section 4 of the Prevention of Corruption Act (1947) has been enacted by Parliament and therefore it must be held that what it lays down is a procedure established by law. The constitutionality of S. 4, therefore, cannot be questioned on the ground that it went against the provisions of Art. 21 of the Constitution. 1961 S C 1629 (1630, 1631) [AIR V 48 C 309] : 1961 (2) Cri L Jour 811.

[30] Held, that in the nature of the prosecution evidence in this case the Court was fully justified in drawing the presumption as provided for in S. 4 (2). The sum of Rs. 35 tendered by the accused to P. W. 1 in this case could not be taken to be so trivial as to attract the saving provision contained in sub-s. (3). 1954 Trav Co 492 (495) [AIR V 41 C 171] : ILR (1954) Trav-Co 856 : 1954 Cri L Jour 1604 (DB).

Rebuttal of presumption by accused

[31] Section 4 expressly places the onus of proof as to part of the issue on the accused. The presumption under S. 4 arises as soon as the prosecution has proved that the accused has accepted or agreed to accept an amount not covered by the proviso as gratification. If unrebutted and until the contrary is proved the gratification will be deemed to have been paid or given or received corruptly as inducement or reward as is mentioned in the Act. But in such cases the burden of proof on the accused is less stringent than that laid on the prosecution in proving guilt and corresponds to that which rests upon a plaintiff or defendant who is required to prove an issue in a civil proceeding, i. e , preponderance of probabilities. 1959 Mad 166 (172) [AIR V 46 C 52] : 1959 Cri L Jour 484.

[32] Under S. 4 the burden, no doubt, is upon the accused to prove that he came by the amount innocently. But that burden is, unlike the burden resting upon the prosecution, not so heavy. The burden is like one in a civil proceeding discharged by

Section 4 — Note 1 *(contd.)*

indicating the balance of probabilities. 1956 Madh B 51 (53) [AIR V 43 C 20] : 1956 Cri L Jour 227.

[33] The presumption against the accused under S. 4 regarding the motive or reward or absence or inadequacy of consideration is a rebuttable presumption. That presumption may be rebutted by the accused not only by any oral testimony or witnesses called on behalf of the accused but also by a statement of the accused under S. 342, Criminal P. C., and by any document produced on his behalf or by the surrounding circumstances. 1951 Cal 524 (527) [AIR V 38 C 156] : ILR (1952) 2 Cal 243 : 52 Cri L Jour 1116 (DB).

[34] Presumption under is rebuttable—It may be rebutted by oral testimony of accused's witnesses and by his statement under S. 342, Cr. P. Code. The burden on the accused can be discharged from the evidence of prosecution witnesses themselves either in cross-examination or even in examination-in-chief—It is not necessary that accused should examine defence witnesses for that purpose. ('55) 20 Cut L T 721 (727).

[35] All that is required from the accused in a bribery case and having regard to S. 4, is to establish by evidence satisfying the Judge of the probability that the amount he received or obtained was received or obtained by him innocently. If he establishes that probability he has rebutted the presumption and is entitled to be acquitted. 1955 Pepsu 156 (158) [(S) AIR V 42 C 36] : ILR (1956) Patiala 223: 1955 Cri L Jour 1387.

[36] Presumption that accused accepted gratification from corrupt motive arises when prosecution proves beyond reasonable doubt that accused accepted gratification — Burden of displacing presumption is ordinarily on accused, i. e., of raising reasonable doubt. ('50) ILR (1950) 2 Cal 632 (637) (DB).

[37] For rebutting the presumption under S. 4 (1) it is not enough for the accused to offer an explanation which has not been disproved or to create some doubt in the mind of the Court, but it is necessary for the accused to prove that he did receive the money otherwise than as illegal gratification of bribe i. e., innocently. The burden of proof required to be discharged by the accused in such cases is less than that required at the hands of the prosecution in proving the case beyond reasonable doubt. This burden may be discharged by the evidence satisfying the Court of the probability of that which the accused is called upon to establish. 1960 Mad 27 (31, 32) [AIR V 47 C 9] : 1960 Cri L Jour 92.

[38] Although a burden is cast upon the accused by reason of S. 4, this burden is not so heavy as upon the prosecution in other cases where no such presumption arises but is akin to burden placed upon a litigant in civil cases and can be discharged by proving preponderance of possibilities. The considerations that a charge under S. 161, I P. C., is one which is easily and may often be lightly made but is in the very nature of things difficult to establish, cannot be suffered to relieve the prosecution of any part of the burden which rests upon it to establish charge beyond reasonable doubt. If after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that, however strong the suspicion raised against the accused, every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal 1956 Madh B 86 (92, 93) [AIR V 43 C 39] : 1956 Cri L Jour 233 (2) (DB).

[39] The presumption under S. 4 (1) arises not only when the accused has accepted or obtained for himself or for any other person any gratification but also when he has accepted or obtained for himself or for any other person any valuable thing from any person Currency notes are valuable things. This being a presumption of law, when the facts necessary for raising the presumption are either proved or admitted, the Court has to proceed on the basis that the gratification obtained by the accused was accepted by him as a motive or reward such as is mentioned in S 161 of the Penal Code until the contrary is proved by the accused. When the prosecution has proved that the accused public servant has received money from any person which is not legally due to him or that fact is admitted by the accused himself, the burden is on him to disprove the presumption arising under S. 4 (1) of the Prevention of Corruption Act and in such a case it is not necessary for the prosecution to affirmatively prove anything more to show that the amount was received by him as a bribe or illegal gratification. The degree of proof required to rebut the presumption must, of course, depend upon the facts and circumstances of each case. But in view of the imperative provision in S. 4 (1) the presumption cannot be held to have been rebutted without sufficient material before the Court which would ordinarily carry conviction to a judicial mind. As the contrary has to be proved it will not be sufficient for the accused merely to create a doubt. A mere explanation by the accused, which is not inconsistent with the proved or admitted fact that he had received money from a person with whom he had dealings officially which was not legally due to him, would not therefore be sufficient, without corroboration by other evidence either direct or circumstantial, to rebut the presumption under S. 4 (1). 1959 Ker 88 (93, 94) [AIR V 46 C 33] : 1959 Cri L Jour 457 (DB).

[40] The only element remaining to be proved to constitute an offence under S. 165 of the Penal Code is that the acceptance was without consideration or for a consideration which the accused knew to be inadequate. It cannot be said that it must first be proved that the acceptance of the valuable thing was a gratification other than legal remuneration before the presumption under S 4 can be drawn so as to throw the burden on the accused. It is not enough for the accused to offer an explanation which has not been disproved or to create some doubt in the mind of the Court. The burden cast on the accused is however less stringent than that laid on the

5. Criminal misconduct in discharge of official duty.

(1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty—

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in section 161 of the Indian Penal Code, or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadaquate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(d) if he, by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.

Section 4 — Note 1 *(contd.)*

prosecutor in proving the guilt and corresponds to that which rests upon a plaintiff or defendant who is required to prove an issue in civil proceedings. 1958 Ker 136 (137, 138) [AIR V 45 C 52] : ILR (1958) Ker 498 : 1958 Cri L Jour 640 (DB).

[41] Once the prosecution establishes the receipt of the tainted money by an accused person, then an onus is cast on the accused to rebut the presumption against him and offer an explanation. Where the accused in his attempt to rebut the presumption takes several stands the very multiplicity of the stands destroy the bona fides of them and they become inadequate to rebut the presumption. 1959 All 483 (485) [AIR V 46 C 121] : ILR (1959) 1 All 508 : 1959 Cri L Jour 924.

SECTION 5 — SYNOPSIS

1. Public servant.
2. S. 5 (1) (a).
3. S. 5 (1) (b).
4. S. 5 (1) (c).
5. S. 5 (1) (d).
6. S. 5 (2).
7. S. 5 (3).
8. S. 5 (4).

1. Public servant. — [1] As the result of the amendment of S. 137 of the Railways Act by Act 17 of 1955 railway servants have become public servants not only for the limited purposes of Chap. IX of the Penal Code but also generally. In any event they are public servants under the Prevention of Corruption Act. 1956 S C 476 (478) [(S) AIR V 43 C 82] : 1956 S C R '82 : ILR (1956) Punj 1163 : 1956 Cri L Jour 837.

[2] For purposes of clause (d) of sub-section (1) of S. 5 of Act II of 1947, it is not necessary that the accused should function as a public servant at the moment at which pecuniary advantage is obtained. For purposes of clause (d), it is sufficient if the accused obtained pecuniary advantage by abusing his position as a public servant. Where a clerk in the Resident Engineer's office abusing his position as a public servant, forged cash order form and subsequently obtained payment on its basis, his case falls under S. 5 (1) (d), and he is punishable for offence punishable under S. 5 (2), read with S. 5 (1) (d). ('57) 1957 Cri L Jour 108 (111) (All).

[3] A misconduct, which is punishable under sub-s. (2) is a misconduct in the discharge of duties as a public servant and therefore where the accused, a Medical Officer is not acting as a public servant but in the exercise of his right as a private practitioner, he cannot be regarded as having committed misconduct in the discharge of his duty as a public servant nor can he be regarded to have obtained any pecuniary advantage by corrupt or illegal means or by abusing his position as a public servant. 1956 All 673 (676) [A I R V 43 C 221] : 1956 Cri L Jour 1276 (DB).

2. S. 5 (1) (a).—[1] Before a Court could find a person guilty of habitually obtaining and accepting gratification other than legal remuneration as a motive for doing an official act under S. 5 (2) of Act II of 1947, it is necessary for the prosecution to establish a settled tendency or practice on the part of such a person. Payment of bribe by three persons in the same transaction is not sufficient to show a settled tendency or practice. ('51) 52 Cri L Jour 355 (357) (DB) (Dacca).

[2] Obtaining means getting something as a result of effort to get it. If a small sum of money is left with the accused a railway

[(2) Any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine :

Provided that the Court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year.

(2A) Where a sentence of fine is imposed under sub-section (2), the Court, in fixing the amount of fine, shall take into consideration the amount or value of the property which the accused person has obtained by committing the offence of criminal misconduct or where the conviction is based on the presumption under sub-section (3), the pecuniary resources or property referred to in that sub-section for which the accused person is unable to account satisfactorily.]

(3) In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume, unless the contrary is

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Section 5 — Note 2 *(contd.)*

serv nt by a person who according to his own showing is in the habit of tipping Railway servants in order to have his work facilitated it cannot be said that the accused corruptly obtained this money, and no offence under S. 5 (1) (a or (d) is committed. 1954 Punj 89 (93) [A I R V 41 C 43] : 1954 Cri L Jour 545 (DB).

[3] A single instance of attempt to obtain a bribe where no amount is actually received does not amount to an offence of criminal misconduct in the discharge of duty 1956 Mad 613 (615) [(S) A I R V 43 C 194] : 1956 Cri L Jour 1330 (DB) + 1955 Mad 182 (185, 186) [(S) AIR V 42 C 47].

[4] The essential ingredients of the offence under S. 5 (1) a) of the Prevention of Corruption Act are the same as the ingredients of the offence under section 161 of the Indian Penal Code subject to one difference, viz., that the offence under S. 5 (1) (a) is an aggravated form of the offence under S. 161. Repetition of the offence under S. 161 of the Indian Penal Code, would amount to the offence of criminal misconduct under S. 5 (1) (a) of the Prevention of Corruption Act, 1957 Ker 134 (139) [(S) A I R V 44 C 73] : I L R (1957) Ker 559 : 1957 Cri L Jour 1127 (DB).

[5] No particulars need be set out in the charge as the offence under S. 5 (1) (a) does not consist of individual acts of bribe-taking as in S. 161 of the Penal Code but is of a general character. Individual instances may be useful to prove the general averment in particular cases but it is by no means necessary because of the presumption which S. 5 (3) requires the Court to draw. 1954 S C 359 (361) [AIR V 41 C 87] : 1955-1 S C R 92 : I L R (1954) Cut 427 : 1954 Cri L Jour 1002.

[6] *Held*, construing the judgment of the High Court that it had not altered a conviction under S. 5 (1) (a) to one under S. 5 (1) (d). The accused had abused his position and helped other persons to derive a pecuniary advantage thereby. He had done this consistently for over several months. This would amount to his habitually obtaining in the discharge of his duty gratification from other persons. The High Court's judgment was therefore consistent with the charge framed under S. 5 (1) (a) and could not be held to be an alteration of the conviction under S 5 (1) (a) to one under S. 5 (1) (d). 1960 S C 487 (490) [AIR V 47 C 82] : 1960 Cri L Jour 676.

3. S. 5 (1) (b). — [1] If the prosecution proves that a public servant has, on several occasions, received gifts from a firm with which he has had official duties the offences defined under S. 5 (1) (b) will be proved to have been committed if from the circumstances of the case it may be presumed that the gifts were received as a motive or reward for undue favour. 1955 N U C (Punj) 4021 [AIR V 42].

4. S. 5 (1) (c). — [1] Section 5 (1) (c) of the Prevention of Corruption Act is *int a vires* and does not offend against Art 14 of the Constitution. In determining whether an Act offends the provisions of Art. 14 of the Constitution, the overall picture of the Act and not a particular provision of it must be considered. There are distinct advantages which an accused person enjoys under the Prevention of Corruption Act and only one disadvantage with regard to the presumption which must be drawn under S. 5 (3). Section 5 (3) is not so far-reaching as to undo the effect of the other provisions that place the accused person at a distinct advantage particularly his competence to give evidence as his own witness. Weighing the advantages against a single disadvantage, the scales incline slightly in favour of advantages and it therefore cannot be said that a person tried under the Prevention of Corruption Act for an offence defined in S. 5 (1) (c) is denied equal protection of the laws. 1957 Punj 110 (112, 115, 117) [(S) A I R V 44 C 57] : I L R 1957) Punj 618 : 1957 Cri L Jour 659 (DB).

[2] The fact that money entrusted to be used for a particular purpose was not used for such purpose and that there was retention

proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption.

[b][*4)* The provisions of this section shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this section, be instituted against him.]

[a] Sub-sections (2) and (2A) were *substituted* for sub-section (2) by the Criminal Law Amendment Act, 1958 (II of 1958), S. 3 [27-2-1958]. [b] *Substituted* for the original sub-section (4) by the Prevention of Corruption (Second Amendment) Act, 1952 (LIX of 1952), S. 4 [12-8-1952.]

OBJECTS AND REASONS

Sub-sections (2) and (2A).—"Experience has shown that there is a tendency among the Courts to deal too leniently with public servants convicted under the Prevention of Corruption Act. Even where imprisonment is awarded, the period is frequently too small to have adequate punitive or deterrent effect and the amounts of fine imposed are frequently grossly incommensurate with the corrupt gains" These sub sections "will result in ensuring that adequate punishment is awarded in cases of proved corruption." — S. O. R. Gaz. Ind., 1957, Extra., Pt. II, sec. 2, page 929.

Section 5 — Note 4 *(contd.)*

for a sufficiently long time, would justify the inference that the accused did not intend to pay. Where a contingent clerk in the office of Superintendent of Police withdraws money from the bank for specific purpose of paying it to certain person but retains it for 4½ months and even then pays it to that person only in part, it can be said that the contingent clerk retained the sum with dishonest intention. He is therefore guilty under S. 5 (2) of the Prevention of Corruption Act. ('57) 1957 Cri L Jour 131 (133) (Him Pra).

[3] The full definition of the crime under clause (c) of S. 5, sub-s. (1) contains expressly a proposition as to a state of mind. The definition states that the act, i. e., (1) misappropriation, or (2) conversion, or (3) allowing any other persons so to do, must have been done "dishonestly" or "fraudulently". Every ingredient of the offence is stated in the definition itself. If this mental element is proved to have been absent in any given case the crime, as defined above, is not committed. Looked at from another aspect, the offence having been fully defined nothing amounts to that crime which does not satisfy that definition. It would indeed be anomalous to hold that while in the case of misappropriation and conversion the section requires that it must be done either dishonestly or fraudulently a person morally innocent of blame could be held vicariously liable for an assistant's crime without there being a dishonest or a fraudulent mind. 1959 Pat 311 (313) [AIR V 46 C 82] : 1959 Cri L Jour 888.

[4] The offence under S. 5 (1) (c) of the Prevention of Corruption Act is the same as embezzlement. In the case of a servant charged with misappropriating the goods of the master the elements of criminal offence of misappropriation will be established if the prosecution proves that the servant received the goods, that he was under a duty to account to his master and had not done so. If the failure to account was due to an accidental loss then the facts being within the servant's knowledge, it is for him to explain the loss. Of course the prosecution has to establish a prima facie case in the first instance. It is not enough to establish facts which give rise to a suspicion and then by reason of S. 106 of the Evidence Act to throw the onus on him to prove his innocence. 1959 S C 1390 (1393) [AIR V 46 C 196] : 1960-1 S C R 452 : ILR (1959) Punj 1944 : 1959 Cri L Jour 1508.

[5] One of the three ingredients in S. 5 (1) (c) is that the accused dishonestly or fraudulently misappropriates or otherwise converts to his own use any property entrusted to him or under his control or allows any other person so to do. If the accused, who alone could say what he did with the property entrusted to him, gives an explanation which is found to be false, the setting up of that false defence would impute to him a fraudulent and dishonest intention. 1961 Andh-Pra 3 (5) [AIR V 48 C 2] : 1961-1 Cri L Jour 33.

[6] Section 5 (1) (c), Prevention of Corruption Act, is more or less similar to S. 409, Penal Code, except with respect to the mens rea which is enlarged for the purposes of S. 5 (1) (c). For a breach of trust the act or omission of the accused should be dishonest, while under S. 5 (1) (c) it may be dishonest or fraudulent. The words 'dishonestly' and 'fraudulently' do not mean exactly the same thing. A dishonest act is not necessarily a fraudulent act. The elements which make an act fraudulent are deceit or intention to deceive and in some cases even mere secrecy. Where there is neither the intention to deceive, nor secrecy the act though dishonest is not fraudulent. 1954 Hyd 56 (59) [AIR V 41 C 241 : ILR (1953) Hyd 573 : 1954 Cri L Jour 464 (DB).

[7] Where the accused persons are tried on charges of criminal conspiracy to commit the offence of criminal breach of trust S. 5 (1) (c) is not applicable. The offence of criminal conspiracy is not dealt with in the Act. ('54) ILR (1954) Nag 757 (762) (DB).

Section 5 — Note 4 *(contd.)*

[8] The prosecution case was that the accused, in his capacity as booking-clerk at Mandi, received, on or after 26th April, 1956, the sums, in question, from the drivers of various transport vehicles, for deposit with the adda cashier. The accused however, failed to deposit the sums It was only several days after he was placed under suspension, that the missing sums were handed over by him to the adda cashier. *Held*, that the conduct of the accused in retaining the money unduly long, his failure to hand over the same to the cashier, when required to do so by the Regional Manager and his abrupt departure for Bilaspur without permission and without handing over charge of his records and the sums, in question were a clear pointer to his dishonesty. It was wrong to say that these sums were left with the accused by the drivers concerned as a private arrangement. It was not a case of mere retention of money, but failure to hand it over, when required to do so by the superior officer. The conduct of the accused, under the circumstances, could not be considered bona fide. Although the ultimate responsibility for the sums, in question, was that of the adda cashier, nevertheless, there was an implied, if not expressed, trust in favour of the accused. The accused might have been overworked, but that was not sufficient explanation for his failure to deposit the moneys when called upon to do so by the Regional Manager. The accused was rightly convicted of dishonest misappropriation, although it was only temporary, punishable under S. 5 (2) of the Prevention of Corruption Act. 1959 Him-Pra 14 (16, 17) [AIR V 46 C 4] : 1959 Cri L Jour 973.

5. Section 5 (1) (d). — [1] Section 5 not only applies to habitual offenders but also applies to a case where the accused is charged with having taken illegal gratification on a solitary occasion as is provided for in S. 5 (1) (d). 1953 All 110 (112) [AIR V 40 C 46] : ILR (1954) 1 All 45 : 1953 Cri L Jour 340.

[2] The words "obtaining" or "attempting to obtain" in S. 161, Penal Code can certainly include threat. The mere fact that the complainant said that the accused by putting the complainant in fear of injury and of threat to implicate him in a criminal case obtained the illegal gratification does not take the offence outside the scope of S. 161, Penal Code or S. 5 (1) (d) of the Prevention of Corruption Act. 1955 Pat 453 (456) [AIR V 42 C 120] : 1955 Cri L Jour 1382.

[3] The word 'obtains' in S. 5 (1) (d) does not eliminate the idea of acceptance of what is given or offered to be given, though it connotes also an element of effort on the part of the receiver. One may accept money that is offered, or solicit payment of a bribe, or extort the bribe by threat or coercion; in each case, he obtains a pecuniary advantage by abusing his position as a public servant. If a man obtains a pecuniary advantage by the abuse of his position, he will be guilty under sub cl. (d) of S. 5 (1). Sections 161, 162 and 163 of the Penal Code, refer to a motive or reward for doing or forbearing to do something, showing favour or disfavour to any person, or for inducing such conduct by the exercise of personal influence It is not necessary for an offence under Cl. (d) to prove all this. It is enough if by abusing his position as a public servant a man obtains for himself any pecuniary advantage, entirely irrespective of motive or reward for showing favour or disfavour. No doubt, to a certain extent the ingredients of the two offences are common. But to go further and contend that the offence as defined in Cl. (d) does not come within the meaning of bribery is to place too narrow a construction on the sub-clause. 1956 S C 476 (478) [(S) AIR V 43 C 82] : 1956 S C R 182 : ILR (1956) Punj 1163 : 1956 Cri L Jour 837.

[4] The words "pecuniary advantage" are wide enough to include cases of cash payment. 1960 Mys 111 (135) [AIR V 47 C 32] : 1960 Cri L Jour 934 (DB) ✣ 1953 All 110 (112) [AIR V 40 C 46] : ILR (1954) 1 All 45 : 1953 Cri L Jour 340.

[5] Section 5 (i) (d) cannot be so construed as to exclude from its purview offences provided for by the Indian Penal Code, as it is a common feature of criminal legislation to look at the same act from different points of view and to define it as different offences considered from such different points of view, whether under the same enactment or under different enactments. 1952 All 597 (601) [AIR V 39].

[6] As soon as the requirements of sub-s. (3) of S. 5, have been fulfilled, the Court will not only be justified in making but is called upon to make, the presumption that the accused person is guilty of criminal misconduct within the meaning of S. 5 (1) (d). In order to succeed in respect of the charge under S. 5 (1) (a), the prosecution has to prove that the accused person had accepted or obtained or agreed to accept or attempted to obtain from any person any gratification by way of bribe within the meaning of S. 161 of the I. P. Code. The charge under S. 5 (1) (d) does not require any such proof. If there is evidence forthcoming to satisfy the requirements of the earlier part of sub-s. (3) of S. 5, conviction for criminal misconduct can be had on the basis of the presumption which is a legal presumption to be drawn from the proof of facts in the earlier part of the sub-s. (3) aforesaid. Hence, the failure of the charge under Cl. (a) of sub-s. (1) of S. 5, does not necessarily mean the failure of the charge under S. 5 (1) (d). 1960 S C 7 (12) [AIR V 47 C 2] : 1960-1 S C R 461 : ILR (1959) Punj 1955 : 1960 Cri L Jour 131.

[7] Mere receiving of money by public servant even if it be by corrupt means is not sufficient to make out an offence under S. 5 (2) read with S. 5 (1) (d). The words "by otherwise abusing his position" read along with the words "in the discharge of his duty" appearing in S. 5 (1) (d) make it quite clear that an offence under that section requires that the public servant should misconduct himself in the discharge of his own duty. It is no part of the duty of a Government teacher to make appointments in a Railway

Section 5 — Note 5 *(contd.)*

Running Shed. There would, therefore, be no question of his committing misconduct in the discharge of his duty when he takes money for procuring a job for a person in the Running Shed. 1959 S C 847 (849) [AIR V 46 C 116] : 1959 Supp 2 S C R 739 : 1959 Cri L Jour 1127.

[8] The act of the Revenue Minister in directing release of property from superintendence of Court of Wards in no way amounts to an offence under S. 5 (1) (d). ('54) I L R (1954) Patiala 148 (163).

[9] 'Other person' in S. 5 (1) (d) refers to a person other than the one in whose favour the order is passed. ('54) I L R (1954) Patiala 148 (165).

6 Section 5 (2). — [1] It is ordinarily desirable that prosecution of public servants for offence of criminal misconduct should mention the specific act or acts sought to be relied upon in proof thereof and to state, in cases falling under clauses (a) and (b), that all or such of the instances as may be held proved, are intended to be relied upon as proof of the habit. But a trial cannot be held to be illegal on the ground that particular items of bribery have not been specified in the charge, if the omission has not occasioned a failure of justice. 1952 Orissa 289 (294) [AIR V 39] : I L R (1952) Cut 109 : 1952 Cri L Jour 1533 (DB).

[2] Charge not indicating the manner in which accused had abused his position in order to have pecuniary advantage and illegal and corrupt means — Illegal and corrupt means employed not also indicated Defect is a petty irregularity and is curable when there is no prejudice to accused. 1953 All 110 (112) [AIR V 40 C 46]: I L R (1954) 1 All 45 : 1953 Cri L Jour 340.

[3] The conduct which was described in clauses (a) to (d) of sub-s. (1) had always been considered to be criminal and punishable. Hence it could not be said that sub-s. (2) made some act which was not punishable at the time at which it was committed punishable. Sub-section (3) only laid down a rule of evidence and did not create any substantive offence. The offence was defined in sub-s. (1) and it was punishable under sub-s. (2). As sub-s. (3) only provided a rule of evidence there could be no question of such a rule being hit by Art. 20 (1). Hence there was no force in the plea that sub-s (2) was ultra vires because they contravened Art. 20 (1) of the Constitution. ('58) 1958 All L Jour 424 (427).

[4] It is an error in law to have charged accused who are not public servants with having committed the offences under S. 5 (1) (c) and S. 5 (1) (d) punishable under S. 5 (2) of the Prevention of Corruption Act read with S. 34 of the Penal Code. When these offences are said to have been committed in pursuance of the criminal conspiracy then it would be proper if a charge under S. 5 (1) (c) and (d) read with S. 109, Penal Code is framed against those accused. 1958 Bom 354 (359) [AIR V 45 C 100] : 1958 Cri L Jour 1144 (DB).

[5] Where the trial of the accused is under S. 5 (2) and not for specific offences under S. 161 of the Penal Code, then the limitations under S. 234 of the Criminal P. C. are not applicable. 1952 Orissa 289 (293) [AIR V 39]: I L R (1952) Cut 109 : 1952 Cri L Jour 1533 (DB).

[6] Conduct which was not previously punishable but which is made punishable by S. 5 of the Prevention of Corruption Act, 1947, really consists of two matters : (1) allowing some one else to misappropriate property entrusted to or under the control of a public servant, and (2) obtaining a valuable thing or pecuniary advantage by abuse of official position. These two are really the new additions made to the list of offences previously punishable. 1955 Mad 214 (217) [(S) AIR V 42 C 56] : 1955 Cri L Jour 691.

[7] The charge under S. 5 (1) must refer to some specific period during which the accused is alleged to have committed the offence. The period may be one year, may be two years, may be perhaps a little more, but it cannot be so wide as to amount to an abuse of the process of the Court. 1955 Mad 214 (218) [(S) AIR V 42 C 56] : 1955 Cri L Jour 691.

[8] Where the charge under S. 5 (2) wrongly mentioned February 1946 to June 1947 as the period during which the offences were committed— *Held* that the wrong inclusion of period upto 11-3-1947 in the charge during which no offence could in law be committed did not invalidate the charge in respect of offences that might have been committed during the period from 11-3-1947 to June 1947. 1949 Cal 641 (646) [AIR V 36 C 183] : ILR (1950) 2 Cal 45 : 51 Cri L Jour 10 (DB).

[9] Act II of 1947 which came into existence on 11th March, 1947, is not retrospective in effect or operation; and that Act cannot therefore be applied to wrongful acts or omissions committed before that date. The offence of criminal misconduct by a public servant in the discharge of his duty having been created for the first time on 11th March, 1947, where no act of misconduct or omission involving such conduct is committed on and after that date a charge under S. 5 (2) of that Act is unsustainable and must fail. 1951 Bom 233 (241, 242) [AIR V 38 C 44] : I L R 1950) Bom 706 (DB) ✠ ('61) 1961 (2) Cri L Jour 268 (269, 270) (Punj).

[10] Bribery case— Decoy witness — There should be independent corroboration of his statement. ('54) Madh B L J 1954 H C R 966 (967).

[11] Courts seem to have taken the view that in the case of bribe-givers a less strict standard may be applied than in the case of accomplices. However where the evidence of those witnesses has been found to be tainted for the reason that signed statements were taken from them by the police in the course of the investigation, the further circumstance that they are the bribe-givers themselves assumes a greater significance and it may not be prudent to base a conviction on their sole

Section 5 — Note 6 *(contd.)*

evidence in the absence of any corroboration whatsoever. 1961 Ker 99 (105) [AIR V 48 C 31] : ILR (1960) Ker 783 : 1961 (1) Cri L Jour 505 (FB).

[12] The testimony of a sub-divisional Magistrate who is an executive Magistrate participating in a trap in a bribery case cannot be ignored. 1955 Pepsu 156 (158) [(S) AIR V 42 C 36] : I L R (1956) Patiala 223 : 1955 Cri L Jour 1387.

[13] If the evidence of a person, who on his own showing may be taken to be an accomplice, cannot be relied upon for the purpose of payment of a bribe, it would be equally unsafe to rely on it even for the purpose of the demand of the bribe, because, the two really go together so far as the evidence is concerned. 1952 Orissa 289 (301) [AIR V 39] : I L R (1952) Cut 109 : 1952 Cri L Jour 1533 (DB).

[14] *Held* this was not a case of laying a trap in the usual way for a man who was demanding a bribe but of deliberately tempting a man to his own undoing after his suggestion about breaking the law had been finally and conclusively rejected with considerable emphasis and decision 1956 S C 643 (651) [(S) AIR V 43 C 109] : 1956 Cri L Jour 1254.

[15] It cannot be laid down as an absolute rule that the laying of traps must be prohibited on the ground that by so doing an invitation is held out for the commission of offences. The detection of crime may become difficult if intending offenders, especially in cases of corruption, are not furnished opportunities for display of their inclinations and activities. Where matters go further and the police authorities themselves supply the money to be given as a bribe, severe condemnation of the method is merited. But whatever the ethics of the question might be, there is no warrant for the view that the offences committed in the course of traps are less grave and call only for lenient or nominal sentences. 1956 S C 476 (479) [(S) AIR V 43 C 82] : 1956 S C R 182 : I L R (1956) Punj 1163 : 1956 Cri L Jour 837.

[16] Certain precautionary steps are necessary before searches for marked notes or property to assure the Court that there has been no planting by designing or overzealous people. The main precaution is that as few people as possible should be permitted to be present at the time of search. If it is necessary to have a number of persons about, the officer responsible for the search should see that they are authorized, have legitimate functions in the conduct of the search and subject at that time to his control. Whenever there is a house search it is necessary to have two respectable residents of the locality. It is essential that whoever is allowed to be present must give personal search to the accused. ('61) 1961 M P L J 721 (727, 728).

[17] The recovery of the currency notes from the person of the accused is an important link in proving the case in the prosecution for offence under S. 161, Penal Code and S. 5 (2), Prevention of Corruption Act and if the recovery becomes doubtful no conviction can be maintained 1958 All 334 (335) [A I R V 45 C 76] : 1958 Cri L Jour 586.

[18] Minimum sentence is one year unless there are special reasons, for imposing lesser sentence. ('61) 1961 (1) Cri L Jour 544 (549) (DB) (Pat).

[19] Sentence — Sentence should be consistent with enormity of offence — Loss of post and anguish of long trial cannot be mitigating circumstances. 1955 N U C (Punj) 4021 [AIR V 42].

[20] The provisions of the Prevention of Corruption Act do not repeal the provisions of the Indian Penal Code. Every one of the offences specified in clauses (a) to (d) of S. 5 (1) is an offence made punishable under S. 161 of the Penal Code also. The charge framed against the accused that he committed the offence under S 5 (1) (d) of the Prevention of Corruption Act necessarily implies that he had committed the offence punishable under S. 161, I. P. Code. Hence separate sentences for the conviction under S. 161, I. P. Code and S. 5 (2) of the Prevention of Corruption Act are illegal since there is only one act which constitutes an offence under two enactments. 1960 Mad 27 (32) [AIR V 47 C 9]: 1960 Cri L Jour 92 + 1954 Sau 121 (123) [A I R V 41 C 52] 1954 Cri L Jour 1466 (DB).

[21] Section 5 (2) of the Prevention of Corruption Act in fact makes the sentence under Ss. 161 and 165, Penal Code more severe and the sentence for an offence under S. 5 (1) (c) is made less severe by prescribing a punishment extending to seven years or with fine or with both. 1954 Hyd 56 (59, 60) [AIR V 41 C 24] : I L R (1953) Hyd 573: 1954 Cri L Jour 464 (DB).

[22] Punishment —Infliction of lenient sentence will defeat object of the Act. 1961 Mys 44 (49) AIR V 48 C 10]: 1961 (1) Cri L Jour 285 (DB).

[23] Fine of Rs. 200 for taking illegal gratification of Rs. 300 is ridiculous 1954 Sau 62 (64) [AIR V 41 C 29]: 1954 Cri L Jour 688 (DB).

[24] Sentence of 1 year's imprisonment for corruption by a public servant cannot be considered as unduly severe. 1959 S C 831 (833) [AIR V 46 C 111]: 1959 Supp 2 S C R 776: 1959 Cri L Jour 1120.

[25] Accused persons charged under S. 5 (1) (c) of Prevention of Corruption Act —Some of the accused not public servants — Accused who was public servant convicted under S. 5 (2) instead of under that provision read with S. 34, Penal Code—S. 537, Criminal P. C. held applied to such a case — *Held* there was no failure of justice. 1961 S C 1762 (1778, 1779). [AIR V 48 C 327]: 1961 (2) Cri L Jour 828.

7. Section 5 (3).—[1] Sub-s. (3) of S. 5 sets out a new rule of evidence Therefore, all that the prosecution has to do is to show that the accused, or some person on his behalf, is in possession of pecuniary resources or property disproportionate to his known sources of income and for which the accused cannot satis-

Section 5 — Note 7 *(contd.)*

factorily account. Once that is established then the Court has to presume, unless the contrary is proved, that the accused is guilty of the new offence created by S 5, namely, criminal misconduct in the discharge of his official duty. 1954 S C 359 361) [AIR V 41 C 87]: 1955-1 S C R 92: ILR (1954) Cut 427 : 1954 Cri L Jour 1002.

[2] Section 5 (3) only lays down a rule of evidence which enables the prosecution to prove more easily than otherwise the various offences defined in S. 5 (1) in a particular manner. Apparently in view of the difficulty of producing proof of specific instances the legislature devised another mode of proof founded on an inquiry into the financial position of the accused on the date on which he is alleged to have transgressed S. 5 (1). 1955 Mad 214 (217) [(S) AIR V 42 C 56]: 1955 Cri L Jour 691.

[3] After the conditions laid down in the earlier part of sub-s. (3) of S. 5 have been fulfilled by evidence to the satisfaction of the Court, the Court has got to raise the presumption that the accused person is guilty of criminal misconduct in the discharge of his official duties, and this presumption continues to hold the field unless the contrary is proved, that is to say, unless the court is satisfied that the statutory presumption has been rebutted by cogent evidence. Not only that, the section goes further and lays down in forceful words that his conviction therefore shall not be invalid by reason only that it is based solely on such presumption". 1960 S C 7 (11) [A I R V 47 C 2]: 1960-1 S C R 481 : I L R (1959) Punj 1955 : 1960 Cri L Jour 131 + ('61) 1961 (2) Cri L Jour 385 (390) (DB) (Pat).

[4] The rule of law laid down in S. 5 (3) is a departure from the normal law of the land that no person can be convicted on a mere presumption of his having committed an offence. No doubt evidence can be adduced under the sub-section in respect of a specific charge under any of the clauses of S. 5 (1), but in order that an accused can be tried on that specific charge a sanction has to be given at the outset. The rule in sub-s. (3) has nothing to do with sanction 1954 Sau 132 (135) [AIR V 41 C 56]: 1954 Cri L Jour 1559 (DB).

[5] Section 5 (3) does not create a new offence but only lays down a rule of evidence, enabling the court to raise a presumption of guilt in certain circumstances — A rule which is a complete departure from the established principle of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts on to the accused to disprove the charge framed against him. 1960 S C 7 (9) [AIR V 47 C 2]: 1960 1 S C R 461: ILR (1959) Punj 1955: 1960 Cri L Jour 131.

[6] It is partly true that sub-s. (3) of S. 5 does not create an offence by itself but is only in the nature of a rule of evidence as to what constitutes criminal misconduct; but in view of the provisions that on proof of unexplained possession of resources or property disproportionate to known sources of income, a presumption of misconduct is to be made against the accused and a conviction can be based solely on that presumption, it is virtually the creation of a distinct head of the offence of criminal misconduct. A charge, therefore, which specifies "being in possession of property disproportionate to your known resources' as an offence by itself is not open to the objection that no such offence has been created by the Act. 1952 Orissa 289 (293) [AIR V 39]: ILR (1952) Cut 109: 1952 Cri L Jour 1533 (DB).

[7] Section 5 (3) does not create any offence. It does not speak of any specific individual act of a person or his attempt at any specific act, but refers to a state of his pecuniary position as contrasted with his known earnings, which might be a cumulative result of acts done by him, which might fall under S. 5 (1). In enacting sub-s. (3) of S. 5, the Legislature did not intend to create an offence, separate from the one created under sub-s. (1), but intended to lay down a rule that if a person's pecuniary resources, as compared to his known or legitimate sources of income reached a point which was disproportionate to the said income, it shall be presumed, unless the person concerned accounted satisfactorily for it, that he had acquired those pecuniary resources by the commission of an act or series of acts under S. 5 1). Possession of pecuniary resources disproportionate to the known sources of a person's income is not one particular act of a person, but is a consequence arising out of his habitual acceptance of bribes, in other words, a consequence of habitual commission of offences by him under S. 5 (1). Acquisition of such a pecuniary position is not and cannot be, a separate or distinct offence from an offence under S. 5 (1). In short, S 5 (3) does not create a separate offence of criminal misconduct independently of sub-s. (1), but is only a rule of evidence 1956 Bom 717 (718) [A I R V 43 C 283]: ILR 1956 Bom 489: 1956 Cri L Jour 1310 (DB). (AIR 1952 Orissa 289, *Dissent d from.*)

[8] Under S. 5 (3) once the disproportionate possession is made out, the accused has two opportunities, viz., one that of satisfactorily accounting for this disproportion and the other of rebutting the presumption of criminal misconduct arising therefrom, if the explanation is found unsatisfactory. The presumption against the accused under this sub-section is not to be drawn until the explanation of the accused for the disproportionate possession and the evidence bearing on it is considered and found unsatisfactory. At that stage of the consideration of case, the normal principle will apply, viz, that the accused is entitled to the benefit of doubt and that where reasonable explanation is offered, which is acceptable and raises a doubt that the prosecution has not discharged the burden, though the accused may not have proved the explanation. But where the Court feels justified in drawing the presumption against the accused after a due consideration of the explanation, then the burden is on the accused to displace the presumption of criminal misconduct, always re-

Section 5 — Note 7 *(contd.)*

membering that the burden of proof on the accused in such cases is less than that on the prosecution and that it is enough for the accused to make out the truth of his defence in all reasonable probability though not clearly beyond doubt. 1952 Orissa 289 (294) [A I R V 39] : ILR (1952) Cut 109 : 1952 Cri L Jour 1533 (DB).

[9] The presumption under S. 5 (3) can be drawn only in a trial of an offence punishable under sub-s. (2) of the Act and not otherwise. Section 5 (3) cannot be held to create a separate offence and therefore it is wrong to say that without putting the accused on trial for having committed criminal misconduct within the meaning of S. 5 (1) (a), (b), (c), or (d) a presumption as permitted under S. 5 (3) of the Act can be drawn. Where the charge framed read as a whole showed that the accused had been put on trial, not because he had committed criminal misconduct within the meaning of S. 5 (1) (a), (b), (c) or (d), but because he was found to be in possession of property which was disproportionate to his known sources of income it cannot be said that he is charged with criminal misconduct. 1958 Pat 374 (376, 378) [AIR V 45 C 126] : 1958 Cri L Jour 925 (DB). (AIR 1952 Orissa 289, *Dissented from.*)

[10] Section 5 (3) speaks of the accused person satisfactorily accounting for his pecuniary resources. Regard being had to the context in which the words occur, and also to the fact that it is the Court which is required to presume that he is guilty, there is no doubt that S. 5 (3) requires that the accused should satisfactorily account for his possession of disproportionate resources not to some one else but to the Court before which he is being tried. 1955 Mad 214 (218) [(S) A I R V 42 C 56] : 1955 Cri L Jour 691.

[11] To the question whether the possession of unexplained resources could be used to corroborate the evidence adduced by the prosecution to show that on a particular occasion a particular bribe was received, it is not possible to give a general answer. The answer will depend upon the circumstances of each case. 1955 Mad 214 (218) [(S) A I R V 42 C 56] : 1955 Cri L Jour 691.

[12] The burden cast on the accused by sub-s. (3) of S. 5, to prove the contrary of the presumption, cannot be discharged by mere probabilities or bare statements of the accused. 1960 Mys 111 (134) [AIR V 47 C 32] : 1960 Cri L Jour 934 (DB).

[13] The expression 'known sources of income' must have reference to sources known to the prosecution on a thorough investigation of the case. It cannot be contended that 'known sources of income' means sources known to the accused. The prosecution cannot, in the very nature of things, be expected to know the affairs of an accused person. Those will be matters 'specially within the knowledge' of the accused within the meaning of S. 106 of the Evidence Act. The prosecution can only lead evidence to show that the accused was known to earn his living by service under the Government during the material period. The prosecution would not be justified in concluding that travelling allowance was also a source of income when such allowance is ordinarily meant to compensate an officer concerned for his out-of-pocket expenses incidental to journey performed by him for his official tours. That could not possibly be alleged to be a very substantial source of income. The source of income of a particular individual will depend upon his position in life with particular reference to his occupation or avocation in life. In the case of a Government servant, the prosecution would, naturally, infer that his known source of income would be the salary earned by him during his active service. His pension or his provident fund would come into calculation only after his retirement, unless he had a justification for borrowing from his provident fund. 1960 S C 7 (11) [AIR V 47 C 2] : 1960-1 SCR 461 : ILR (1959) Punj 1955 : 1960 Cri L Jour 131,

[14] The Legislature had advisedly used the expression 'satisfactorily account'. The emphasis must be on the word 'satisfactorily', and the Legislature has, thus, deliberately cast a burden on the accused not only to offer a plausible explanation as to how he came by his large wealth, but also to satisfy the Court that his explanation was worthy of acceptance. 1960 S C 7 (11) [AIR V 47 C 2] : 1960-1 S C R 461 : ILR (1959) Punj 1955 : 1960 Cri L Jour 131.

[15] The failure of the prosecution to prove affirmatively the truth of the allegations in regard to the bribes on earlier occasions, does not justify a finding that they are probably false. Further, even in a case where it is found that the prosecution had failed to prove the particular facts and circumstances of criminal misconduct, the presumption under sub-s. (3) cannot be avoided, if the prosecution has satisfied the requirements of that sub-section. 1960 Mys 111 (134) [A I R V 47 C 32] : 1960 Cri L Jour 934 (DB).

[16] Where the accused who was Inspector of Factories was found, on a particular day, while in camp in the course of his official duty, to have been in possession of a heavy amount of money and the same was found to be disproportionate to his known sources of income, and was not satisfactorily explained, but on the other hand, the defence thereof was false, *Held*, that it must be presumed that the accused was guilty of criminal misconduct. 1952 Orissa 289 (307) [A I R V 39] : I L R 1952 Cut 109 : 1952 Cri L Jour 1533 (DB).

[17] Any travelling allowance given to a whole time Government servant who draws a regular monthly salary, is for the purpose of covering incidental expenses during travelling on Government duty and not intended to be a source of profit. 1960 Mys 111 (133) [AIR V 47 C 32] : 1960 Cri L Jour 934 (DB).

[18] In the case of a whole-time Government servant, the known source of his income is generally the salary; by rules governing the conduct of Government servants and by conditions of service, full-time Government

Section 5 — Note 7 *(contd.)*
servant is generally prevented from following any other occupation or profession. Before the presumption under sub-s. (3) of S. 5 could arise. it has to be seen whether the assets acquired by the accused after he entered Government service and in his possession on the date of offence, were disproportionate to his known sources of income. If the prosecution has failed to disclose all the sources of income of an accused person, it is always open to him to prove those other sources of income which have not been taken into account or brought into evidence by the prosecution. 1960 Mays 111 (132) [AIR V 47 C 32]: 1960 Cri L Jour 934 (DB).

[19] Where a person is charged with criminal misconduct and it is seen that he is in possession of property or income which could not have been amassed or earned by the official remuneration which he had obtained, the Court is entitled to come to the conclusion that the amassing of such wealth was due to bribery or corruption and the person is guilty of an offence of criminal misconduct. Such a presumption cannot be drawn in the case of a prosecution under ss. 161, 165 and 409, Penal Code. 1957 SC 458 (462)[(S) AIR V 44 C 67] : 1957 S C R 423 : ILR (1957) 2 All 468 : 1957 L Jour 575.

[20] Under S. 5(3), prosecution has to prove pecuniary resources in possession of accused, his known resources of income and accused's inability to satisfactorily account for his possession — For proof of accused's inability to satisfactorily account for possession of pecuniary resources. prosecution is entitled to rely upon evidence of accused — Explanation given by accused unacceptable — Prosecution case to be taken to be proved — Accused to prove contrary — Accused at least to show that allegations of prosecution are probably false—Failure of prosecution to prove affirmatively truth of allegations does not justify finding that they are probably false—Contrary not proved — Court to presume criminal misconduct. 1949 Cal 641 (648, 649, 650) [AIR V 36 C 183] : I L R (1950) 2 Cal 45 : 51 Cri L Jour 10 (DB).

[21] Except in cases under the Prevention of Corruption Act the circumstance that a person owns large assets is irrelevant as evidence of guilt. ('53) I L R (1953) 2 All 250 (271) (DB).

[22] Where the only charge of criminal misconduct alleged against the accused was of the nature mentioned in S. 5 (1) (c) and that charge has failed and the accused is acquitted of it, the accused cannot be convicted under S. 5 (2) of any other type of criminal misconduct referred to in S. 5 (1), in respect of which there was no charge against the accused, by calling in aid the presumption laid down in S. 5 (3). Section 5 (2) or (3) does not create an offence. The offence which is punished under sub-s. (2) or can be founded on the rule of presumption laid down in sub-s. (3) must be the offence of criminal misconduct of one or more of the categories mentioned in cls. (a) to (d) of sub-s. (1). 1961 S C 583 (586) [AIR V 48 C 85] : 1961 (1) Cri L Jour 730.

[23] Where there is no evidence of any improper acquisitions after the Act came into force, previous acquisitions cannot be relied on as raising a presumption of habitual corruption during the period (regarding which the charge can legally be brought) after the commencement of the Act, though possibly, if habitual corruption is proved on the basis of S. 5 (3) regarding the period after the Act came into force, evidence of previous corruption might be regarded as furnishing some corroboration. ('61) 1961 (2) Cri L Jour 268 (271) (Punj).

8. Section 5 (4). — [1] The offence of criminal misconduct punishable under S. 5 (2) read with S. 5 (1) (c) of the Prevention of Corruption Act is not identical in essence, import and content with an offence under S. 409, Penal Code The offence of criminal misconduct is a new offence created by the Prevention of Corruption Act and does not repeal by implication or abrogate S. 409 of the Penal Code. There can be a trial and a conviction under S. 409, Penal Code even if the accused has been acquitted of an offence under S. 5 (2) of the Prevention of Corruption Act. 1957 S C 592 (593) [(S) AIR V 44 C 87]: 1957 S C R 868 : 1957 Cri L Jour 892 + 1960 S C 397 (399) [AIR V 47 C 67] : 1960 Cri L Jour 539 + 1957 S C 458 (464) [AIR V 44 C 67] : 1957 S C R 423 : I L R (1957) 2 All 468 : 1957 Cri L Jour 575. (AIR 1952 Punj 89, *Over ruled*) + 1955 All 275 (280, 281, 282) [(S) AIR V 42 C 84] : 1955 Cri L Jour 754 (FB) + 1958 Andh Pra 29 (30) [AIR V 45 C 6] : 1958 Cri L Jour 15 (DB) + 1956 All 197 (199) [AIR V 43 C 87] + 1956 Pepsu 1 (2, 3) [(S) AIR V 43 C 1] : 1956 Cri L Jour 100 (DB) + 1955 Bhopal 17 (17) [(S) AIR V 42 C 7] : 1955 Cri L Jour 1559 + 1955 N U C (Sau) 5768 [AIR V 42] + 1954 Him Pra 76 (78) [AIR V 41 C 42] : 1954 Cri L Jour 1481 + 1954 Hyd 56 (64) [AIR V 41 C 24] : I L R (1953) Hyd 573 : 1954 Cri L Jour 464 (DB) + 1954 Raj 211 (213, 214) [AIR V 41 C 65] : I L R (1954) 4 Raj 910 : 1954 Cri L Jour 1446 (DB) + 1953 Madh B 139 (141, 142) [AIR V 40 C 48] : I L R (1953) Madh B 370 : 1953 Cri L Jour 932 + 1953 Mad 137 (137) [AIR V 40 C 40] : 1953 Cri L Jour 309.

[*See also* 1952 All 35 (37) [AIR V 39] : I L R (1954) 1 All 1 : 1952 Cri L Jour 236 (DB). (A I R 1925 All 230 and Cri. Misc. Case No. 506 of 1951, D/- 5-6-1951 (All), *Overruled.*)]

[2] The language used by the Legislature in S. 5 (4), Prevention of Corruption Act, clearly negatives any suggestion that the legislature intended to repeal the provisions of S. 409, Penal Code. Section 409 is not also impliedly repealed by the Prevention of Corruption Act because the provisions of the two statutes are not incompatible. It was open to the prosecution to launch a prosecution either under S. 409, Penal Code, or under S. 5 (2), Prevention of Corruption Act even before the amendment of the latter Act in 1952. 1955 Bom 451 (453, 454) [(S) AIR V 42 C 121] :

[5A. Investigation into cases under this Act.

Notwithstanding anything contained in the Code of Criminal Procedure, 1898, no police-officer below the rank,—

(a) in the presidency towns of Madras and Calcutta, of an Assistant Commissioner of Police,

(b) in the presidency-town of Bombay, of a Superintendent of Police, and

(c) elsewhere, of a Deputy Superintendent of Police,

shall investigate any offence punishable under section 161, section 165 or section 165A of the Indian Penal Code or under sub section *(2)* of section 5 of this Act, without the order of a Presidency Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant :

Section 5 — Note 8 (*contd.*)

I L R (1955) Bom 984 (FB). (AIR 1952 Punj 89, *Diss. from.*)

[3] In face of the amendment made in S. 5 of the Prevention of Corruption Act, 1947, by the substitution of a new sub-s. (4) in place of the old one by the Amending Act LIX of 1952, it cannot be argued that the operation of Act II, in the case of a public servant, excludes the operation of S. 409 of Penal Code. The amendment makes that the prosecution can elect to charge a public servant either under S. 409 of the Penal Code or under S. 5 (1) (c) of the Prevention of Corruption Act, 1947. Hence, the trial of a public servant before a special Judge under S 409 of the Penal Code is held valid. 1953 Cal 681 (682) [AIR V 40 C 258] : 1953 Cri L Jour 1523 (DB). (A I R 1952 Punj 89, superseded by amending Act LIX of 1952.) ✣ 1955 Cal 236 (241) [AIR V 42 C 61] : I L R (1956) 2 Cal 625 : 1955 Cri L Jour 784 (DB).

[4] Before the amendment in 1952, it could have been said that S. 5 repealed by implication, S. 409, Penal Code. But by amendment in 1952, the Legislature has made it clear that both S. 5 and S. 409, Penal Code, should operate side by side. ('54) I L R (1954) Hyd 558 (560, 561, 562) (DB).

[5] Section 5 (4) is not retrospective in operation and does not apply to proceedings pending when the amendment came into force. 1953 Punj 249 (249, 250) [AIR V 40 C 104] : I L R (1954) Punj 139 : 1953 Cri L Jour 1632 (DB) ✣ ('54) I L R (1954) Hyd 558 (562) (DB).

[6] There is no discrimination against an accused who is proceeded against for an offence under S. 409, Penal Code, and not for an offence under S. 5 (1) (c), Prevention of Corruption Act. The provisions of S. 409 do not go against Art. 14 of the Constitution. 1954 All 80 (81) [AIR V 41 C 51] : 1954 Cri L Jour 96 (DB).

[7] As S. 405, Penal Code, is not repealed by S. 5 (1) (c), Prevention of Corruption Act, the application of S 409 which is an aggravated form of offence, to a public servant is not barred by Art. 14 of the Constitution. 1957 S C 458 (464) [(S) AIR V 44 C 67] : 1957 S C R 423 : I L R (1957) 2 All 468 : 1957 Cri L Jour 575. (AIR 1952 Punj 89, overruled on the question of repeal.)

[8] The provisions of S. 5, Prevention of Corruption Act, 1947 do not derogate from any other provisions of law. They do not derogate from the provisions of S. 409, Penal Code, or the Cr. P. Code with regard to that section. The special procedure set up under the Prevention of Corruption Act does not entitle a public servant to insist that the only proceeding which could be instituted against him must be under the special Act and not under the Cr. P. Code. Therefore, the Courts would have jurisdiction as they had before to proceed against a public servant under S. 409 according to the procedure laid down under the Cr. P Code notwithstanding the special provisions contained in the Prevention of Corruption Act, 1947 and the Criminal Law Amendment Act, 1952. 1954 Bom 549 (550) [AIR V 41 C 144] : I L R (1955) Bom 159 : 1954 Cri L Jour 1745 FB).

[9] Sub-section (4) should necessarily be confined to the offence committed by a public servant qua public servant. The necessary condition for the application of sub s. (4) of S. 5 is that the liability to be proceeded against for any offence shall be on him as a public servant and not in his personal capacity. In this view, sub-s. (4) of S. 5 does not confer any option on the prosecution to proceed against a public servant under S. 5 (1) (c) or under S. 408, Penal Code. 1957 Andh Pra 663 (667) [(S) AIR V 44 C 213] : 1957 Cri L Jour 1078 (DB).

[10] Railway Clerks selling tickets, receiving money and misappropriating it—Act may constitute an offence under S 408, Penal Code but will not, unless the person committing the act is also a public servant, constitute an offence under S. 5 (1) (c) of the Prevention of Corruption Act—S. 26 of the General Clauses Act will not in terms apply or the same acts or omissions simipliciter do not constitute an offence under both the Acts. 1957 Andh Pra 663 (667, 668) [(S) AIR V 44 C 213] : 1957 Cri L Jour 1078 (DB).

SECTION 5A — SYNOPSIS

1. Compliance with section.
2. Non-compliance with section—Effect.
3. Permission of Magistrate for investigation.
4. Nature of offence.

1. Compliance with section. — *After amendment.* — [1] It is only where there has been no order by a competent Magistrate that the investigation should be conducted by a Police Officer not inferior in rank to that of a

Provided that a police-officer of the Delhi Special Police Establishment, not below the rank of an Inspector of Police, who is specially authorised by the Inspector-General of Police of that Establishment may, if he has reasons to believe that, on account of the delay involved in obtaining the order of a Magistrate of the first class, any valuable evidence relating to such offence is likely to be destroyed or concealed, investigate the offence without such order; but in every case where he makes such investigation, the police officer shall, as soon as may be, send a report of the same to a Magistrate of the first class, together with the circumstances in which the investigation was made.]

[a] *Inserted* by the Prevention of Corruption (Second Amendment) Act, 1952 (LIX of 1952), S. 5 [12-8-1952].

STATE AMENDMENTS

GUJARAT

Same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Maharashtra, in section 5A in clause *(b)* after the words "Presidency town of Bombay" *insert* the words "and any other area for which a Commissioner of Police has been appointed". —Bom. Act LVI of 1959, S. 3 and Sch. [w. e. f. 4-1-1960].

Section 5A — Note 1 *(contd.)*

Deputy Superintendent. Where there is the order by the District Magistrate directing the Police to take the necessary action the legality of the investigation is not liable to any objection at all. 1954 Trav-Co 492 (494) [AIR V 41 C 171] : ILR (1954) Trav-Co 856 : 1954 Cri L Jour 1604 (DB).

[2] During the course of an investigation started on 2-5-1949, by an inspector of Police in respect of offences punishable under S. 420, I. P. Code and S. 6, Essential Supplies (Temporary) Powers Act committed by a certain person who was not a public servant, it was found that some persons who were public servants were liable to be prosecuted under S. 5 (2), Prevention of Corruption Act. The Inspector then made an application to the Magistrate for sanction for investigation under S. 5 (4) of the Act against such public servants. The sanction was given on 20-3-1951 and a charge-sheet was filed on 15-11-1951—*Held*, that in the circumstances of the case the continuance of such portion of the investigation as remained, as against the public servants concerned by the same officer after obtaining the permission of the Magistrate was reasonable and legitimate and therefore, there was no such defect in the investigation as to call for interference. 1955 S C 196 (206) [(S) A I R V 42 C 34] : 1955 S C R 1150 : ILR (1955) Punj 135 : 1955 Cri L Jour 526.

[3] The Circle Inspector of the Special Police Establishment belongs to the Special Police Establishment which is governed by the Police Establishment Act (XXV of 1946). In such a case an Officer not below the rank of Inspector of Police of the Delhi Special Police Establishment authorised by the Inspector-General of Police of that Establishment can investigate into these offences as provided for under S. 5-A of the Prevention of Corruption Act. The investigation by the officer is governed by the proviso to S. 5-A of the Corruption Act. The only condition in such a case of investigation is that the investigating officer should have sent a report of the investigation to a Magistrate of the First Class. The laying of a trap or the apprehension of a person while committing an offence cannot preclude or prevent the same Officer from investigating the offence. There is nothing in law or procedure or otherwise which vitiates such investigation. ('59) 1959-2 Andh W R 317 (319, 320).

[4] Entire investigation made by Deputy Superintendent of Police — Sub Inspector eventually sending up charge-sheet but not making any investigation — Proviso to S. 3 (before amendment in 1952) held sufficiently complied with though Deputy Superintendent had made first information report to Sub-Inspector as complainant. ('55) 8 Sau L R 46 (48) (DB). (AIR 1954 Sau 62, *Foll.*)

[5] A Deputy Superintendent of Police or an Assistant Superintendent of Police need not obtain permission of any Magistrate to investigate into offences coming under these sections. Where the permission of the First Class Magistrate as contemplated in S. 5-A (c) had been obtained by the Sub-Inspector who investigated into a case under S. 161, Penal Code, he has the authority or jurisdiction to investigate into this case and the investigation under these circumstances cannot be said to be illegal. 1957 Mys 38 (39) [AIR V 44 C 21] : ILR (1956) Mys 301 : 1957 Cri L Jour 463.

[6] Rank of Assistant Superintendent of Police as a Police Officer is just below that of a District Superintendent of Police, and definitely above the Inspector of Police. His designation as Assistant Superintendent does not and will not by itself make out that he is an officer inferior in rank to a Deputy Superintendent. It appears that an officer holding the rank of Deputy Superintendent of Police is designated in some jurisdiction as Assistant Superintendent. In the absence of any evidence to support the contention that the rank of the Assistant Superintendent of Police is inferior to that of a Deputy Superintendent, it cannot be said that the investigation by him was in violation of S. 5-A. 1954 Trav-Co 492 (494) [AIR V 41 C 171] : ILR (1954) Trav-Co 856 : 1954 Cri L Jour 1604 (DB) ✠ 1961 Mys 44 (49) [AIR V 48 C 10] :

Section 5A — Note 1 *(contd.)*
1961 (1) Cri L Jour 285 (DB). (Assistant Superintendent of Police and Deputy Superintendent of Police are of equal status.)

[7] *Held*, on facts that the police officer had started investigation before he obtained permission of the Magistrate under S. 5-A and had thus contravened its provisions. 1959 S C 707 (711) [AIR V 46 C 94] : 1959 Supp 2 S C R 201 : 1959 Cri L Jour 920.

Before amendment

[8] (Brij Mohan Lall J., in the order of reference): — Ordinarily an officer below the rank of a Deputy Superintendent of Police is not to conduct the investigation. But an exception is possible if sanctioned by a Magistrate of the first class. 1954 All 204 (205) [AIR V 41 C 114] : I L R (1954) 1 All 379 : 1954 Cri L Jour 438 (FB).

[9] Deputy Superintendent of Police laying trap—Accused caught while accepting bribe —Panchanama arranged by Deputy Superintendent of Police — Deputy Superintendent present at scene of offence with Police party— Accused arrested after searching him and recovering marked currency notes from his person—Investigation held substantially conducted by Deputy Superintendent of Police although he had lodged the formal first information before Sub-Inspector of Police for launching prosecution. 1954 Sau 62 (64) [AIR V 41 C 29] : 1954 Cri L Jour 688 (DB).

[10] Section 3, Proviso—Proper interpretation of — Officer carrying investigation or arrest without warrant, below rank of Deputy Superintendent of Police — He should obtain order of 1st Class Magistrate—But Deputy Superintendent of Police or any officer above his rank need not obtain such order. 1955 N U C (Assam) 2795 [AIR V 42].

[11] Section 3 only prohibits an offence under S. 161, Penal Code, being investigated by an officer below the rank of a Deputy Superintendent of Police without an order of a Magistrate of the first class. It does not provide that an offence under that section can be investigated only by that officer below the rank of a Deputy Superintendent of Police who has been authorised to investigate by the Magistrate. ('50) 1950 All L Jour 533 (535).

2. Non-compliance with section — Effect.—[1] Section 5 (4) and proviso to S. 3 of the Prevention of Corruption Act as it stood prior to its amendment by Act LIX of 1952 and the corresponding S. 5-A as inserted by Amending Act LIX of 1952 are mandatory and not directory and the investigation conducted in violation thereof bears the stamp of illegality. What sub-s. (2) of S. 156, Cr. P. Code cures is investigation by an officer not empowered under that section, i. e., with reference to sub-ss. (1) and (3) thereof. Sub-s. (1) of S. 156 is a provision empowering an officer in charge of a police station to investigate a cognizable case without the order of a Magistrate and delimiting his power to the investigation of such cases within a certain local jurisdiction. It is the violation of this provision that is cured under sub-s. (2). Obviously sub-s. (2) of S. 156 cannot cure the violation of any other specific statutory provision prohibiting investigation by an officer of a lower rank than a Deputy Superintendent of Police unless specifically authorised. But apart from the implication of the language of S. 156 (2), it is not permissible to read the emphatic negative language of sub-s. (4) of S. 5 of the Act or of the proviso to S. 3 of the Act, as being merely in the nature of an amendment of or a proviso to sub-s. (1) of S. 156, Cr. P. Code. 1955 S C 196 (203) [(S) A I R V 42 C 34] : 1955-1 S C R 1150 : 1955 Cri L Jour 526 : ILR (1955) Punj 135.

[But see 1951 All 546 (547) [A I R V 38 C 126] : I L R (1950) All 382 : 52 Cri L Jour 197 (DB). (The failure to comply with the proviso to S. 3 of the Prevention of Corruption Act is an irregularity which falls within the ambit of sub-s. (2) of S. 156, Cr. P. Code.) ✠ 1952 All 122 (124) [AIR V 39] : 1952 Cri L Jour 292. (Investigation by an officer below the rank of Deputy Superintendent of Police, however undesirable, is a mere irregularity and not an illegality vitiating the investigation and the complaint based upon it.)]

[2] The failure to comply with the Proviso to S. 3 is not a mere irregularity coming within the saving provision contained in sub-s. (2) of S. 156, Cr. P. Code, but it amounts to an illegality vitiating the entire proceedings. The position will be still stronger in the case of a violation of the mandatory provision contained in S. 5-A, Prevention of Corruption Act, as amended in the year 1952. In view of the express exclusion of the general provision contained in Cr. P. Code, there is no scope for contending that an infringement of the mandate contained in S. 5-A would be saved by sub-s. (2) of S. 156, Cr. P. Code. Any such infringement would undoubtedly be an illegality. 1954 Trav-Co 492 (494) [AIR V 41 C 171]: ILR (1954) Trav-Co 856: 1954 Cri L Jour 1604 (DB).

[3] A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. When a breach of the mandatory provisions of S. 5-A is brought to the notice of the Court at an early stage of the trial the court will have to consider the nature and extent of the violation and pass appropriate orders for such re-investigation as may be called for, wholly or partly and by such officer as it considers appropriate with reference to the requirements of S. 5 A. 1955 S C 196 (205) [(S) AIR V 42 C 34] : 1955-1 SCR 1150: ILR (1955) Punj 135 : 1955 Cri L Jour 526 ✠ 1961 Mys 44 (49) [AIR V 48 C 10]: 1961 (1) Cri L Jour 285 (DB).

[4] Where the two conditions laid down in the proviso to S. 5A have not been complied with by the Inspector of Police conducting the investigation, the investigation is illegal but the illegality committed in the course of the investigation does not affect the competence and jurisdiction of the court for trial and when cognizance of the case has in

Section 5A — Note 2 *(contd.)*
fact been taken and the case has proceeded to termination, the invalidity of the preceding investigation does not vitiate the result unless miscarriage of justice has been caused thereby. 1961 S C 1762 (1777) AIR V 48 C 327]: 1961 (2) Cri L Jour 828 ✣ 1956 Bom 287 (297) [(S) AIR V 43 C 130]: ILR (1956) Bom 343: 1956 Cri L Jour 585 (DB) ✣ 1958 Manipur 17 (18) [A I R V 45 C 9] : 1958 Cri L Jour 1053.

[5] *(Before amendment)* — When a Police Officer below the rank of a Deputy Superintendent of Police investigates an offence under S. 120-B, read with S. 420, Penal Code and S. 5 (2), Prevention of Corruption Act of 1947 without complying with the provisions of S. 5 (4) (now S. 5-A) of the latter Act such failure would not vitiate the entire proceedings in Court based on the charge-sheet submitted by the Investigating Officer. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for. 1956 Cal 56 (56, 57) [(S) AIR V 43 C 16]: 1956 Cri L Jour 396 (FB). (AIR 1953 Cal 226, *Overruled.*)

[6] Generally a conviction is not vitiated because there has not been strict compliance with the provisions of the Act in the matter of investigation by a police officer. Where an objection that the investigation had been made by an officer below the rank of Deputy Superintendent of Police in contravention of the provisions of the Act had not been raised before the High Court, it cannot be allowed to be raised before the Supreme Court in appeal by special leave. 1959 S C 831 (832) [AIR V 46 C 111]: 1959 Supp 2 S C R 776: 1959 Cri L Jour 1120.

[**See however** 1954 Punj 42 (43, 44) [A I R V 41 C 23]: ILR (1954) Punj 682: 1954 Cri L Jour 310. *(Before amendment)* Where the investigation has not been carried out in accordance with the provisions of S. 5 (4) (as it stood before amendment in 1952) such investigation is not a mere irregularity falling under S. 156 (2) of the Criminal P. C. but is an illegality and the entire proceedings based on the charge-sheet reported by the officer not competent to investigate must fail.)]

[7] Non-compliance with the provisions of S. 5-A, Prevention of Corruption Act, in the matter of investigation does not bar the trial based on the report of a Police-Officer not empowered by S. 5-A to investigate. Such non-compliance does not vitiate the proceedings based on the report of a Police-Officer not empowered by the section to investigate. Non-compliance with the provisions of the section in the matter of investigation is curable within S. 537, Criminal P. C. and the arrest of an offender for an offence punishable under Ss. 161, 165 or 165-A, Penal Code, or S. 5 (2), Prevention of Corruption Act, without warrant does not vitiate the proceedings in the trial. 1955 Punj 151 (156) [(S) A I R V 42 C 60]: ILR (1955) Punj 226 : 1955 Cri L Jour 1101 (FB).

[8] The failure to comply with the mandatory provisions of S. 5-A (c) would not necessarily vitiate a trial as the omission of this type falls within the category of curable irregularities. It is not right to regard the entire proceedings based on the charge-sheet reported by an officer who was not competent to investigate to be bad if the evidence tendered has been found to be uninfluenced by the investigation and independently leads to a particular conclusion. 1955 Nag 204 (206) [(S) AIR V 42 C 52]: I L R (1955) Nag 882: 1955 Cri L Jour 1201 (DB). (A I R 1953 Cal 226, *Dissent.*)

[9] *(Before amendment)* — The provisions of S. 5 (4) are mandatory but they are in the nature of a direction to the Police and though the Police Officer conducting unauthorised investigation may expose himself to other penalties for contravening it, the jurisdiction of the Court to take cognizance of the offence and try it cannot be questioned. 1955 Sau 91 (92) [(S) A I R V 42 C 33]: 1955 Cri L Jour 1520 (DB). (AIR 1953 Cal 226 and AIR 1954 Punj 42, *Not foll.*)

[10] Non-compliance with S. 5 (4) (before amendment in 1952)—Jurisdiction of Special Magistrate to try — Defect in investigation would not take away the jurisdiction of the Special Magistrate under S. 7 of Criminal Law Amendment Act (1952) to try the case. 1957 S C 592 (593) [(S AIR V 44 C 87]: 1957 SCR 868 : 1957 Cri L Jour 892.

[11] Where the permission under S. 5-A is granted mechanically and the case is investigated partly before so called permission and partly after it that is an illegality — But the illegality does not affect the competency and the jurisdiction of the Court. 1958 Madh Pra 157 (159) [A I R V 45 C 55] : 1958 Cri L Jour 764.

[12] Investigation by officer of rank below Deputy Superintendent of Police without permission of Magistrate — Statements of witnesses taken down and signatures of deponents taken thereto — It must be held that officer acted in violation of S. 162, Criminal P. C. and statements are hit by S. 162. 1961 Ker 99 (103) [AIR V 48 C 31]: I L R (1960) Ker 783: 1961 (1) Cri L Jour 505 (FB).

[13] Where the investigating officer on receipt of specific and detailed information about the commission of an offence under S. 5 (1) (c), Prevention of Corruption Act proceeds with the investigations without the sanction of the Magistrate under S. 5-A of the Act and without registering the F. I. R. the statements of witnesses recorded during the course of such inquiry would be hit by the provisions of S. 162 Criminal P. C. 1961 Andh Pra 3 (6) [AIR V 48 C 2]: 1961 (1) Cri L Jour 33.

3. Permission of Magistrate for investigation. — [1] When a Magistrate is approached for granting permission under S. 5-A he

6. Previous sanction necessary for prosecution.

[a][*(1)*] No Court shall take cognizance of an offence punishable under section 161 [aa][or section 164] or section 165 of the Indian Penal Code or under

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Section 5A — Note 3 (*contd.*)

is expected to satisfy himself that there are good and sufficient reasons for authorising an officer of a lower rank to conduct the investigation. The granting of such permission is not to be treated by a Magistrate as a mere matter of routine but it is an exercise of his judicial discretion having regard to the policy underlying it. 1955 S C 196 (205) [(S) AIR V 42 C 34] : 1955-1 S C R 1150 : ILR (1955) Punj 135 : 1955 Cri L Jour 526.

[2] Section 5-A of the Prevention of Corruption Act does not say that a Magistrate issuing orders under that section should be a Magistrate having power to try that case. The powers under section 5-A of the Act are not the powers conferred on him under the Cr. P. Code. That being so, any Magistrate of the First Class appointed to a District, can exercise that power in respect of all offences committed in the District to which he is appointed, even if the offence in question is committed in a place outside his local area as defined under S. 12, Cr. P. C. 1960 Mys 242 (243) [AIR V 47 C 84] : 1960 Cri L Jour 1226 (2).

[3] In a case where an officer, other than the designated officer, seeks to make an investigation he should get the order of a Magistrate empowering him to do so before he proceeds to investigate and it is desirable that the order giving the permission should ordinarily, on the face of it, disclose the reasons for giving the permission. For one reason or other, if the said salutary practice is not adopted in a particular case, it is the duty of the prosecution to establish, if that fact is denied, that the Magistrate in fact has taken into consideration the relevant circumstances before granting the permission to a subordinate police officer to investigate the case. Thus where it appears that the Magistrate in granting the permission under S. 5-A did not realise the significance of his order giving permission, but only mechanically issued the order on the basis of the application which did not disclose any reason, presumably because he thought that what was required was only a formal compliance with the provisions of the section, the provisions of S. 5-A are not complied with. 1959 S C 707 (710) [AIR V 46 C 94] : 1959 Supp 2 S C R 201 : 1959 Cri L Jour 920.

[4] In view of the fact that an objection as to the error, omission or irregularity is to be raised at an early stage of the proceedings under S. 537, Criminal P. C., the trial Judge in a criminal proceeding under Prevention of Corruption Act has the power to go into the question whether the Magistrate in giving permission to a police officer of the lower rank under S. 5-A (c) has committed any irregularity or not. 1957 Madh B 43 (44) [AIR V 44 C 19] : 1957 Cri L Jour 184 (DB).

[5] *Before amendment*—S. 3 does not require the permission to be in any particular form, nor even to be in writing. Where no objection was raised in the trial Court that the permission to investigate given under S. 3 was defective or that the Magistrate did not consider the facts of the case before granting the permission and hence the Magistrate was not examined as witness in the trial, the objection taken in appeal could not be sustained. 1955 Punj 65 (73) [AIR V 42 C 24] : ILR (1954) Punj 75 : 1955 Cri L Jour 609 (DB).

[6] Where during investigation of an offence under S. 165-A, Penal Code, on the attention of the District Magistrate being drawn to S. 5-A by the District Superintendent of Police, the former replies by a memorandum that steps be taken and a chalan be put up after completing the enquiry : *Held*, that this does not amount to the necessary authority contemplated under S. 5-A. 1955 Nag 204 (205) [(S) AIR V 42 C 52] : ILR (1955) Nag 882 : 1955 Cri L Jour 1201 (DB).

[7] Merely because a Sub-Divisional Magistrate who has participated in a trap in a bribery case is present when the bribe money is recovered from the accused, that does not mean that in law he has ceased to be a Sub-Divisional Magistrate. He is therefore competent to order the Sub Inspector of Police to carry on the investigation and the order is a valid order under S. 5-A (c), Prevention of Corruption Act. 1955 Pepsu 156 (158) [(S) AIR V 42 C 36] : ILR (1956) Patiala 223 : 1955 Cri L Jour 1387.

4. Nature of offence.—[1] Even after the amendment of 1952 in the Prevention of Corruption Act the position regarding an offence under S. 161, I. P. Code and under sub-s. (2) of S. 5, Prevention of Corruption Act is that it is cognizable so far as officers of the rank of a Deputy Superintendent of Police and above are concerned. But so far as the officers below the rank of a Deputy Superintendent of Police are concerned, the said offences are non-cognizable in so far as they cannot investigate them without the permission of a Magistrate of the First Class. All that the Magistrate has to see before granting permission is, whether there is a prima facie case or not. Where the Magistrate perused the F. I. R. before giving permission it could not be said, that he did not satisfy himself regarding good and sufficient reasons to conduct the investigation 1957 Madh B 43 (45, 46, 47) [AIR V 44 C 19] : 1957 Cri L Jour 184 (DB).

SECTION 6 — SYNOPSIS

1. Scope.
2. Essentials of sanction.
3. Authority competent to remove.
4. Public servant.
5. Absence of sanction.
6. Grant of sanction.
7. Validity of sanction.
8. Form of sanction.

sub-section *(2)* of section 5 of this Act, alleged to have been committed by a public servant except with the previous sanction,—

(a) in the case of a person who is employed in connection with the affairs of the [b][Union] and is not removable from his office save by or with the sanction of the Central Government [c][* *], [d][of the] Central Government;

(b) in the case of a person who is employed in connection with the affairs of [e][a State] and is not removable from his office save by or with the sanction of the State Government [c][* *], [d][of the] State Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

Section 6 — Synopsis (*contd.*)

9. Burden of proof.

10. Proof of sanction.

11. Taking cognizance.

1. Scope. — [1] No sanction is necessary to prosecute a public servant under S. 409, Penal Code as he does not normally act in his capacity as a public servant when committing criminal breach of trust. 1957 S C 458 (464) [(S) AIR V 44 C 67] : 1957 S C R 423 : ILR (1957) 2 All 468 : 1957 Cri L Jour 575.

[2] Per *majority*, *Mulla, J.*, *Contra.* — By omitting to mention S. 409 it is plain that the Legislature intended that the provision for sanction as laid down in S. 6, Prevention of Corruption Act did not apply to an offence punishable under S. 409, I. P. Code. It is not competent for a Court to extend the meaning so as to include S. 409 which is not there. Thus the rule about sanction as laid down in S. 6, Prevention of Corruption Act has no application when a public servant is prosecuted under the general law for an offence under S. 409, I. P. Code. 1955 All 275 (278) [(S) AIR V 42 C 84] : 1955 Cri L Jour 754 (FB).

[3] For embarking on a prosecution under the Act where the presumptions have to be invoked, the previous sanction of the authority concerned has to be taken ; but as S. 6 stands it would be only when there is prosecution under the Act, and not otherwise. It cannot be held that although the accused was prosecuted under S. 409, Penal Code, it is really an offence covered by S. 5 (1) (c) of the Prevention of Corruption Act and is punishable under S. 5 (2) of that Act and as the accused was prosecuted without any sanction under S. 6 the prosecution is bad. 1955 Cal 236 (239) [AIR V 42 C 61] : ILR (1956) 2 Cal 625 : 1955 Cri L Jour 784 (DB).

[4] No sanction under S. 6 is necessary if the Court is asked to take cognizance of an offence punishable under S. 409, Penal Code. Sanction is necessary only if the prosecution is for an offence under S. 5 (2). ('54) ILR (1954) Nag 757 (760) (DB).

[5] It is open to the prosecution to prosecute a public servant under S. 409, Penal Code without sanction from the State and the Court cannot insist that the prosecution must be under S. 5 (1) (c), Prevention of Corruption Act with the sanction of the State. 1954 Raj 211 (214) [AIR V 41 C 65] : ILR (1954) 4 Raj 910 : 1954 Cri L Jour 1446 (DB).

[6] Previous sanction from the competent authority is a condition precedent to confer jurisdiction on any particular Court to try a person accused of an offence under section 161 or section 165, I. P. C., or under sub-section (2) of section 5 of the Prevention of Corruption Act where the offence has been committed by a public servant. ('57) 1957 All L Jour 211 (212).

[7] Where the charge against the accused is under S. 165A, Penal Code no previous sanction is necessary. 1955 NUC (Him Pra) 1295 [AIR V 42].

[8] Section 6 does not make any mention of any other section of the Penal Code and if the accused is therefore not charged under S. 161 or 165, Penal Code but under certain other sections of the Penal Code the provisions of the Prevention of Corruption Act would not apply. 1952 All 35 (38) [AIR V 39] : ILR (1954) 1 All 1 : 1952 Cri L Jour 236 (DB). (Case before amendment in 1955.)

[9] The marginal note to S. 6 is perfectly general, and it throws no light whatsoever upon the meaning of the section, when taken by itself. It cannot therefore be taken into consideration in the interpretation of the language of the statute. 1954 Bom 109 (112) [AIR V 41 C 27] : 1954 Cri L Jour 284 (DB).

[10] Rules of procedure are in the absence of anything to the contrary, retrospective in their operation. The rule requiring sanction before the Court can take cognizance of an offence is a rule of procedure which applies retrospectively to all complaints, whatever be the date of the commission of the offence to which they relate. The procedure to be followed is the procedure that prevails on the date of the complaint. Accordingly sanction under S. 6 of Act II of 1947 would be necessary even though the offence might have been committed before the Act came into force. 1950 All 494 (495) [AIR V 37 C 198] : 51 Cri L Jour 1323.

[11] Where the sanction under S. 6 wrongly mentioned an offence under S. 5 (2) having been committed during the period February 1946 to June 1947: *Held* that the sanction was invalid as regards the period upto 11-3-1947 on which date the Act received the assent of the Governor-General but the sanction was valid as regards the period from 11-3-1947. 1949 Cal 641 (645) [AIR V 36 C 183] : ILR (1950) 2 Cal 45 : 51 Cri L Jour 10 (DB).

[12] The discretion to sanction prosecution under S. 6 is vested solely in the sanctioning

[1][*(2)* Where for any reason whatsoever any doubt arises whether the previous sanction as required under sub-section *(1)* should be given by the Central or State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.]

[a] Section 6 was *renumbered* as sub-section *(1)* of that section by the Prevention of Corruption (Second Amendment) Act, 1952 (LIX of 1952), S. 6 [12-8-1952]. [aa] *Inserted* by the Prevention of Corruption (Amendment) Act, 1955 (L of 1955), S. 3 [w. e. f. 1-1-1956]. [b] *Substituted* for "Federation" by A. L. O., 1950 [26-1-1950]. [c] The words "or some higher authority" were *omitted*, *ibid.* [d] *Inserted* by the Repealing and Amending Act, 1949 (XL of 1949), S. 3 and Sch. [1-5-1949]. [e] *Substituted* for "a Part A State" by the Part B States (Laws) Act, 1951 (III of 1951), S. 3 and Sch. [1-4-1951]. [f] Sub-section *(2)* was *inserted* by Act LIX of 1952, S. 6.

Section 6 — Note 1 *(contd.)*

authority and is absolute. Its exercise cannot be questioned in a Court of law. 1953 All 37 (40) [AIR V 40 C 11] : 1953 Cri L Jour 192.

2. Essentials of sanction.—[1] The object of the provision for sanction is that the authority giving the sanction should be able to consider for itself the evidence before it comes to a conclusion that the prosecution in the circumstances be sanctioned or forbidden. It should be clear from the form of the sanction that the sanctioning authority considered the evidence before it and after a consideration of all the circumstances of the case sanctioned the prosecution, and therefore unless the matter can be proved by other evidence, in the sanction itself the facts should be referred to indicate that the sanctioning authority had applied its mind to the facts and circumstances of the case. 1958 S C 124 (126) [AIR V 45 C 19] : 1958 S C R 762 : ILR (1958) Punj 572 : 1958 Cri L Jour 265.

[2] The Prevention of Corruption Act, no doubt, does not prescribe any particular form of sanction : but sanction to prosecute a particular person for an offence implies : (1) a full knowledge of the facts upon which it is sought to prosecute him and (2) a deliberate decision of the sanctioning authority that he may be prosecuted. These two things are necessary to be proved before it can be said that a particular order amounts to a sanction for prosecution. Furthermore, it is necessary that the sanction should be given after all the facts have been collected against the accused so that the sanctioning authority has before it the materials upon which the prosecution is to be launched. 1950 All 494 (496) [AIR V 37 C 198] : 51 Cri L Jour 1323.

[3] In a charge of criminal misconduct by a public servant in the discharge of his duty by habitual acceptance of illegal gratification the instances of bribe-taking would no doubt constitute evidence of the offence and it may not be necessary to bring to the notice of the sanctioning authority particular instance of bribe-taking; but, it cannot be said that the same principle applies where the accused is charged with accepting illegal gratification from a specified person on a specified occasion. In such a case, the factual constituent of the offence is the instance itself and therefore the necessity of placing essential facts constituting the offence for which the accused is to be prosecuted cannot be dispensed with. 1953 Sau 130 (132) [AIR V 40 C 65] : 1953 Cri L Jour 1237 (DB).

[4] All that the order of sanction must show is that all relevant materials were placed before the authority sanctioning the prosecution and that the authority considered those materials and the order sanctioning prosecution resulted therefrom. The sanction need not set out the reasons for the sanction. The object of this sanction is nothing more than to ensure the discouragement of frivolous, doubtful and impolitic prosecutions. (Sanction held proper.) 1953 Mad 785 (786) [AIR V 40 C 300] : 1953 Cri L Jour 1429.

[5] The law relating to requirements of sanction is that correlation between the sanction and the offence to be taken cognizance of, in respect, of essential facts of the offence, has to be made out. It is not necessary that the particulars of the offence or the essentials of the evidence relating thereto should be set out in the sanction or should be proved to have been placed before the sanctioning authority. It is sufficient that the sanction sets out the offence and the essential factual ingredients thereof in such manner as to indicate the taking cognizance of the charge which is before the Court is authorised. Where, therefore, the District Magistrate wrote a letter to the Chief Secretary to the Government of Orissa wherein he set out that according to his information the accused in the course of his visit to rice mills as Inspector of Factories had been collecting heavy sums as illegal gratification from the managers or the proprietors of the mills under threat or mischief to the mill owners and that a heavy sum of money had been seized from his possession, but the various instances of bribery were not referred to in the letter and the sanction to prosecute the accused was granted on the basis of that letter : *Held* that the sanction was perfectly valid. 1952 Orissa 289 (300) [AIR V 39] : ILR (1952) Cut 109 : 1952 Cri L Jour 1533 (DB).

[6] The satisfaction of the sanctioning authority is subjective. The Courts are concerned only with one matter, namely, to find whether sanction for the particular prosecution was in fact accorded by the proper authority. If the record shows that the sanction was in fact accorded and the sanction was in respect of the particular transaction which is the subject matter of the charge against the accused the requirements of law

Section 6 — Note 2 *(contd.)*
are fully satisfied. 1955 N U C (Assam) 2795 [AIR V 42].

[7] No special form is prescribed for according sanction under S. 6, Prevention of Corruption Act. The prosecution however must show that the sanctioning authority had before it the relevant facts on the basis of which prosecution was desired. The satisfaction of the sanctioning authority is entirely subjective. He is the judge of the materials that should be placed before him for enabling him to accord the sanction. If the facts placed before him are not sufficient to enable him to exercise his discretion properly he will ask for mere particulars but it is for him and him alone to determine this matter. The Courts are concerned only with one matter to find whether sanction for the particular prosecution was in fact accorded by the proper authority. If the record shows that the sanction was in fact accorded and the sanction was in respect of the particular transaction which is the subject-matter of the charge against the accused the requirements of law are fully satisfied. 1953 All 37 (39, 40) [A I R V 40 C 11] : 1953 Cri L Jour 192.

[8] Where the law prescribes sanction as a condition precedent to a prosecution the Court must not only be satisfied that the required sanction has been accorded but that the sanctioning authority has accorded it after applying its mind to the facts constituting the offence. ('57) 1957 All L Jour 28 (29) (DB).

[9] Requisites of sanction for prosecution — No time for obtaining sanction — No particular form—Sanctioning authority should be in know of nature of charge and materials on which it is based. 1955 NUC (Assam) 2795 [AIR V 42].

3. Authority competent to remove. — [1] The words "to remove him from his office" are significant and would clearly show that the authority contemplated therein is the one competent to remove that public servant from his office and not any public servant holding the office held by the accused person. Section 6, Prevention of Corruption Act cannot override the provisions of the Constitution and consequently, sub-s. (2) thereof can be made applicable to only such cases where it cannot be ascertained with reasonable certainty as to who had actually appointed the accused person, or where by change in rules, the authority who had actually appointed him was no longer competent to remove him from his office. The accused was absorbed in the Bhopal Police under G. O. 1239, dated 28th January, 1954, though the order was to take effect from 1st April, 1952. Only the Government of Bhopal, that is, the Chief Commissioner, was competent to appoint the accused as a Police Sub-Inspector. When he was so appointed by the Chief Commissioner the authority competent to remove him from his office would, by virtue of Art. 311 of the Constitution, be not one subordinate to the Chief Commissioner. Consequently the sanction for prosecution as required under S. 6, Prevention of Corruption Act must be by the Chief Commissioner and not by an authority subordinate to him. The sanction of the Chief Secretary could be of no help to the prosecution. The Chief Secretary was subordinate to the Chief Commissioner and consequently the sanction of the former cannot be deemed to be the sanction of the Chief Commissioner. 1956 Bhopal 36 (38, 39, 40) [AIR V 43 C 21] : 1956 Cri L Jour 975.

[2] The accused, whose appointment as a police patel was made by a Collector, was tried under S. 161, Penal Code and S. 5 (2) of the Prevention of Corruption Act. It was held that there was nothing in the notification of 1951 to indicate that it was intended to take away the power which the Collectors had of removing persons appointed by them under the authority delegated to them by an earliar notification. The sanction given by the Collector to prosecute the Police Patel whose appointment was made by the Collector was therefore a valid sanction under S. 6 (1) (c) of the Prevention of Corruption Act. ('55) 6 Sau L R 313 (315) (DB).

[3] Accused appointed Executive Engineer for Tripura State Road by order of Governor of Assam—Accused later on put in charge of certain Division, by order of Governor—Since generally power to appoint carries power to dismiss, Governor of Assam had power to dismiss accused—Sanction given by the Governor under signature of Chief Engineer and Secretary P. W. D. Assam for prosecution of accused for taking bribe held legal and the prosecution held valid. 1952 Tripura 1 (5) [A I R V 39] : 1952 Cri L Jour 1201.

[4] The accused, a prosecuting Sub-Inspector, was tried for an offence under the Act. While the Assistant Inspector-General, who ranked with a Superintendent of Police, was the authority who appointed him the sanction for the prosecution was given by the Deputy Inspector-General, an authority higher in rank than a superintendent. *Held*, that the sanction did not contravene the provisions of cl. 1 (c) of S. 6. 1957 Punj 91 (92) [(S) A I R V 44 C 46] : ILR (1956) Punj 1377 : 1957 Cri L Jour 540.

[5] Even though the sanction of the General Board is required before a nakadar can be appointed or removed, yet the actual power of appointment or removal is with the President of the Municipality and consequently he can sanction the prosecution of the nakadars (persons employed to collect octroi duty at the octroi outpost). 1955 Sau 117 (118) [AIR V 42 C 42] : 1955 Cri L Jour 1633 (DB).

[6] The power to appoint Upper Division Clerks in permanent vacancies in the existing divisions vests in the Executive Engineer of the Division concerned and not in the Chief Engineer though the latter exercises supervision in the matter of filling up these vacancies by requiring his approval to the appointment. The Executive Engineer being the authority competent to appoint, he is also the proper authority to remove the clerk from his office and, is therefore, the proper authority to sanction prosecution under S. 6 (1) (c). 1951

Section 6 — Note 3 *(contd.)*

Assam 42 (42) [AIR V 38 C 19] : ILR (1950) 2 Assam 344 (DB).

[7] *Held*, that the rules which were framed under the Panchayat Raj Act of 1947 and were in force at the relevant time had made the Director of Panchayats the prescribed authority to remove a panch from office. ('57) 1957 All L Jour 28 (29) (DB).

[8] Police constable committing offence under S. 161, Penal Code—S. 6 (c) applies — Sanction of Superintendent of Police is necessary before Court can take cognizance of offence. 1950 All 5 (6) [AIR V 37 C 3] : ILR (1950) All 1113 : 51 Cri L Jour 222.

[9] Article 311 (1) of the Constitution and R. 1705 (c) of the Railway Establishment Code cannot be read as implying that the removal must be by the very same authority who made the appointment or by his direct superior. It is enough that the removing authority is of the same rank or grade. 1955 S C 70 (73) [(S) A I R V 42 C 17] : 1955-1 S C R 965 : 1955 Cri L Jour 249.

[10] Even if there is any delegation of powers it will not satisfy the requirements of Art. 311 of the Constitution. By a change in the rules altering by downgrading it, the appointing authority would not affect the guarantee afforded by a statutory provision. Therefore the competence of the authority to order removal or dismissal will have to be determined with reference to the requirements of Art. 311 (1) of the Constitution and one of the requirements is that the authority that orders dismissal or removal should not be one subordinate in rank to that by which the civil servant in question was appointed and the principle would appear to be that it is the factum of the appointment of the civil servant who claims the guarantee that determines the scope of the guarantee conferred by Art. 311. Where the appointment was by the erstwhile Cochin Government it is only the Kerala Government, the successor to the Cochin Government who can give sanction. Section 6 of the Act cannot override the provisions of the Constitution and consequently sub-s. (2) thereof can be made applicable to only such cases where it cannot be ascertained with reasonable certainty as to who had actually appointed the accused person. ('61) I L R (1961) 1 Ker 512 (514, 516).

[11] In the case of a Class III railway servant it is the General Manager of the railways who is the appointing authority and who normally can take disciplinary action of suspending or dismissing the servant from service. The opening words of R. 1704 of Discipline and Appeal Rules under the Indian Railways Establishment Code, Vol. 1951 "subject to the provisions of R. 1705" govern the provisions of R. 1704 (i) and R. 1704 (ii), so that the delegation which the General Manager purported to make in favour of the Traffic Superintendent is subject to the provisions of R. 1705. Under cl. (c) of R. 1705 the only authority that could remove or dismiss the railway servant is the General Manager and not the Traffic Superintendent, so that it is clear that in regard to the power to dismiss a railway servant a delegate cannot exercise his authority having regard to the fact that the delegation is subject to the provisions of R. 1705. Hence the sanction by Traffic Superintendent must be taken to be granted by an officer who was not competent to dismiss the servant and is not valid. 1956 Bom 504 (505) [AIR V 43 C 198] : 1956 Cri L Jour 879 (DB).

[12] The delegation of authority by the principal which is in its essence revocable cannot have the effect of divesting the donor of the power permanently—Rajpramukh delegating authority of appointment and dismissal of clerks in P. W. D. Department to Chief Engineer—Prosecution of a clerk in the department under the Act—Sanction by Rajpramukh is valid—His power to sanction not being exhausted by its delegation — Rajpramukh can exercise the same power himself on the general law that a principal can always exercise the power which he delegated to his agent, if the principal can at any moment revoke the authority of the agent. 1954 Sau 62 (64) [AIR V 41 C 29]: 1954 Cri L Jour 688 (DB).

[13] The accused was at first appointed as a Signaller in the B. B. and C. I. Railway by the order of the District Traffic Superintendent of the then B. B. and C. I. Railway Company. That railway continued to be managed by the B. B. and C I. Railway Company up to the 31st of December, 1941; it was contemplated that the management of this railway would be taken over by the Government of India from the 1st of January, 1942. The railway employees, who accepted the offer of the employment by the Government of India were taken in Government service and like others, the accused was also taken in the service of the Government of India — *Held*, that according to the provisions of Art. 311 of the Constitution, or for that matter those of cl. (c) of R. 1705, Page 179 of the Railway's Establishment Code, Vol. I of 1951, the accused could be removed only by an authority who appointed him or who was superior to the authority, and not by an authority lower than that by which he was appointed to the post held by him substantively. It had therefore to be examined as to by what authority the accused was appointed at the time when he was taken into Government service after taking over the management of the B. B. and C. I. Railway by the Government of India. As to what authority appointed him when the management was in the hands of the B. B. and C. I. Railway Company was immaterial. Where sanction had been given by the Regional Traffic Superintendent the sanction would be valid only if the appointment was made by the Regional Traffic Superintendent, or an officer of equal or lower rank. It was for the prosecution to show that valid sanction had been given, and it was, therefore the duty of the prosecution to prove that the accused was appointed under the Government of India by Regional Traffic Superintendent, or an officer of equal rank or lower rank. 1959 Raj 214 (216) [AIR

Section 6 — Note 3 *(contd.)*
V 46 C 74] : I L R (1958) 8 Raj 688 : 1959 Cri L Jour 1115.

4. Public servant. — [1] Section 6 must be construed with reference to the words used therein independent of any construction which may have been placed by the decisions on the words used in S. 197, Criminal P. C. In giving effect to the ordinary meaning of the words used in S. 6, the conclusion is inevitable that at the time a Court is asked to take cognizance not only the offence must have been committed by a public servant but the person accused is still a public servant removable from his office by a competent authority before the provisions of S. 6 can apply. Where therefore the accused have ceased to be public servants at the time the Court takes cognizance of the offences alleged to have been committed by them as public servants, the provisions of S. 6 do not apply and the prosecution against them is not vitiated by the lack of a previous sanction by a competent authority. 1958 S C 107 (109, 110) [AIR V 45 C 15] : 1958 S C R 1037 : ILR (1958) Punj 986 : I L R (1957) 2 All 523 : 1958 Cri L Jour 254.

[2] The words "public servant" in S. 6 (1) means a person who is in service at the time when the Court is called upon to take cognizance of the offence. Section 6 (1) has consequently no application to the case of the public servant who is no longer in service. 1954 Bom 109 (112) [AIR V 41 C 27] : 1954 Cri L Jour 284 (DB).

[3] Section 6 affords protection only to those public servants who were in office both on the date of the commission of the offence charged and the date when a Court is asked to take cognizance. S. 6 is enacted only for the protection of public servants and not ex-public servants. 1955 All 531 (533) [(S) A I R V 42 C 151] : 1955 Cri L Jour 1310.

[4] Prosecution of person after termination of his services and when he is not in employ of Government — No sanction is required. 1953 All 470 (470) [AIR V 40 C 221] : 1953 Cri L Jour 1052 (DB). (A I R 1933 Sind 177, *Dissented from*; AIR 1937 Nag 293 held *overruled* in AIR 1952 Nag 12.)

[5] The protection afforded by S. 197, Criminal P. C., or S. 6, Prevention of Corruption Act (1947) is only intended to be enjoyed by Judges, Magistrates and other public servants while still in office and no sanction is necessary for the prosecution of a Government servant who had already been discharged from service before the case was brought against him. 1952 Punj 89 (94) [AIR V 39] : I L R (1954) Punj 35 : 1952 Cri L Jour 316 (DB). (*Overruled* on a different point in A I R 1957 S C 458.)

5. Absence of sanction. — [1] In a prosecution under S, 161, Penal Code previous sanction is a necessity irrespective of the question whether the public servant was acting or purporting to act in the discharge of his official duty. The theory of implied sanction is clearly unknown to law. Sanction for prosecution under S. 161 to be a legal one should be clearly evidenced either from the order granting the sanction or other documentary evidence placed before the Court or even oral evidence that the facts were placed before the officer from whom sanction was sought. No onus lies on the accused to take the objection which should have been taken notice of by the Magistrate on his own initiative. Section 537, Criminal P. C. cannot cure an illegality of this kind which cuts away the basis of the prosecution. 1952 Tripura 21 (22) [AIR V 39] : 1952 Cri L Jour 1648.

[2] Prosecution requiring sanction — Trial without sanction is null and void being by Court not competent — Subsequent trial with proper sanction is not barred. 1957 S C 494 (496) [(S) AIR V 44 C 75] : 1957 S C R 650 : 1957 Cri L Jour 597.

[3] If the prior sanction of the competent authority as laid down in S. 6 read with Art. 311 of the Constitution was not obtained the trial would be ab initio void and will have to be set aside though a fresh trial would be possible after a proper sanction had been obtained and a charge-sheet submitted afresh against the accused for his trial of offences for which the sanction had been obtained. 1956 Bhopal 36 (37) [AIR V 43 C 21]: 1956 Cri L Jour 975.

[4] Absence of sanction under S. 6 — Court did not get jurisdiction under the law to try the offence under S. 161, Penal Code. 1957 Tripura 18 (21) [AIR V 44 C 8] : 1957 Cri L Jour 394.

[5] Under S. 6 the sanction of some authority is necessary before the Court can take cognizance — Proceedings without such sanction are void. 1949 Assam 3 (3) [AIR V 36 C 2] : I L R (1949) 1 Assam 328 : 50 Cri L Jour 540 (DB).

[6] Where a police constable is prosecuted for an offence under S. 161, I. P. C., for accepting a bribe and no sanction of authority competent to remove him from office is obtained the Court is not entitled to take cognizance of the offence and the trial without such sanction is invalid. ('50) ILR (1950) All 670 (673) (DB).

[7] Where the Court takes cognizance of the offence in the absence of the sanction, and if the proper sanction is subsequently obtained, while the proceedings are not yet over, the irregularity may be cured under S. 537, Criminal P. C. But if the whole trial is completed in the absence of a proper sanction then the trial is vitiated as having taken place in contravention of S. 6 of the Act. 1953 Sau 130 (132) [AIR V 40 C 65] : 1953 Cri L Jour 1237 (DB).

[8] Want of sanction—Effect — Complaint under Ss. 342, 506, 323 and 161, Penal Code — Previous sanction under S. 6 not obtained for prosecution under S. 161, Penal Code — All offences forming part of one transaction and not capable of splitting up — Case could not proceed against accused in respect of other charges without sanction for prosecution under S. 161—Proceedings quashed. 1949 Ajmer 36 (37) [AIR V 36 C 13] : 50 Cri L Jour 634.

Section 6 — Note 5 *(contd.)*

[9] If the facts constitute an offence requiring either the sanction of a superior authority or the filing of a complaint by a Court, it cannot be evaded by adopting the device of omitting one of the ingredients of the offence and prosecuting him under some other section. To illustrate, if a public servant receives amounts on behalf of the State and dishonestly misappropriates them, the offence directly falls under S. 5 (1) (c) of the Prevention of Corruption Act. He can be prosecuted only with the previous sanction of his superior authority. The prosecution cannot, by adopting the device of ignoring the fact that the accused is public servant, evade the requirement of previous consent by filing a complaint under S. 408, Penal Code. 1957 Andh Pra 663 (670) [(S) AIR V 44 C 213] : 1957 Cri L Jour 1078 (DB).

[10] Where the facts mentioned in the complaint give rise to two offences one of which required either a complaint by the Court concerned or a sanction by the prescribed authority, the prosecution cannot be started under the section which did not require any complaint by the Court or sanction necessary in law for taking cognizance of the case and thus evade the provisions of sanction. Thus, where the offence disclosed in the complaint is in truth and substance an offence under S. 161 of the Penal Code or S. 5 (1) (d) of Act II of 1947 which might also come under S. 384 of the Penal Code and the prosecution under the first two sections requires sanction under S. 6 of Act II of 1947 while the offence under S. 384 did not require any such sanction, the law relating to sanction cannot be evaded by proceedings against the accused for an offence under S. 384, I. P. Code. Such a trial is without jurisdiction. 1955 Pat 453 (455) [A I R V 42 C 120] : 1955 Cri L Jour 1382.

[11] It was contended in this case that as the sanction under S. 6 was only for receiving Rs. 50 as illegal gratification from *P* and therefore an offence under S. 5 (1)(d), the prosecution, the charge and conviction should have been under that provision, but as the accused was tried under S. 5 (1) (a) for the charge of being a habitual receiver of bribes and the sanction was only for one single act of receiving illegal gratification, the trial was wholly void as it was a trial by a Court without jurisdiction : *Held*, that the prosecution for offence under S. 5 (1) (d) was not barred because the proceedings were not without previous sanction which was validly given for the offence of receiving a bribe; but the offence of habitually receiving illegal gratification could not be taken cognizance of and the prosecution and trial for that offence was void for want of sanction which was a condition precedent for the Courts taking cognizance of the offence alleged to be committed. The want of sanction for the offence of habitually accepting bribes therefore did not make the taking of cognizance of the offence of taking a bribe of Rs. 50 void nor the trial for that offence illegal and the Court a Court without jurisdiction. 1958 S C 124 (127) [AIR V 45 C 19] : 1958 S C R 762 : ILR (1958) Punj 572 : 1958 Cri L Jour 265.

[12] Just as it is the duty of the Judges and Magistrates to consider the question of sanction whenever public servants are charged before them, it is also the duty of the lawyers to take the point about sanction at the earliest stage and invite the Judge or the Magistrate to decide it before proceeding to deal with the merits of the prosecution case. 1954 Sau 132 (138) [AIR V 41 C 56] : 1954 Cri L Jour 1559 (DB).

[13] Where a Special Judge comes to the conclusion that there is no valid sanction under S. 6 of the Prevention of Corruption Act, 1947, he should hold that the entire proceeding before him with regard to the offence under S. 5 (2) of that Act is null and void. That being so, he cannot pass an order, either of acquittal or of conviction. 1961 Pat 203 (204) [A I R V 48 C 51] : 1961 (1) Cri L Jour 694 (DB).

6. Grant of sanction. — [1] It is essential that persons charged with the responsible duty of granting sanction which is a duty of deciding whether or not the credit and reputation of another citizen should be put in peril by means of a criminal prosecution, should bring to the discharge of their duty a sense of responsibility and the industry required to examine the relevant materials. The duty of granting a proper sanction can hardly be imagined to have been properly discharged by merely putting one's signature on a ready-made sanction presented by the police. 1955 Cal 430 (431, 432) [(S) A I R V 42 C 124] : 1955 Cri L Jour 1169 (DB).

[2] All that the sanctioning authority is required to do is that he should apply his mind to the facts of the case as stated to him and decide whether on such facts there should be a prosecution. It is not necessary that he should hold any enquiry to satisfy himself as to the truth of the facts alleged. 1955 Cal 129 (131) [(S) A I R V 42 C 32] : 1955 Cri L Jour 433 (DB).

[3] The sanction under the Prevention of Corruption Act is not intended to be nor is an automatic formality and it is essential that the provisions in regard to sanction should be observed with complete strictness. 1958 S C 124 (126) [AIR V 45 C 19] : 1958 S C R 762 : I L R (1958) Punj 572 : 1958 Cri L Jour 265.

[4] The sanction for prosecution by the officer concerned under S. 6 should not be granted as a matter of routine, merely on the request of the prosecuting authority. He should not take his decision in this respect lightly but he should realise that it is his duty to take a deliberate decision as to whether it is a fit case for according sanction for prosecution. Where the sanction is accorded without the application of his mind by the officer concerned and without ascertaining full facts, the sanction is not properly and validly given and the whole trial is vitiated. 1961 All 368 (371) [A I R V 48 C 95] : 1961 (2) Cri L Jour 51 (DB).

[5] Where the authority went through the enclosures of the letter sent by the Dy. Supe-

Section 6 — Note 6 *(contd.)*

rintendent of Police and then accorded the sanction : *Held*, that though the authority might have been a little mechanical in granting a sanction it had all the necessary material before it and it must be deemed to have exercised its mind about it. 1953 Ajmer 17 (19) [AIR V 40 C 19] : 1953 Cri L Jour 1310.

[6] Signing the sanction for prosecution of a member of the staff is not a statutory duty conferred on the President of the Cantonment Board. Therefore where the resolution was passed by the meeting which was presided over by the Vice-President the signature put by the latter could not be considered to be something unauthorized according sanction to prosecute. 1958 Madh Pra 2 (3) [AIR V 45 C 2] : 1958 Cri L Jour 41.

7. Validity of sanction.—[1] The burden of proving that the requisite sanction has been obtained rests on the prosecution and such burden includes proof that the sanctioning authority had given the sanction in reference to the facts on which the proposed prosecution was to be based ; and these facts may appear on the face of the sanction or may be proved by extraneous evidence. Where the facts constituting the offence do not appear on the face of the letter sanctioning prosecution, it is incumbent upon the prosecution to prove by other evidence that the material facts constituting the offence were placed before the sanctioning authority. Where this is not done, the sanction must be held to be defective and an invalid sanction cannot confer jurisdiction upon the Court to try the case. 1954 S C 637 (641) [A I R V 41 C 148] : 1954 Cri L Jour 1656 ✣ 1959 Pat 311 (314) [A I R V 46 C 82] : 1959 Cri L Jour 888 ✣ 1955 Cal 430 (432) [(S) A I R V 42 C 124] : 1955 Cri L Jour 1169 (DB) ✣ 1955 Pat 317 (319) [(S) A I R V 42 C 79] : 1955 Cri L Jour 1089 ✣ 1955 Punj 65 (73) [A I R V 42 C 24] : I L R (1954) Punj 75 : 1955 Cri L Jour 609 (DB) ✣ 1955 N U C (Pat) 3258 [AIR V 42] ✣ 1955 N U C (Pat) 1030 [A I R V 42] ✣ ('55) I L R (1955) Patiala 635 (639) ✣ 1953 Sau 139 (140) [A I R V 40 C 70] : 1953 Cri L Jour 1268 (DB) ✣ ('50) 1950 All L Jour 533 (535) ✣ 1949 Mad 710 (711) [A I R V 36 C 312] : 51 Cri L Jour 156.

[2] No objection can be taken to a sanction when, before according it, the sanctioning authority has examined the facts and it is after considering the whole matter that the sanction is given. 1957 Madh Pra 225 (226) [(S) AIR V 44 C 94] : 1957 Cri L Jour 1411.

[3] Invalid sanction—It is not compliance with S. 6 — Sanction is invalid if there is nothing to show that sanctioning authority had facts constituting offence before it—Trial on invalid sanction is without jurisdiction — Defect cannot be cured. 1955 N U C (Mad) 3258 [AIR V 42].

[4] Under S. 6 of the Act a safeguard has been afforded to the accused that he would not be prosecuted without the requisite sanction. Of course, the Court at the time of taking cognisance of the case, ought to see whether such sanction had been given. But it is very difficult at that stage for the Court to find out that the sanction is valid in all respect. The law requires that there should be a valid sanction to prosecute the accused and the accused cannot be debarred from raising such a question when he appears before the Court if he finds that no valid sanction has been given under S. 6. 1959 Raj 214 (218) [A I R V 46 C 74] : I L R (1958) 8 Raj 688 : 1959 Cri L Jour 1115. (A I R 1954 All 223, *Diss. from.*)

[5] Nexus between sanction and facts constituting offence must be clear from sanction itself or by extraneous consideration—Court is not concerned whether all the facts before sanctioning authority were or were not sufficient or whether sanction was accorded after real consideration of facts—Letter giving out facts written to sanctioning authority—Sanctioning authority referring to letter in his sanction—Letter proved—Sanction held valid. ('54) ILR (1954) Madh B 188 (192).

[6] Where the sanction stated that the accused (Sar Panch of Gram Panchayat) had accepted marked currency notes as a bribe for granting permission to the complainant for building his house, it cannot be urged that the sanction does not indicate that the necessary facts which were essential for the sanctioning authority to know to make up his mind were not placed before him. 1956 Madh B 51 (53) [A I R V 43 C 20] : 1956 Cri L Jour 227.

[7] A sanction for prosecution granted by a competent authority under S. 6 clearly stated that the accused had demanded as bribe certain amount from one *D* and had accepted the sum as motive or reward for speedy and favourable settlement of the claim cases, that the sanctioning authority had applied his mind to the facts and the circumstances of the case and was satisfied that in the interest of justice, the accused should be put on his trial in a Court of competent jurisdiction for offences under S. 161 of the Penal Code and S. 5 (2) of the Prevention of Corruption Act, alleged to have been committed by him. In his evidence in Court the sanctioning authority stated that the sanction was prepared by the Police and put before him by the personnel branch of his office and that before according sanction he went through all the relevant papers put before him. It was held that the sanction granted under S. 6 was perfectly valid. 1958 S C 148 (151, 152) [AIR V 45 C 25] : 1958 S C R 999 : 1958 Cri L Jour 279.

[8] Sanction falling both under S. 5 (1) (a) and 5 (1) (d) — Charge and conviction under S. 5 (1) (a) is valid. 1960 S C 487 (490) [A I R V 47 C 82] : 1960 Cri L Jour 676.

[9] Valid sanction to prosecute by Superintendent, Watch and Ward—Magistrate wrongly thinking that sanction to investigate given by District Magistrate, to be sanction to prosecute — Mistake of Magistrate held did not matter as long as there was valid sanction. 1954 All 223 (224) [A I R V 41 C 126] : 1954 Cri L Jour 459.

[10] Sanction order mentioning two places where and certain period during which offences were committed — Charge limited to

Section 6 — Note 7 *(contd.)*

one place and part of period mentioned in sanction order — Sanction not invalid. 1949 Cal 641 (645) [AIR V 36 C 183] : ILR (1950) 2 Cal 45 : 51 Cri L Jour 10 (DB).

[11] Joint trial of offences under Ss. 161 and 218 Penal Code — Previous sanction under S. 6, Prevention of Corruption Act, 1947 not obtained for former offence — Evidence of demand and acceptance of illegal gratification for making false entry relevant for both offences—Accused is not prejudiced by joint trial and conviction for latter offence is valid. 1951 All 502 (504) [AIR V 38 C 117] : 52 Cri L Jour 184.

[12] Where sanction is accorded for prosecution of an offence under S. 161, Penal Code it does not amount to a sanction to prosecute for a graver offence defined in S. 5 (1) and made punishable under S. 5 (2). Even where the facts alleged fall both under S. 161 Penal Code and S. 5 (1) (d), Prevention of Corruption Act, the sanction granted for prosecution under S. 161 cannot be availed of by the prosecution for the prosecution of the accused under S. 5 (2) of the Prevention of Corruption Act. 1953 All 37 (41) [AIR V 40 C 11] : 1953 Cri L Jour 192 ✠ 1961 Pat 203 (204) [A I R V 48 C 51] : 1961 (1) Cri L Jour 694 (DB).

[13] Where the officer who is also the District Magistrate acts as a Collector in according the sanction required under S. 6. it does not matter that he describes himself as the District Magistrate. Where there is no reason to suppose that the officer did not read the charge-sheet which contained all the material particulars of the case when he accorded the sanction, the sanction is not vitiated on the ground that he has not applied his mind to the case. Use of abbreviated forms such as "Sd." to indicate "sanctioned" is not a desirable practice, but is not a defect in the sanction. 1950 All 507 (508) [AIR V 37 C 206] : 51 Cri L Jour 1363.

[14] Sanction for prosecution under S. 409 I. P. C., of one accused only on charge of conspiracy to commit criminal breach of trust, with other accused—Sanction to prosecute both accused under S. 5 (2)—Sanction will not cover prosecution of other accused under S. 409, I. P. C. 1955 S C 287 (292) [(S) AIR V 42 C 51] : 1955 S C R 1177 : 1955 Cri L Jour 857.

[15] Proceedings were started against the accused under S. 161, Penal Code and S. 5 (2) of the Prevention of Corruption Act. While in the chalan on which cognizance was taken the accused was being charged with habitual acceptance within the meaning of S. 5 (1) (a) of the Prevention of Corruption Act of illegal gratification within the meaning of S. 161 of the Penal Code in view of such acceptance on three different occasions the sanctioning authority thought fit to mention only one of the occasions. It was held that this sanction could not be read as a sanction for one specific offence under S. 161 Penal Code and the Magistrate acted illegally in taking cognizance of the case without a valid sanction. ('51) ILR (1951) 2 Cal 159 (161) (DB).

[16] It is quite necessary that the sanction should relate the facts constituting the offence and for which the person is to be prosecuted, and this it must do in respect of all the offences for which he is to be prosecuted. Where the sanction under S. 6 related to the specific allegation in respect of the illegal gratification of Rs. 5,700 and it was in respect of this sum that the Chief Secretary had sanctioned the prosecution of the accused for offence under S. 161, I. P. Code and S. 5 (2) Prevention of Corruption Act, apart from S. 120-B I. P. Code, the sanction, by no stretch of reasoning can be extended to the facts constituting another distinct offence in relation to another sum, of attempt to receive the amount as illegal gratification even though it was an act which was in the nature of a step in the process of the bribe taking. If the accused is to be prosecuted in respect of the offence in relation to the other sum then evidently sanction for the same is essential. Similarly the offence of habitual bribe taking falling under S. 5 (1) (a) of the Prevention of Corruption Act too is a distinct offence from the former one and in respect of this offence too sanction is absolutely necessary. Thus the sanction does not cover the offence in respect of the other sum nor the offence of habitual bribe taking falling under S. 5 (a) of the Prevention of Corruption Act, and that being so, the Court has no jurisdiction to take cognizance of these offences. The illegality cannot be cured under S. 537, Cr. P. Code. The whole trial which is held by the Special Judge without a jury would be void if prejudice is caused to the accused in respect of offences not covered by the sanction. 1954 Sau 132 (135, 136, 137) [AIR V 41 C 56] : 1954 Cri L Jour 1559 (DB).

[17] In respect of prosecution of a public servant under S. 161, Penal Code no sanction under S. 197, Criminal P. C., is necessary. But sanction under S. 6 of the Prevention of Corruption Act will be required if the public servant is not removable from office except with previous permission of the State Government. The prosecution must place before the Court proof of the very order granting the sanction and not proof of the fact that the sanction had been granted. The sanction must be given with full realisation of the responsibility that the sanction is a pre-requisite for the Court taking cognizance. 1952 Orissa 220 (222) [AIR V 39] : ILR (1952) Cut 344 (DB).

[18] Where it is alleged that there is a material difference between the facts represented to the sanctioning authority and those sought to be proved at the trial the crucial question to be considered in such a case is, is the departure such as might reasonably be taken to affect the judgment of the sanctioning authority on the question of sanction with regard to the matter placed before it? If the variations are not so substantial as might reasonably be taken to have affected the judgment of the sanctioning authority, then the order of sanction is not vitiated. 1954 Madh B

Section 6 — Note 7 *(contd.)*
101 (109) [A:I R V 41 C 53] : 1954 Cri L Jour 966.

[19] The question of the validity or sufficiency of the sanction may be raised by the accused at any stage before the final decision is given by the trial Court. 1961 All 368 (370) [A I R V 48 C 95] : 1961 (2) Cri L Jour 51 (DB).

8. Form of sanction.—[1] It is not necessary for the sanction under the Prevention of Corruption Act to be in any particular form or in writing or for it to set out the facts in respect of which it is given. The desirability of such a course is obvious because when the facts are not set out in the sanction proof has to be given aliunde that sanction was given in respect of the facts constituting the offence charged but an omission to do so is not fatal so long as the facts can be, and are, proved in some other way. 1954 S C 359 (360, 361) [AIR V 41 C 87] : 1955 S C R 92 : ILR (1954) Cut 427 : 1954 Cri L Jour 1002+ 1955 Sau 117 (118) [AIR V 42 C 42] : 1955 Cri L Jour 1633 (DB).

[2] Section 6, Prevention of Corruption Act, does not require the sanction to be in any particular form, or that it should be in writing. However desirable it may be that the facts should be referred to on the face of the sanction, the mere lack of it does not render the sanction invalid. In that case, the prosecution may prove by extraneous evidence that the material facts constituting the offence were placed before the sanctioning authority and that the facts related to the offence charged. 1956 Pepsu 12 (13) [AIR V 43 C 5] : ILR (1956) Patiala 1 : 1956 Cri L Jour 103.

[3] A contingent clerk in the office of the Superintendent of Police committed an offence under S. 5 (2) of the Prevention of Corruption Act. The Sub-Inspector of Police submitted a report to the Superintendent of Police in which, after giving the necessary details, he requested the Superintendent of Police to accord sanction to the prosecution of the contingent clerk of an offence under S. 5 (2), Prevention of Corruption Act and S. 409, Penal Code. The Superintendent of Police without passing a separate order, wrote on the margin against the last paragraph of the report that the contingent clerk might be prosecuted. *Held*, that although it might have been better if the Superintendent of Police had recorded his sanction separately, nevertheless, the procedure adopted by him did not invalidate the sanction. ('57) 1957 Cri L Jour 131 (132) (Him Pra).

[4] No particular form in which sanction is to be requisitioned or should be given — Sending of report of offence to A. D. M. held amounted to request for sanction — Though the fact that accused should be prosecuted in particular Court is mentioned in sanction, nonetheless the order held to be order sanctioning prosecution. 1955 N U C (All) 3570 [AIR V 42].

[5] Order sanctioning prosecution signed as "Additional District Magistrate" and not "Additional Collector"—Mistake held technical not affecting prosecution. 1955 NUC (All) 3570 [AIR V 42].

[6] The document containing the contents of a sanction, required under S. 6, Prevention of Corruption Act, 1947, to prosecute an accused, an employee of the Central Government, was not expressed to be made in the name of the President though it was mentioned at the foot that it was made by the order of Central Government. On behalf of the prosecution a witness, an Assistant, Ministry of Home Affairs, Police Section, was examined. He stated that the document bore the signature of the Deputy Secretary, Ministry of Home Affairs and that he was authorised to issue sanction in question on behalf of the Government (Central)—*Held*, that the statement of this witness who had requisite means of knowledge was enough under the circumstances to remove any doubt created by the use of a form though compliance with the provisions of the Prevention of Corruption Act was not in strict conformity with Art. 77 (1) of the Constitution and that the departure did not vitiate the order. 1954 Madh B 101 (108) [A I R V 41 C 53] : 1954 Cri L Jour 966.

[7] Letter of sanction signed by Personal Assistant of sanctioning authority — Personal Assistant examined as witness, proving another document which purported to be draft of letter of which sanctioning letter was copy—Draft signed by sanctioning authority, below the word "approved" — Sanction held was in fact given, though the form was not proper. 1954 S C 637 (641) [AIR V 41 C 148]: 1954 Cri L Jour 1656.

[8] Sanction is not invalid merely on the ground that the clause of S. 5 (1), Prevention of Corruption Act, which describes the particular offence for which the accused is to be prosecuted, is not mentioned in the sanction order. ('61) 1961 (1) Cri L Jour 544 (549) (DB) (Pat).

[9] Sanction not giving facts of case but referring to first information report which was placed before sanctioning authority— Sanction held was granted upon consideration of facts. ('61) 1961 (1) Cri L Jour 544 (549) (DB) (Pat).

[10] Sub-section (2) of S. 5 is the penal provision, but before a cognizance is taken of an offence under this sub-section, it is imperative that there should be a sanction as required by S. 6 for the said prosecution. The sanction has to be in respect of an offence under sub-s. (2) of S. 5 and if this much appears from the sanction, it must be accepted as valid. The Superintendent of Police alleged in his letter for sanction that the accused showed undue favours, obtained money by corrupt or illegal means and received a sum of Rs. 400 as illegal gratification from the proprietor of a firm and these facts were placed before the sanctioning authority. The sanctioning authority accorded sanction for the prosecution of the accused in respect of the offence under sub-s. (2) of S. 5. *Held*, that though the sanctioning authority mentioned sub-s. (3) while granting the sanction,

Section 6 — Note 8 *(contd.)*

as sub-s. (3) did not create a separate offence, it must be deemed to be a surplusage. It was not at all necessary to mention either one clause or the other of sub-s. (1) also in the sanction. The effect of the sanction was not to limit the offence committed by the accused to one under sub-s. (3), only of S. 5 and the sanction was not invalid. ('61) 1961 (2) Cri L Jour 385 (390) (DB) (Pat).

[11] Deputy Secretary having power to make some orders in his own right and to authenticate other orders issued in the name of the President—Deputy Secretary having power to accord sanction under S. 197, Criminal P. C. and S. 6 (1) (a), Prevention of Corruption Act in his own right—Order giving sanction ex facie showing that he did not authenticate it by order of the President — It must be held that he gave sanction in his own right. 1961 S C 1762 (1776) [AIR V 48 C 327] : 1961 (2) Cri L Jour 828.

9. Burden of proof. — [1] The burden of proving the validity of the sanction rests on the prosecution and where the prosecution has failed to discharge this burden the sanction is deemed to be invalid and takes away the Court's jurisdiction to try the case. ('57) 1957 All L Jour 28 (30) (DB).

[2] A valid sanction is regarded as a condition precedent to a valid prosecution under S. 6. The burden of proving that the requisite sanction has been obtained rests on the prosecution and such burden includes proof that the sanctioning authority had given the sanction in reference to the facts on which the prosecution was to be based. All these facts must appear on the face of the sanction or might be proved by extraneous evidence. It is not necessary that sanctions should contain particulars of the offence or essential evidence on which the accused is to be prosecuted. 1958 Madh Pra 2 (4, 5) [A I R V 45 C 2] : 1958 Cri L Jour 41.

[3] In the case of a sanction to prosecute under the Prevention of Corruption Act, it is essential for the prosecution to show that the sanction in question related to the acts committed by the accused in respect of which the prosecution is launched against him. 1950 All 377 (378) [AIR V 37 C 140] : 51 Cri L Jour 1031.

10. Proof of sanction. — [1] Sanction under S. 6 allowing prosecution is a document that falls under S. 74, Evidence Act and therefore it requires no formal proof. Production of its copy or original is a sufficient compliance of the law. 1956 Pepsu 12 (13) [AIR V 43 C 5] : ILR (1956) Patiala 1 : 1956 Cri L Jour 103.

[2] Sanction of Superintendent to prosecute produced — Court can presume that police report was placed before him and that he considered it and that it was he who signed the sanction — Presumption can be rebutted. 1954 All 223 (224) [AIR V 41 C 126] : 1954 Cri L Jour 459.

[3] The original sanction was produced. It purported to be under seal and the officer who obtained it was examined and he stated that he had obtained the same from the Collector who was the sanctioning authority. It was held that the sanction could not be said to be defective or not proved. 1956 Madh B 51 (53) [AIR V 43 C 20] : 1956 Cri L Jour 227.

11. Taking cognizance. — [1] Under the Act the jurisdiction to take cognizance of an offence is conferred on the Courts by the sanction to prosecute the accused granted under S. 6 (1). If the sanction is proper and valid, the fact that the investigation preceding the sanction was irregular or was conducted by an officer not properly authorised to investigate the offence will not affect the jurisdiction of the Court to take cognizance of the offence. 1955 Sau 91 (92) [(S) A I R V 42 C 33] : 1955 Cri L Jour 1520 (DB).

[2] Whether the sanction had been given or not is to be seen before taking cognizance of the offence and not after it. If there is no sanction no cognizance of the offence can be taken at all. The sanction is required only for the purpose of taking cognizance of the offence; once the cognizance is taken its utility is exhausted and it is no longer needed either during the enquiry into the guilt of the accused or for the purpose of convicting him. Whether an accused is guilty or not does not depend upon whether his prosecution was sanctioned or not. The existence of sanction is not an ingredient of any offence. Nor is it the law that an accused cannot be convicted unless the sanction by the appropriate authority of his prosecution has been proved. Only the Court has to be satisfied of the existence of the sanction. The accused is not the person required to be satisfied by it; as a matter of fact the law does not contemplate his presence even when the prosecution satisfied the Court. 1954 All 223 (224) [A I R V 41 C 126] : 1954 Cri L Jour 459.

[3] *(Brij Mohan Lall J., in the order of reference).* Sanction prescribed by S. 6 was given on 25-8-1950. On 6-9-1950 the case was brought to the notice of the District Magistrate that the accused was demanding illegal gratification and the District Magistrate ordered another Magistrate to lay a trap. *Held*, that this did not amount to taking cognizance of any case. As a matter of fact, no case was pending at that time. Nor had any offence been committed till then. The District Magistrate really directed his subordinate to find out whether the offence was going to be committed or not. 1954 All 204 (205) [A I R V 41 C 114] : I L R (1954) 1 All 379 : 1954 Cri L Jour 438 (FB).

[4] Where the Magistrate had before him the charge-sheet against the petitioners some of whom he removed from the category of witnesses to the category of accused persons and enlarged the petitioners on bail and decided that they were to be tried for offences under S. 161, Penal Code and S. 5 (2) of the Prevention of Corruption Act and sanction was thereafter given : *Held*, that the Magistrate took cognizance of the offences without the necessary sanction and therefore the commitment of the petitioners was bad in law. 1953 Pat 225 (227) [AIR V 40 C 78] : 1953 Cri L Jour 1289.

7. Accused person to be competent witness.

Any person charged with an offence punishable under section 161 or section 165 [a][or section 165A] of the Indian Penal Code or under sub-section *(2)* of section 5 of this Act, shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial :

Provided that—

(a) he shall not be called as a witness except on his own request,

(b) his failure to give evidence shall not be made the subject of any comment by the prosecution or give rise to any presumption against himself or any person charged together with him at the same trial,

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Section 6 — Note 11 *(contd.)*

[5] It is necessary for the prosecution not only to procure the order sanctioning prosecution of an offender but also to satisfy the Court that this order was given after the sanctioning authority had fully applied his mind to the facts on the basis of which a charge was levelled against the offender. When a sanction is given, it confers jurisdiction on a competent Court to try the offender for an offence meaning thereby the alleged illegal act or omission and not merely to try him under that particular label which is given to it by the sanctioning authority. A valid sanction is necessary only for taking cognizance of a case but once a proper cognizance is taken, the Court can exercise and should exercise all the rights given to it under the Criminal Procedure Code. It is the duty of the Court to try the offender under that section which in its opinion most appropriately covers the illegal act or omission of the offender. The real test is whether the new or altered charge is based on the same facts which have already been considered by the sanctioning authority or whether some new facts have come to light in evidence which require its consideration. The stress is clearly on facts and not on the penal section applied to those facts. Thus, a Court acts within its rights when it tries the accused under S. 5 (2) of the Prevention of Corruption Act, even though the sanction to prosecute him was given only for an offence under S. 161, Penal Code. 1958 All 481 (486, 487, 488) [AIR V 45 C 119] : I L R (1958) 1 All 133 : 1958 Cri L Jour 827.

[6] Under S. 6 the previous sanction is necessary in respect of an offence punishable under S. 161 of the Penal Code. Where the sanction was not produced until after the appeal by the accused from his conviction, the conviction and the sentence will be set aside, even though the record shows that the sanction was actually given, much before the cognizance of the offence was taken. ('52) 1952 Cri L Jour 245 (245, 246) (DB) (Dacca).

Section 7 — Note 1

[1] Section 7 is a departure or deviation from the procedure till then obtaining in a criminal case and thereby an accused person is held competent to be a witness on his behalf. Whereas under S. 342, as it stood before the recent amendment, no accused person was entitled to be administered an oath and thereby competent to testify in a Court of law in a case in which he is accused. Under S. 7 any person charged with an offence punishable under S. 161 or S. 165A of the Indian Penal Code, or under sub-s. (2) of S. 5 of the Prevention of Corruption Act, is a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial; and there are also certain safeguards provided in the matter of giving such testimony. 1957 S C 458 (462) [(S) AIR V 44 C 67] : 1957 SCR 423 : ILR (1957) 2 All 468 : 1957 Cri L Jour 575.

[2] The failure of a Court to inform an accused of the right conferred by S. 7 of the Act is not an irregularity and it is not obligatory on the part of the Court trying a case under S. 161 or 165, I. P. Code to inform the accused that he can appear as a witness for himself. It is for him to know what his rights are and to seek to exercise them; the Court's duty is to see that he has every reasonable opportunity of exercising them and nothing more. 1954 All 204 (208) [AIR V 41 C 114] : I L R (1954) 1 All 379 : 1954 Cri L Jour 438 (FB). (AIR 1951 All 546, *Overruled*; AIR 1953 All 110, *Approved.*) ✠1957 Madh Pra 225 (226) [(S) AIR V 44 C 94] : 1957 Cri L Jour 1411. (AIR 1951 All 546, *Diss. from.*) ✠1954 All 223 (224) [AIR V 41 C 126]: 1954 Cri L Jour 459.

[3] The section never contemplated Courts giving a kind of warning or offering a kind of reminder to the accused about the right or privilege conferred upon him by the section. The provisos to the section clearly indicate that a Court cannot ask the accused to appear as a witness for himself, nor can the Court draw a presumption against the accused, if the accused has chosen not to appear as a witness for himself. 1953 All 110 (113) [A I R V 40 C 46] : ILR (1954) 1 All 45 : 1953 Cri L Jour 340.

[4] The accused cannot be called as a witness except on his own request. Where he is represented at the trial by a counsel he can take counsel's advice if necessary and therefore the fact that the Court did not inform him of his right to give his statement on oath does not prejudice him. 1955 NUC (Him Pra) 1295 [AIR V 42].

[5] In view of S. 1 (2), Criminal P. C., the Criminal Law Amendment Act repeals, alters or amends none of the provisions of the Prevention of Corruption Act, either expressly or

(c) he shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of any offence other than the offence with which he is charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such offence is admissible evidence to show that he is guilty of the offence with which he is charged, or

(ii) he has personally or by his pleader asked questions of any witness for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution, or

(iii) he has given evidence against any other person charged with the same offence.

[a] *Inserted* by the Prevention of Corruption (Second Amendment) Act, 1952 (LIX of 1952), S. 7 [12-8-1952].

[a][**8. Statement by bribe giver not to subject him to prosecution.**

Notwithstanding anything contained in any law for the time being in force, a statement made by a person in any proceeding against a public servant for an offence under section 161 or section 165 of the Indian Penal Code or under sub-section *(2)* of section 5 of this Act, that he offered or agreed to offer any gratification (other than legal remuneration) or any valuable thing to the public servant, shall not subject such person to a prosecution under section 165A of the said Code.]

[a] *Inserted* by the Criminal Law Amendment Act, 1958 (II of 1958), S. 3 [27-2-1958].

OBJECTS AND REASONS

"Since the introduction of section 165A of the Indian Penal Code, persons offering illegal gratification to public servants have become more reluctant to come forward to give evidence. This is because on his own admission in Court such a person becomes liable for prosecution under that section. This section will afford the necessary protection to the person whose evidence has been utilised in Court for the prosecution of corrupt public servants."
— S. O. R., Gaz. Ind., 1957, Extra., Pt. II-Section 2, page 929.

[THE] PREVENTION OF CRUELTY TO ANIMALS ACT, 1890
(ACT XI of 1890)

[The Act printed here is as on 1-2-1961.]

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by implication. Section 7 is still binding in regard to trials under S. 161, Penal Code and the violation of this mandatory provision is not a minor illegality but vitiates the trial. 1955 N U C (All) 3590 [AIR V 42].

[6] Accused not charged under S. 5 (2) of the Prevention of Corruption Act or S. 161 or S. 165 of the Penal Code but some other sections of the Penal Code — Section 7 has no application. 1952 All 35 (37) [A I R V 39] : ILR (1954) 1 All 1: 1952 Cri L Jour 236 (DB). (A I R 1925 All 230 and Cri Misc No. 506 of 1951, D/- 5-6-1951 (All), *Overruled on a different point.*)

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STATEMENT OF OBJECTS AND REASONS

"In different parts of British India there are more than twenty enactments in force relating to cruelty to animals, but the local extent of most of these enactments is very limited, while the necessity imposed by others of proving cruelty to an animal to have caused obstruction, inconvenience, annoyance, risk, danger or damage to the public renders it very difficult to maintain a prosecution.

The object of the present Bill is to provide an easily enforceable law which may be applied by any Local Government to any part of the territories under its administration, either in addition to, or to the exclusion of, any other enactment in force in such part of the suppression of cruelties to animals."

—Gaz. of Ind., 1890, Part V, page 4.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937 ; 2 A. L. O., 1956.
—Amended by Acts XIV of 1917 ; XXV of 1938.
—Amended in Bombay by Bom. Acts XXVIII of 1946 ; XXXII of 1953.
[*Note.*—Amendments made by Bom. Acts XIII of 1922 ; IX of 1923; XI of 1928 and III of 1933 are *repealed* by Bom. Act XXVIII of 1946, S. 2.]
—Amended in Madras by Mad. Act XX of 1942.
—Extended and amended in Andhra Pradesh by A. P. Act XXIII of 1958.
—Extended by Acts LIX of 1949 ; XXX of 1950.
—Extended in Bombay by Bom. Acts IV of 1950 ; XXXIV of 1959.
—Extended in Madras by Mad. Act XXII of 1957.
—Extended in Punjab by Punj. Acts V of 1950 ; XVIII of 1958.
—For repeal see Act LIX of 1960, S. 41.

[THE] PREVENTION OF CRUELTY TO ANIMALS ACT, 1890

(ACT XI OF 1890)[a]

[21st March, 1890.]

An Act for the Prevention of Cruelty to Animals.

WHEREAS it is expedient to make further provision for the prevention of cruelty to animals ; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1890, Pt. V, page 4. For Report of the Select Committee, *see* page 95.

This Act has been *declared* in force in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (III of 1872), S. 3 as amended by the Sonthal Parganas Justice and Laws Regulation, 1899 (III of 1899).

Section 2 [except sub-section *(2)*], S. 5, so much of S. 8 as relates to S. 5 and Ss. 9 and 11 of this Act have been *declared* to be in force in Khondmals District by the Khondmals Laws Regulation, 1936 (IV of 1936), S. 3 and Schedule ; and in the Angul District by the Angul Laws Regulation, 1936 (V of 1936), S. 3 and Schedule.

The Act has been extended to Ajmer-Merwara, by Notificatior No. 508-C/59-A/38, D/- 19-1-1939, Gaz. of Ind., 1939, Pt. II-A, page 88.

Preamble — Note 1

[1] The provisions of the Act apply to cases of cruelty exercised towards any animal which is either domestic or being a *foroe naturoe* has been captured and is in captivity ('97) 24 Cal 881 (882) (DB).

Sections 2, 6-B, 8, 11, 12 and 14 to 17 were *extended* to all local areas in Bihar, by Bihar Govt. Notification No. 895-A-10-J, D/- 15-3-1940, and sections 3-A and 6-A were *extended* to all municipalities and notified areas in Bihar other than the Dehri-on-Sone notified area, from 1-2-1942 by Bihar Govt. Notfn. No. 2850-J/A 43/41, D/- 23-12-1941.

The Act has been *extended* to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (LIX of 1949), S. 3 [1-1-1950] and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (XXX of 1950), S. 3 [16-4-1950].

It has also been *extended* to (A) the States merged in the States of—

Bombay : *see* Bom. Act IV of 1950, S. 3 [30-3-1950] ;

Punjab : *see* Punj. Act V of 1950, S. 3 and Schedule [15-4-1950] ;

and (B) to the territories transferred to the States of—

Andhra Pradesh : *see* A. P. Act XXIII of 1958, S. 3 and Schedule [w. e. f. 1-2-1960].

Madras : *see* Mad. Act XXII of 1957, S. 3 and Schedule [18-12-1957].

Punjab : *see* Punj. Act XVIII of 1958, S. 3 and Schedule [15-5-1958].

For the repeal of this Act, *see* the Prevention of Cruelty to Animals Act, 1960 (LIX of 1960), S. 41.

1. Title, extent and commencement, and supersession of other enactments.

(1) This Act may be called THE PREVENTION OF CRUELTY TO ANIMALS ACT, 1890.

(2) This section extends to the whole of India except [a][the territories which, immediately before the 1st November, 1956, were comprised in Part B States]: and the [A][State Government] may, by notification in the Official Gazette, extend, on and from a date to be specified in the notification, the whole or any part of the rest of this Act to any such local area as it thinks fit.

(3) When any part of this Act has been extended under sub-section *(2)* to a local area, the [A][State Government] may, by notification in the Official Gazette, direct that the whole or any part of any other enactment in force in the local area for the prevention of cruelty to animals shall, except as regards anything done or any offence committed or any fine or penalty incurred or any proceedings commenced, cease to have effect in the local area, and such whole or part shall cease to have effect accordingly until the [A][State Government], by a like notification, otherwise directs.

(4) The [A][State Government] may cancel or vary a notification under sub-section *(2)* or sub-section *(3)*.

[a] *Substituted* for "Part B States" by 2 A. L. O., 1956 [1-11-1956].

Immediately before the 1st November 1956, the following were the Part B States in India : Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin.

STATE AMENDMENTS

ANDHRA PRADESH

In the Act, as amended by Madras Act XX of 1942, in sub-section *(2)* of section 1, after the expression "except the territories which.....in Part B States" *add* "other than the territories specified in sub-section *(1)* of section 3 of the States Reorganisation Act, 1956".

—A. P. Act XXIII of 1958, S. 3 and Schedule [w. e. f. 1-2-1960].

MADRAS

In its application to the territories specified in Schedule II to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959 *omit* the amendment made by A. P. Act XXIII of 1958, S. 3 and Schedule. —Mad. (Added Territories) A. L. O., 1961 [w. r. e. f. 1-4-1960].

2. Definitions.

In this Act, unless there is something repugnant in the subject or context,

(1) "animal" means any domestic or captured animal; [a][*]

Section 1 — Note 1

[1] The mere extension of the Prevention of Cruelty to Animals Act (11 of 1890), where there is no notification under S. 1 (3) of that Act, does not repeal S. 62 of the Bombay District Police Act. 1921 Bom 249 (249) [AIR V 8]: 45 Bom 203: 22 Cri L Jour 696 (DB).

Section 2 — Note 1

[1] Crabs are animals within the meaning of S. 2 (1). ('97) 24 Cal 881 (883) (DB).

(2) "street" includes any way, road, lane, square, court, alley, passage or open space, whether a thoroughfare or not, to which the public have access;

[b][*(3) phooka* or *doom dev* includes any process of introducing air or any substance into the female organ of a milch animal with the object of drawing off from the animal any secretion of milk.]

[a] The word "and" was *omitted* by the Prevention of Cruelty to Animals (Amendment) Act, 1938 (XXV of 1938), S. 2 [1-12-1938]. [b] *Inserted*, *ibid.*

STATE AMENDMENTS

ANDHRA PRADESH

In the Act, as amended by Madras Act XX of 1942, in section 2 —

(i) for clause (1), substitute the following clause, namely:—

"(1) 'animal' means every domestic or captured animal and includes every domestic or captured bird";

(ii) after clause (1), *insert* the following clause, namely:—

"(1-A) 'Commissioner of Police' means the Commissioner of City Police in the cities of Hyderabad and Secunderabad;"

—An. P. Act XXIII of 1958, S. 3 and Sch. [w. e. f. 1-2-1960].

MADRAS

In its application to the territories specified in Sch. II to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959 *omit* cl. (1-A) added by An. P. Act XXIII of 1958.

— Mad (Added Territories) A. L. O., 1961 [w. r. e. f. 1-4-1960].

[a]**3. Penalty for cruelty to animals and for sale of animals killed with unnecessary cruelty.**

If any person—

(a) overdrives, beats, or otherwise treats any animal so as to subject it to unnecessary pain or suffering, or

(b) binds, keeps, carries or consigns for carriage any animal in such manner or position as to subject it to unnecessary pain or suffering, or

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SECTION 3 — SYNOPSIS

1. Scope.
2. Clause (a).
3. Clause (b).
4. Clause (c).

1. Scope. — [1] The Act is aimed at the individual who actually practises the cruelty and it was not intended by the Legislature to make a master personally liable for the act of his servant done in the course of the servant's employment, and certainly not when the act is done contrary to the orders of the master. ('02) 26 Bom 609 (616) (DB).

2. Clause (a).— [1] The words "cruelly and unnecessarily" in S. 3 (a) govern the three verbs that follow namely "beats, overdrives" etc. 1932 Bom 427 (428) [AIR V 19]: 56 Bom 264: 33 Cri L Jour 689 (DB).

[2] Overdriving by itself is not made punishable. To constitute an offence under this sub-section, it must be shown that the overdriving was such as to subject the animal to unnecessary pain or suffering. Overloading is not the same as overdriving. The fact that the bulls appeared to be weak and to be struggling hard to drag the cart, is not sufficient to make out that the bulls were subjected to unnecessary pain or suffering. 1959 Ker 325 (Pr 2) [AIR V 46 C 104]: 1959 Cri L Jour 1182.

3. Clause (b). — [1] The intention of language used in S. 3 (b) is not to punish any form of cruelty but to punish only such cruelty as is inflicted on an animal by causing it unnecessary pain or suffering by reason of the manner or position in which the animal is bound or carried. 1917 Bom 199 (200) [AIR V 4]: 41 Bom 654: 18 Cri L Jour 826 (DB).

[2] The applicant purchased certain cranes whose eyes were seeled and stitched up prior to the applicant's purchase of them. While the applicant was conveying them by rail it was noticed that the birds' eyes were stitched up and were bleeding — *Held*, the cruelty, if any, was caused by the antecedent stitching up of the eyes and not by the manner or position in which the birds were carried in the luggage van of the train. 1917 Bom 199 (200) [A I R V 4]: 41 Bom 654: 18 Cri L Jour 826 (DB).

4. Clause (c). — [1] A person exposing crabs for sale at a public place with their legs broken and shells crushed in as to necessarily cause them pain, is liable under S. 3. ('97) 24 Cal 881 (883) (DB).

[2] Working a lean pony and using bridles with leather disc studded with nails deserves conviction under S. 3 in preference to S. 6. 1924 Rang 373 (373) [AIR V 11].

[3] A torture of cows for getting "piri" dye in a place where the animals' sufferings could be witnessed by persons from the streets falls within S. 3 of the Act. ('13) 14 Cri L Jour 132 (133) (DB) (Cal).

[4] Starvation is, in view of the collocation of words in the section, one kind of ill-treatment, and the words 'otherwise ill-treats any

(c) offers for sale or without reasonable cause has in his possession any live animal which is suffering pain by reason of mutilation, starvation, thirst, over-crowding or other ill-treatment, or

(d) offers for sale any dead animal or part of a dead animal which he has reason to believe has been killed in an unnecessarily cruel manner, or

(e) without reasonable cause abandons any animal in circumstances which render it likely that it will suffer pain by reason of starvation or thirst,

he shall be punished, in the case of a first offence, with fine which may extend to fifty rupees, or with imprisonment for a term which may extend to one month and, in the case of a second or subsequent offence committed within three years of the previous offence, with fine which may extend to one hundred rupees, or with imprisonment for a term which may extend to three months, or with both.]

[a] *Substituted* for the original section by the Prevention of Cruelty to Animals (Amendment) Act, 1938 (XXV of 1938), S. 4 [1-12-1938].

[a][**3A. Penalty for overloading animals.**

(1) If any person overloads any animal, he shall be punished with fine which may extend to fifty rupees, or with imprisonment for a term which may extend to one month.

(2) If the owner of any animal, or any person who, either as a trader, carrier or contractor or by virtue of his employment by a trader, carrier or contractor, is in possession of, or in control of the loading of, any animal, permits the overloading of such animal, he shall be punished with fine which may extend to one hundred rupees.]

[a] *Inserted* by the Prevention of Cruelty to Animals (Amendment) Act, 1938 (XXV of 1938), S. 4 [1-12-1938].

[a][**4. Penalty for practising phooka.**

(1) If any person performs upon any cow or other milch animal the operation called *phooka* or *doom dev*, or permits such operation to be performed upon any such animal in his possession or under his control, he shall be punished

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Section 3 — Note 4 *(contd.)*

animal' in 3 (a) include starvation of an animal. ('06) 3 Cri L Jour 116 (117)(DB) (Cal).

Section 3-A — Note 1

[1] The determination by the Local Government of the maximum weight to be carried by pack ponies, and publication of the District Magistrate's orders in the *local Gazette* to that effect are not necessary requirements for a determination of the case under S. 3-A, on the merits. It is for the Magistrates to decide whether as a matter of fact there was overloading or not, and decide the cases in accordance with their finding on that point. 1938 Mad 949 (949) [A I R V 25]: 40 Cri L Jour 172.

[2] The question whether the victoria was overloaded within the meaning of S. 3-A and caused unnecessary suffering and pain to the horse is merely a question of fact, and the High Court would not interfere in revision. 1942 Bom 32 (32) [AIR V 29]: 43 Cri L Jour 341 (DB).

[3] There is no practical means of determining what is over-driving or over-loading, except by considering whether under the circumstances the over-loading or over-driving was cruel and unnecessary. 1932 Bom 427 (428) [AIR V 19]: 56 Bom 264: 33 Cri L Jour 689 (DB).

[4] In a case for an offence under S. 3-A, where the charge is one for overloading, the prosecution has necessarily to prove the actual weight of the load. In a criminal prosecution there is very little scope for any presumption being drawn as to the weight of the goods loaded in a cart. It will be wrong and unsafe to enter a conviction against the accused on the strength of any such presumption. 1959 Ker 325 (Pr 3) [AIR V 46 C 104] : 1959 Cri L Jour 1182. (Dictum.—"The Prosecutor and the Magistrate appear to have been under the impression that in a prosecution under the Prevention of Cruelty to Animals Act the statement of the S P. C. A. Inspector is in itself sufficient to sustain a conviction of the accused. This is an erroneous view.)

Section 4 — Note 1

[1] Accused prosecuted for performing phooka upon milch buffaloes—Accused proved only as the owner of the animals on which phooka was performed while in his possession —No evidence that accused himself did so— Accused convicted without being given an opportunity to defend himself under S. 6 of Bengal Cruelty to Animals Act (1 of 1920). (Corresponding to S. 4 of this Act) — *Held* conviction was wrong. 1940 Cal 328 (329) [AIR V 27] : 41 Cri L Jour 736.

with fine which may extend to five hundred rupees, or with imprisonment for a term which may extend to two years, or with both, and the animal on which the operation was performed shall be forfeited to Government:

Provided that in the case of a second or subsequent conviction of a person under this section he shall be punished with fine which may extend to five hundred rupees and with imprisonment for a term which may extend to two years.

(2) A Court may order payment out of any fine imposed under this section of an amount not exceeding one-tenth of the fine to any person other than a police officer or officer of a society or institution concerned with the prevention of cruelty to animals who has given information leading to the conviction.]

[a] *Substituted* by the Prevention of Cruelty to Animals (Amendment) Act, 1938 (XXV of 1938), S. 5 [1-12-1938].

5. Penalty for killing animals with unnecessary cruelty anywhere.

If any person kills any animal in an unnecessarily cruel manner, he shall be punished with fine which may extend to two hundred rupees, or with imprisonment for a term which may extend to six months, or with both.

[a][**5A. Penalty for being in possession of the skin of a goat killed with unnecessary cruelty.**

If any person has in his possession the skin of a goat, and has reason to believe that the goat has been killed in an unnecessarily cruel manner, he shall be punished with fine which may extend to one hundred rupees, or with imprisonment which may extend to three months, or with both, and the skin shall be confiscated.

[a] Sections 5A and 5B were *inserted* by the Prevention of Cruelty to Animals (Amendment) Act, 1917 (XIV of 1917), S. 2.

[a]**5B. Presumptions as to possession of the skin of a goat.**

If any person is charged with the offence of killing a goat contrary to the provisions of section 5, or with an offence punishable under section 5A, and it is proved that such person had in his possession, at the time the offence was alleged to have been committed, the skin of a goat with any part of the skin of the head attached thereto, it shall be presumed, until the contrary be proved, that such goat was killed in an unnecessarily cruel manner, and that the person in possession of such skin had reason so to believe.]

[a] *See* Foot-note (a) under S. 5-A.

6. Penalty for employing anywhere animals unfit for labour.

[a][*] If any person employs in any work or labour any animal which by reason of any disease, infirmity, wound, sore or other cause is unfit to be so employed, or permits any such unfit animal in his possession or under his control to be so employed, he shall be punished with fine which may extend to one hundred rupees.

[b][* * * * * *]

[a] The figure and brackets "(1)" were *omitted* by the Prevention of Cruelty to Animals (Amendment) Act, 1938 (XXV of 1938), S. 6 [1-12-1938]. [b] Sub-sections (2) to (6) were *omitted, ibid.*

Section 6 — Note 1

[1] Where an animal is the property of the accused and is employed in the work of the accused, it is nonetheless employed by the accused by reason of the fact that the accused employs a driver to drive the animals. 1932 Pat 65 (66) [AIR V 19] : 10 Pat 847 : 33 Cri L Jour 232. (Complaint against bullock-cart driver — Court can take cognizance under S. 190 (c) of Cr. P. C. also.)

[2] The word "permits" in S. 6 does not involve any conscious act on the part of the person who is held to be liable under the section. The fact that the accused was absent and ignorant of the use of the animal by his servant is, therefore, no defence to a charge under S. 6. 1932 Pat 65 (66) [AIR V 19] : 10 Pat 847 : 33 Cri L Jour 232.

[**See however** ('98) 20 All 186 (187). (The word 'permits' in S. 6 implies knowledge of that which is permitted.)]

[3] If a man takes all reasonable precau-

[a][6A. Interpretation.

For the purposes of sections 3A and 6, any owner or other person in possession or control of any animal shall be deemed to have permitted an offence if he has failed to exercise reasonable care and supervision with a view to the prevention of such offence, and, for the purposes of section 4, if he fails to prove that he has exercised such care and supervision.

[a] Sections 6A, 6B and 6C were *inserted* by the Prevention of Cruelty to Animals (Amendment) Act, 1938 (XXV of 1938), S. 7 [1-12-1938].

STATE AMENDMENT

MAHARASHTRA

In its application to the Bombay area of the State of Maharashtra, for section 6A, *substitute* the following section, namely :—

"**6A.** *Interpretation.*—For the purposes of sections 3A, 4 and 6, an owner or other person in possession or control of an animal shall be deemed to have permitted an offence if he fails to prove that he has exercised reasonable care and supervision with a view to the prevention of such offence.

Explanation. — For the purpose of this section a person claiming the animal shall be deemed to be the owner or person in possession or control of the same."

—Bom. Act XXXII of 1953, S. 2 [20-5-1953].

[a][6B. Treatment and care of animals.

(1) The State Government may, by general or special order, appoint infirmaries for the treatment and care of animals in respect of which offences against this Act have been committed, and may authorise the detention therein of any animal pending its production before a Magistrate.

(2) The Magistrate before whom a prosecution for an offence against this Act has been instituted may direct that the animal concerned shall be treated and cared for in an infirmary, until it is fit to perform its usual work or is otherwise fit for discharge, or that it shall be sent to a *pinjrapole*, or, if the Veterinary Officer in charge of the area in which the animal is found or such other Veterinary Officer as may be authorised in this behalf by rules made under section 15 certifies that it is incurable or cannot be removed without cruelty, that it shall be destroyed.

(3) An animal sent for care and treatment to an infirmary shall not, unless the Magistrate directs that it shall be sent to a *pinjrapole* or that it shall be destroyed, be released from such place except upon a certificate of its fitness for discharge issued by the Veterinary Officer in charge of the area in which

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Section 6 — Note 1 *(contd.)*

tions to prevent the doing of an act and such act is done in spite of his precaution, it cannot be said that he has permitted the doing of that act. ('12) 13 Cri L Jour 274 (274) (DB) (All).

[4] Offences under S. 6 of the Act are punishable with fine only. 1924 Rang 373 (373) [AIR V 11].

[5] Besides the punishment of the offender under S. 6, the Act contemplates two courses as affecting the animal. If the animal is suffering from an incurable malady which is likely immensely to prove fatal the Magistrate may direct its immediate destruction (S. 10). But when the animal is suffering a disease which is capable of being cured, the Act empowers the Magistrate to send it to an infirmary or to a pinjrapole. Gorakshan Sabha is neither an infirmary nor a pinjrapole. The Magistrate's order directing the animal to be sent to a Gorakshan Sabha is tantamount to a confiscation which is not contemplated by the Act. Such an order cannot therefore stand. ('39) 1939 Nag L Jour 356 (356).

[6] Original complaint filed against employee — Magistrate issuing summons against owner not named in complaint—Owner tried and convicted—Magistrate does not act without jurisdiction. 1932 Pat 65 (65) [AIR V 19]: 10 Pat 847 : 33 Cri L Jour 232.

[7] Petitioner was convicted under S. 6 after a summary trial. It was contended in revision that conviction order was illegal on the grounds (1) that the conviction was based merely on the Magistrate's own observation of the condition of the horse in question and on no evidence (2) that the Magistrate should not have tried the case himself and (3) that evidence for defence was not taken. There was no complaint on the record; nor did the record show that any evidence was recorded by the Magistrate in the case—*Held*, that the contentions were well founded and conviction must be set aside. ('05) 2 Cri L Jour 187 (188) (Lah).

the infirmary is situated or such other Veterinary Officer as may be authorised in this behalf by rules made under section 15.

(4) The cost of transporting an animal to an infirmary or *pinjrapole*, and of its maintenance and treatment in an infirmary, shall be payable by the owner of the animal in accordance with a scale of rates to be prescribed by the District Magistrate or, in Presidency-towns, by the Commissioner of Police :

Provided that when the Magistrate so orders, on account of the poverty of the owner of the animal, no charge shall be payable for the treatment of the animal.

(5) If the owner refuses or neglects to pay such cost or to remove the animal within such time as a Magistrate may prescribe, the Magistrate may direct that the animal be sold and that the proceeds of the sale be applied to the payment of such cost.

(6) The surplus, if any, of the proceeds of such sale shall, on application made by the owner within two months from the date of the sale, be paid to him.

[a] *See* foot-note (a) under S. 6A.

STATE AMENDMENTS

ANDHRA PRADESH

In the Act, as amended by Madras Act XX of 1942, in sub-section (4) of section 6B, for the words "by the District Magistrate or, . . . Commissioner of Police" *substitute* the words "by the District Collector or, in the cities of Hyderabad and Secunderabad, by the Commissioner of Police." —An. P. Act XXIII of 1958, S. 3 and Sch. [w. e. f. 1-2-1960].

MADRAS

In its application to the territories specified in Sch. II to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, in sub-section (4) for the words "in the cities of Hyderabad and Secunderabad", *substitute* the words "in Presidency-Towns".

—Mad. (Added Territories) A. L. O., 1961 [w. r. e. f. 1-4-1960].

MAHARASHTRA

In its application to the whole of the State of Maharashtra (*see* Bom. Act XXXIV of 1959, S. 25), in S. 6B—

(1) in sub-section (3)—

(a) omit the words "unless the Magistrate directs that it shall be sent to a *pinjrapole* or that it shall be destroyed";

(b) add at the end the following proviso, namely :—

"Provided that the Magistrate or the Veterinary Officer may at any time before the animal is released direct that it shall be sent to a pinjrapole or be destroyed." —Bom. Act XXXII of 1953, S. 3 [20-5-1953].

(2) in sub-section (4), after the words "an animal", the words, brackets and figures, "for the purposes of examination by the Veterinary Officer referred to in sub-section (2) or (3), or;" shall be *inserted*;

(3) for sub-section (5), the following shall be *substituted*, namely,—

"(5) *(a)* If, in the case of an animal directed to be destroyed or sent to *pinjrapole* under sub-section (2) the owner refuses or neglects to pay the costs which he is liable to pay under sub-section (4), such costs shall be recoverable from him as a fine on the order of a Magistrate, provided that no such order shall be made without the owner being given a reasonable opportunity of showing cause before the Magistrate why such costs should not be recovered;

(b) If, in the case of an animal directed to be sent to an infirmary under sub-section (2) and certified under sub-section (3) to be fit for discharge from the infirmary, the owner refuses or neglects to remove the animal within such time as the Magistrate may prescribe or to pay the costs which he is liable to pay under sub-section (4), the Magistrate may direct that the animal be sold and that the proceeds of the sale be applied to the payment of such costs."

(4) after sub-section (6), the following shall be *inserted*, namely,—

"(7) If the costs payable by the owner under sub-section (4) shall exceed the proceeds of such sale, the excess amount to such extent as shall seem reasonable to the Magistrate shall be recoverable from the owner as a fine on the order of Magistrate, provided that no such order shall be made without the owner being given a reasonable opportunity of showing cause before the Magistrate why such amount should not be recovered."

—Bom. Act XXVIII of 1946, S. 3 [20-11-1946].

[a]6C. Penalty for baiting or inciting animals to fight.

If any person—

(a) incites any animal to fight, or

(b) baits any animal, or

(c) aids or abets any such incitement or baiting,

he shall be punished with fine which may extend to fifty rupees.

Exception.—It shall not be an offence under this section to incite animals to fight if such fighting is not likely to cause injury or suffering to such animals and all reasonable precautions are taken to prevent injury or suffering from being so caused.]

[a] See Foot-note (a) under S. 6-A.

STATE AMENDMENT

ANDHRA PRADESH

In the Act, as amended by Madras Act XX of 1942, after section 6-C, *insert* the following section, namely :—

"**6-D.** *Penalty for causing animals to fight.*—Any person who in any place causes any animal to fight or for the purpose of pigeon-flying starves a pigeon of food or drink or hangs its head downwards to make it disgorge the food contents of its stomach shall be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to one hundred rupees or with both."

—An. P. Act XXIII of 1958, S. 3 and Sch. [w.e.f. 1-2-1960].

7. Penalty for permitting diseased animals to go at large or to die in public place.

If any person wilfully permits any animal of which he is the owner [a][or is in charge] to go at large in any street while the animal is affected with contagious or infectious disease, or without reasonable excuse permits any diseased or disabled animal of which he is the owner [a][or is in charge] to die in any street, he shall be punished with fine which may extend to one hundred rupees [a][where he is the owner of the animal, or to fifty rupees where he is in charge of but not the owner of the animal].

[a] *Inserted* by the Prevention of Cruelty to Animals (Amendment) Act, 1938 (XXV of 1938), S. 8 [1-12-1938].

[a][7A. Special power of search and seizure in respect of certain offences.

[b][*(1)*] If a police officer, not below the rank of sub-inspector, has reason to believe that an offence under section 5, in respect of a goat, is being or is about to be, or has been, committed in any place, or that any person has in his possession the skin of a goat with any part of the skin of the head attached thereto, he may enter and search such place or any place in which he has reason to believe any such skin to be, and may seize any such skin and any article or thing used or intended to be used in the commission of such offence.]

[c][*(2)* If a police officer, not below the rank of sub-inspector, or any person specially authorised by the [A][State Government] in this behalf has reason to believe that *phooka* or *doom dev* has just been or is being performed on any animal within the limits of his jurisdiction, he may enter any place in which he has reason to believe such animal to be, and may seize the animal and produce it for examination by the Veterinary Officer in charge of the area in which the animal is seized.]

[a] *Inserted* by the Prevention of Cruelty to Animals (Amendment) Act, 1917 (XIV of 1917), S. 3. [b] The original section 7-A was *renumbered* as sub-section *(1)* of that section, *ibid*, 1938 (XXV of 1938), S. 9 [1-12-1938]. [c] *Inserted*, *ibid*.

8. Search-warrants.

(1) If a Magistrate of the first [a][or second class, Presidency Magistrate], Sub-divisional Magistrate, Commissioner of Police or District Superintendent

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Section 6-C — Note 1

[1] To compel or permit two rams to go on fighting after one of them had been hurt is "ill treatment". ('34) 1934 Mad W N 535 (536).

of Police, upon information in writing and after such inquiry as he thinks necessary, has reason to believe that an offence [b][against this Act] is being or is about to be or has been committed in any place, he may either himself enter and search or by his warrant authorise any police officer [c][not below the rank of sub inspector] to enter and search the place.

(2) The provisions of the [d]Code of Criminal Procedure, 1882, relating to searches under that Code shall, so far as those provisions can be made applicable, apply to a search under sub-section *(1)* [e][or under section 7A.]

[a] *Substituted* for "class" by the Prevention of Cruelty to Animals (Amendment) Act, 1938 (XXV of 1938), S. 10 [1-12-1938]. [b] *Substituted* for "against section 4, section 5 or section 6", *ibid*. [c] *Substituted* for "above the rank of a Constable", *ibid*. [d] See now the Code of Criminal Procedure, 1898 (V of 1898). [e] *Inserted* by the Prevention of Cruelty to Animals (Amendment) Act, 1917 (XIV of 1917), S. 4.

9. Limitation for prosecutions.

A prosecution for an offence against this Act shall not be instituted after the expiration of three months from the date of the commission of the offence.

10. Destruction of suffering animals.

[a][*(1)*] When any Magistrate, Commissioner of Police or District Superintendent of Police has reason to believe that an offence against this Act has been committed in respect of any animal, he may direct the immediate destruction of the animal if in his opinion its sufferings are such as to render such a direction proper.

[a][*(2)* Any police officer above the rank of a constable who finds any animal so diseased, or so severely injured, or in such a physical condition that it cannot, in his opinion, be removed without cruelty, may, if the owner is absent or refuses to consent to the destruction of the animal, forthwith summon the Veterinary Officer in charge of the area in which the animal is found and if the Veterinary Officer certifies that the animal is mortally injured, or so severely injured or in such a physical condition that its destruction is desirable, the police officer may, after obtaining orders from a Magistrate, destroy the animal or cause it to be destroyed.]

[a] *Inserted* by the Prevention of Cruelty to Animals (Amendment) Act, 1938 (XXV of 1938), S. 11 [1-12-1938].

11. Saving with respect to religious rites and usages.

Nothing in this Act shall render it an offence to kill any animal in a manner required by the religion or religious rites and usages of any race, sect, tribe or class.

STATE AMENDMENT

MAHARASHTRA

In its application to the Bombay area of the State of Maharashtra, in section 11, after the words "offence to," the words "abandon or" shall be *inserted*.

—Bom. Act XXVIII of 1946, S. 4 [20-11-1946].

12. Provision supplementary to section 1 with respect to extent of Act.

Notwithstanding anything in section 1, sections [a][4 and 13, sections 9 and 10, and sections 6A, 7A, 8 and 15 so far as they relate to offences under Section 4] shall extend to every local area in which any section of this Act constituting an offence is for the time being in force.

[a] *Substituted* for "9, 10 and 11" by the Prevention of Cruelty to Animals (Amendment) Act, 1938 (XXV of 1938), S. 12 [1-12-1938].

Section 10 — Note 1

[1] Conviction of accused under S. 6 for having worked a permanently lame bullock —There are two courses open to Magistrate, besides punishing offender — If the animal is suffering from incurable malady which is likely immensely to prove fatal, the Magistrate may direct its immediate destruction under S. 10. But if it is suffering from curable disease the Act empowers the Magistrate to send it to pinjrapole or infirmary. ('39) 1939 Nag L Jour 356 (356).

[a][13. Offence under section 4 to be cognizable.

Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence punishable under section 4, shall be a cognizable offence within the meaning of that Code.]

[a] Sections 13 to 17 were *added* by the Prevention of Cruelty to Animals (Amendment) Act, 1938 (XXV of 1938), S. 13 [1-12-1938].

STATE AMENDMENT

MADRAS

(i) Section 13 shall be *renumbered* as sub-section *(1)* of that section and in the sub-section as so renumbered for the words and figure "under section 4", the words "under this Act" shall be substituted.

(ii) After the sub-section as so renumbered, the following sub-section shall be *added*, namely :—

"*(2)* Any agent of the Society for the Prevention of Cruelty to animals who is specially empowered by the Provincial Government in that behalf may arrest without a warrant any person committing in his view any offence punishable under this Act; and the provisions of the Code of Criminal Procedure, 1898, shall apply to an arrest made by such agent as if it had been effected by a Police officer." — Mad. Act XX of 1942, S. 4.

[a][14. General power of seizure for examination.

Any police officer above the rank of a constable or any person authorised by the State Government in this behalf, who has reason to believe that an offence against this Act has been or is being committed in respect of any animal, may, if in his opinion the circumstances so require, seize the animal and produce the same for examination by the nearest Magistrate or by such Veterinary Officer as may be designated in this behalf by rules made under section 15; and such police officer or authorised person may, when seizing the animal, require the person in charge thereof to accompany it to the place of examination.]

[a] *See* Foot-note (a) under S. 13.

[a][15. Power to make rules.

(1) The [A][State Government] may, by notification in the Official Gazette, and subject to the condition of previous publication, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, the [A][State Government] may make rules—

(a) prescribing the maximum weight of loads to be carried or drawn by any animal;

(b) prescribing conditions to prevent the overcrowding of animals;

(c) prescribing the period during which, and the hours between which, buffaloes shall not be used for draught purposes;

(d) prescribing the purposes to which fines realized under this Act may be applied, including such purposes as the maintenance of infirmaries, *pinjrapoles*, and veterinary hospitals;

(e) prohibiting the use of any bit or harness involving cruelty;

(f) requiring persons carrying on the business of a farrier to be licensed and registered;

(g) requiring persons owning, or in charge of, premises in which animals are kept or milked to register such premises, to comply with prescribed conditions as to the boundary walls or surroundings of such premises, to permit their inspection for the purpose of ascertaining whether any offence against section 4 is being, or has been, committed therein, and

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Section 15 — Note 1

[1] Agent of society appointed as Additional Police Officer by Police Commissioner — No duration of appointment — Power of appointment vesting in Local Government but subsequently again delegated to Police Commissioner—Appointment, *held* did not lapse. 1942 Bom 32 (32) [AIR V 29] : 43 Cri L Jour 341.

to expose in such premises copies of section 4 of this Act in a language or languages commonly understood in the locality; and

(h) prescribing the manner in which cattle may be impounded in any place appointed for the purpose, so as to secure the provision of adequate space, food and water.

(3) If any person contravenes, or abets the contravention of, any rule made under this section, he shall be punished with fine which may extend to fifty rupees.]

[a] *See* Foot-note (a) under S. 13.

[a][**16.** Persons authorised under section 14 to be public servants.

Every person authorised by the [A][State Government] under section 14 shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.]

[a] *See* Foot-note (a) under S. 13.

[a][**17.** Indemnity.

No suit, prosecution or other legal proceeding shall lie against any person who is, or who is deemed to be, a public servant within the meaning of section 21 of the Indian Penal Code, in respect of anything in good faith done or intended to be done under this Act.]

[a] *See* Foot-note (a) under S. 13.

[THE] PREVENTION OF CRUELTY TO ANIMALS ACT, 1960

(ACT LIX of 1960)

[The Act printed here is as on 1-2-1961.]

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STATEMENT OF OBJECTS AND REASONS

"The Committee for the prevention of cruelty to animals appointed by the Government of India drew attention to a number of deficiencies in the Prevention of Cruelty to Animals Act, 1890 (Central Act No. 11 of 1890) and suggested its replacement by a more comprehensive Act. The existing Act has a restricted scope as :

(1) it applies only to urban areas within municipal limits.
(2) it defines the term "animal" as meaning any domestic or captured animal and thus contains no provision for prevention of cruelty to animals other than domestic and captured animals,
(3) it covers only certain specified types of cruelty to animals, and
(4). penalties for certain offences are inadequate.

This Bill is intended to give effect to those recommendations of the committee which have been accepted by the Government of India and in respect of which central legislation can be undertaken. The existing Act is proposed to be repealed.

Besides declaring certain types of cruelty to animals to be offences and providing necessary penalties for such offences and making some of the more serious of them cognizable, the Bill also contains provisions for the establishment of an Animal Welfare Board with the object of promoting measures for animal welfare.

Provision is also being made for the establishment of a Committee to control experimentation on animals when the Government, on the advice of the Animal Welfare Board is satisfied that it is necessary to do so for preventing cruelty to animals during experimentation. The Bill also contains provisions for licensing and regulating the training and performance of animals for the purpose of any entertainment to which the public are admitted through sale of tickets." — Gaz. of Ind., 1959 Extra., Pt. II—Sec. 2, p. 326.

[THE] PREVENTION OF CRUELTY TO ANIMALS ACT, 1960
(ACT LIX of 1960)[a]

[26th December, 1960.]

An Act to prevent the infliction of unnecessary pain or suffering on animals and for that purpose to amend the law relating to the prevention of cruelty to animals.

Be it enacted by Parliament in the Eleventh year of the Republic of India as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of India, 1959, Ext. Pt. II, S. 2, p. 326. And for Joint Committee Report, *see* Gaz. of Ind., 1960, Ext. Pt. II, S. 2, p. 15.

CHAPTER I
PRELIMINARY

1. Short title, extent and commencement.

(1) This Act may be called THE PREVENTION OF CRUELTY TO ANIMALS ACT, 1960.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date[a] as the Central Government may, by notification in the Official Gazette, appoint, and different dates[a] may be appointed for different States and for the different provisions contained in this Act.

[a] 1st April, 1961, is the date appointed on which the Act came into force in the State of Punjab and the union territory of the Andaman and Nicobar Islands: S. O. 823 dated 1-4-1961 in Gaz. Ind. 1961, Pt. II—Sec. 3 (ii), page 806. Chap. I came into force in the union territory of Himachal Pradesh on 2nd Oct., 1961—*see* Gaz. Ind., 1961, Pt. II —Sec. 3 (ii), page 2397.

2. Definitions.

In this Act, unless the context otherwise requires,—

(a) "animal" means any living creature other than a human being ;

[*cf.* Penal Code, S. 47.]

(b) "Board" means the Animal Welfare Board established under section 4;

(c) "captive animal" means any animal (not being a domestic animal) which is in captivity or confinement, whether permanent or temporary, or which is subjected to any appliance or contrivance for the purpose of hindering or preventing its escape from captivity or confinement or which is pinioned or which is or appears to be maimed ;

(d) "domestic animal" means any animal which is tamed or which has been or is being sufficiently tamed to serve some purpose for the use of man or which, although it neither has been nor is being nor is intended to be so tamed, is or has become in fact wholly or partly tamed ;

(e) "local authority" means a Municipal Committee, District Board or other authority for the time being invested by law with the control and administration of any matters within a specified local area ;

(f) "owner", used with reference to an animal, includes not only the owner but also any other person for the time being in possession or custody of the animal, whether with or without the consent of the owner ;

(g) "*phooka*" or "*doom dev*" includes any process of introducing air or any substance into the female organ of a milch animal with the object of drawing off from the animal any secretion of milk ;

(h) "prescribed" means prescribed by rules made under this Act ;

(i) "street" includes any way, road, lane, square, Court, alley, passage or open space, whether a thoroughfare or not, to which the public have access.

Note : The definition of "animal" in the present Act is wider than the one in 1890 Act, wherein it as defined as "any domestic or captured animal".

3. Duties of persons having charge of animals.

It shall be the duty of every person having the care or charge of any animal to take all reasonable measures to ensure the well-being of such animal and to prevent the infliction upon such animal of unnecessary pain or suffering.

CHAPTER II[a]

ANIMAL WELFARE BOARD

4. Establishment of Animal Welfare Board.

(1) For the promotion of animal welfare generally and for the purpose of protecting animals from being subjected to unnecessary pain or suffering, in particular, there shall be established by the Central Government, as soon as may be after the commencement of this Act, a Board to be called the Animal Welfare Board.

(2) The Board shall be a body corporate having perpetual succession and a

common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property and may by its name sue and be sued.

[a] Chapter II came into force in the Union Territory of Himachal Pradesh on 2nd Oct., 1961-See Gaz. Ind., 1961, Pt. II-sec. 3 (ii), page 2397.

Note.—There was no provision in 1890 Act for the constitution of Animal Welfare Board, for the promotion of animal welfare generally.

5. Constitution of the Board.

(1) The Board shall consist of he following persons, namely : —

(a) the Inspector-General of Forests, Government of India, *ex officio*;

(b) the Animal Husbandry Commissioner to the Government of India, *ex officio*;

(c) one person to represent such association of veterinary practitioners as in the opinion of the Central Government ought to be represented on the Board, to be elected by that association in the prescribed manner;

(d) two persons to represent practitioners of modern and indigenous systems of medicine, to be nominated by the Central Government;

(e) one person to represent each of the Municipal Corporations of Bombay, Calcutta, Delhi and Madras, and one person to represent any other Municipal Corporation as, in the opinion of the Central Government, ought to be represented on the Board, to be elected by each of the said Corporations in the prescribed manner;

(f) one person to represent each of such three organisations actively interested in animal welfare as in the opinion of the Central Government ought to be represented on the Board, to be chosen by each of the said organisations in the prescribed manner;

(g) one person to represent each of such three societies dealing with prevention of cruelty to animals as in the opinion of the Central Government ought to be represented on the Board, to be chosen in the prescribed manner;

(h) three persons to be nominated by the Central Government;

(i) six members of Parliament, four to be elected by the House of the People (Lok Sabha) and two by the Council of States (Rajya Sabha).

(2) Any of the persons referred to in clause *(a)* or clause *(b)* of sub-section *(1)* may depute any other person to attend any of the meetings of the Board.

(3) One of the Members of the Board shall be nominated by the Central Government to be its Chairman.

6. Term of office and conditions of service of members of the Board.

(1) Save as otherwise provided in this section, the term of office of a member of the Board shall be three years.

(2) Subject to the provisions contained in sub-section *(4)*, the term of office of the member elected to represent any Municipal Corporation (other than the Corporations of Bombay, Calcutta, Delhi and Madras) shall be one year from the date on which such member assumes office.

(3) The term of office of an *ex officio* member shall continue so long as he holds the office by virtue of which he is such a member.

(4) The term of office of a member elected or chosen under clause *(c)*, clause *(e)*, clause *(f)*, clause *(g)* or clause *(i)* of section 5 to represent any body of persons shall come to an end as soon as he ceases to be a member of the body which elected him or in respect of which he was chosen.

(5) The term of office of a member nominated, elected or chosen to fill a causal vacancy shall continue for the remainder of the term of office of the member in whose place he is nominated, elected or chosen.

(6) The members of the Board shall receive such allowances, if any, as the Board may, subject to the previous approval of the Central Government, provide by regulations made by it in this behalf.

(7) No act done or proceeding taken by the Board shall be questioned on the ground merely of the existence of any vacancy in, or defect in the constitution of, the Board.

7. Secretary and other employees of the Board.

(1) The Central Government shall appoint one of its officers to be the Secretary of the Board.

(2) Subject to such rules as may be made by the Central Government in this behalf, the Board may appoint such number of other officers and employees as may be necessary for the exercise of its powers and the discharge of its functions and may determine the terms and conditions of service of such officers and other employees by regulations made by it with the previous approval of the Central Government.

8. Funds of the Board.

The funds of the Board shall consist of grants made to it from time to time by the Government and of contributions, donations, subscriptions, bequests, gifts and the like made to it by any local authority or by any other person.

9. Functions of the Board.

The functions of the Board shall be—

(a) to keep the law in force in India for the prevention of cruelty to animals under constant study and advise the Government on the amendments to be undertaken in any such law from time to time;

(b) to advise the Central Government on the making of rules under this Act with a view to preventing unnecessary pain or suffering to animals generally, and more particularly when they are being transported from one place to another or when they are used as performing animals or when they are kept in captivity or confinement;

(c) to advise the Government or any local authority or other person on improvements in the design of vehicles so as to lessen the burden on draught animals;

(d) to take all such steps as the Board may think fit for ameliorating the condition of beasts of burden by encouraging, or providing for, the construction of sheds, water-troughs and the like and by providing for veterinary assistance to animals;

(e) to advise the Government or any local authority or other person in the design of slaughter-houses or in the maintenance of slaughter-houses or in connection with slaughter of animals so that unnecessary pain or suffering, whether physical or mental, is eliminated in the pre-slaughter stages as far as possible, and animals are killed, wherever necessary, in as humane a manner as possible;

(f) to take all such steps as the Board may think fit to ensure that unwanted animals are destroyed by local authorities, whenever it is necessary to do so, either instantaneously or after being rendered insensible to pain or suffering;

(g) to encourage, by the grant of financial assistance or otherwise, the formation of pinjrapoles, sanctuaries and the like where animals and birds may find a shelter when they have become old and useless or when they need protection;

(h) to co-operate with, and co-ordinate the work of, associations or bodies established for the purpose of preventing unnecessary pain or suffering to animals or for the protection of animals and birds;

(i) to give financial and other assistance to animal welfare organisations functioning in any local area or to encourage the formation of animal welfare organisations in any local area which shall work under the general supervision and guidance of the Board;

(j) to advise the Government on matters relating to the medical care and attention which may be provided in animal hospitals and to give financial and other assistance to animal hospitals whenever the Board thinks it necessary to do so;

(k) to impart education in relation to the humane treatment of animals and to encourage the formation of public opinion against the infliction of unnecessary pain or suffering to animals and for the promotion of animal welfare by means of lectures, books, posters, cinematographic exhibitions and the like;

(l) to advise the Government on any matter connected with animal welfare or the prevention of infliction of unnecessary pain or suffering on animals.

10. Power of Board to make regulations.

The Board may, subject to the previous approval of the Central Government, make such regulations as it may think fit for the administration of its affairs and for carrying out its functions.

CHAPTER III

CRUELTY TO ANIMALS GENERALLY

11. Treating animals cruelly.

(1) If any person—

(a) beats, kicks, over-rides, over-drives, over-loads, tortures or otherwise treats any animal so as to subject it to unnecessary pain or suffering or causes or, being the owner permits, any animal to be so treated; or

(b) employs in any work or labour any animal which, by reason of any disease, infirmity, wound, sore or other cause, is unfit to be so employed, or being the owner, permits any such unfit animal to be so employed; or

(c) wilfully and unreasonably administers any injurious drug or injurious substance to any domestic or captive animal or wilfully and unreasonably causes or attempts to cause any such drug or substance to be taken by any domestic or captive animal; or

(d) conveys or carries, whether in or upon any vehicle or not, any animal in such a manner or position as to subject it to unnecessary pain or suffering; or

(e) keeps or confines any animal in any cage or other receptacle which does not measure sufficiently in height, length and breadth to permit the animal a reasonable opportunity for movement; or

(f) keeps for an unreasonable time any animal chained or tethered upon an unreasonably short or unreasonably heavy chain or cord; or

(g) being the owner, neglects to exercise or cause to be exercised reasonably any dog habitually chained up or kept in close confinement; or

(h) being the owner of any captive animal, fails to provide such animal with sufficient food, drink or shelter; or

(i) without reasonable cause, abandons any animal in circumstances which render it likely that it will suffer pain by reason of starvation or thirst; or

(j) wilfully permits any animal, of which he is the owner, to go at large in any street while the animal is affected with contagious or infectious

disease or without reasonable excuse permits any diseased or disabled animal, of which he is the owner, to die in any street; or

(k) offers for sale or, without reasonable cause, has in his possession any animal which is suffering pain by reason of mutilation, starvation, thirst, overcrowding or other ill-treatment; or

(l) needlessly mutilates any animal or kills any animal in an unnecessarily cruel manner; or

(m) confines or causes to be confined any animal in such a manner as to make it an object of prey for any other animal solely with a view to providing entertainment for other persons; or

(n) for the purposes of his business, organises, keeps, uses or acts in the management of, any place for animal fighting or for the purpose of baiting any animal or permits or offers any place to be so used or receives money for the admission of any other person to any place kept or used for any such purposes; or

(o) promotes or takes part in any shooting match or competition wherein animals are released from captivity for the purpose of such shooting;

he shall be punishable, in the case of a first offence, with fine which may extend to fifty rupees, and, in the case of a second or subsequent offence committed within three years of the previous offence, with fine which may extend to one hundred rupees, or with imprisonment for a term which may extend to three months, or with both.

(2) For the purposes of sub-section *(1)*, an owner shall be deemed to have committed an offence if he has failed to exercise reasonable care and supervision with a view to the prevention of such offence:

Provided that where an owner is convicted of permitting cruelty by reason only of having failed to exercise such care and supervision, he shall not be liable to imprisonment without the option of a fine.

(3) Nothing in this section shall apply to—

(a) the dehorning of cattle, or the castration or branding or nose-roping of any animal, in the prescribed manner; or

(b) the destruction of stray dogs in lethal chambers or by other methods with a minimum of suffering; or

(c) the extermination or destruction of any animal under the authority of any law for the time being in force; or

(d) any matter dealt with in Chapter IV; or

(e) the commission or omission of any act in the course of the destruction or the preparation for destruction of any animal as food for mankind unless such destruction or preparation was accompanied by the infliction of unnecessary pain or suffering.

12. Penalty for practising phooka or doom dev.

If any person performs upon any cow or other milch animal the operation called *phooka* or *doom dev* or permits such operation being performed upon any such animal in his possession or under his control, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to two years, or with both, and the animal on which the operation was performed shall be forfeited to the Government.

13. Destruction of suffering animals.

(1) Where the owner of an animal is convicted of an offence under section 11, it shall be lawful for the Court, if the Court is satisfied that it would be cruel to keep the animal alive, to direct that the animal be destroyed and to assign the animal to any suitable person for that purpose, and the person to whom such animal is so assigned shall, as soon as possible, destroy such animal or

cause such animal to be destroyed in his presence without unnecessary suffering, and any reasonable expense incurred in destroying the animal may be ordered by the Court to be recovered from the owner as if it were a fine :

Provided that unless the owner assents thereto, no order shall be made under this section except upon the evidence of a veterinary officer in charge of the area.

(2) When any Magistrate, Commissioner of Police or District Superintendent of Police has reason to believe that an offence under section 11 has been committed in respect of any animal, he may direct the immediate destruction of the animal, if in his opinion, it would be cruel to keep the animal alive.

(3) Any police officer above the rank of a constable or any person authorised by the State Government in this behalf who finds any animal so diseased or so severely injured or in such a physical condition that in his opinion it cannot be removed without cruelty, may, if the owner is absent or refuses his consent to the destruction of the animal, forthwith summon the veterinary officer in charge of the area in which the animal is found, and if the veterinary officer certifies that the animal is mortally injured or so severely injured or in such a physical condition that it would be cruel to keep it alive the police officer or the person authorised, as the case may be, may, after obtaining orders from a Magistrate, destroy the animal injured or cause it to be destroyed.

(4) No appeal shall lie from any order of a Magistrate for the destruction of an animal.

CHAPTER IV

EXPERIMENTATION ON ANIMALS

14. Experiments on animals.

Nothing contained in this Act shall render unlawful the performance of experiments (including experiments involving operations) on animals for the purpose of advancement by new discovery of physiological knowledge or of knowledge which will be useful for saving or for prolonging life or alleviating suffering or for combating any disease, whether of human beings, animals or plants.

15. Committee for control and supervision of experiments on animals.

(1) If at any time, on the advice of the Board, the Central Government is of opinion that it is necessary so to do for the purpose of controlling and supervising experiments on animals, it may, by notification in the Official Gazette, constitute a Committee consisting of such number of officials and non-officials, as it may think fit to appoint thereto.

(2) The Central Government shall nominate one of the members of the Committee to be its Chairman.

(3) The Committee shall have power to regulate its own procedure in relation to the performance of its duties.

(4) The funds of the Committee shall consist of grants made to it from time to time by the Government and of contributions, donations, subscriptions, bequests, gifts and the like made to it by any person.

16. Staff of the Committee.

Subject to the control of the Central Government, the Committee may appoint such number of officers and other employees as may be necessary to enable it to exercise its powers and perform its duties, and may determine the remuneration and other terms and conditions of service of such officers and other employees.

17. Duties of the Committee and power of the Committee to make rules relating to experiments on animals.

(1) It shall be the duty of the Committee to take all such measures as may be necessary to ensure that animals are not subjected to unnecessary pain or suffering before, during or after the performance of experiments on them, and for that purpose it may, by notification in the Gazette of India and subject to the condition of previous publication, make such rules as it may think fit in relation to the conduct of such experiments.

(2) In particular, and without prejudice to the generality of the foregoing power, rules made by the Committee shall be designed to secure the following objects, namely :—

(a) that in cases where experiments are performed in any institution, the responsibility therefor is placed on the person in charge of the institution and that, in cases where experiments are performed outside an institution by individuals, the individuals are qualified in that behalf and the experiments are performed on their full responsibility;

(b) that experiments are performed with due care and humanity, and that as far as possible experiments involving operations are performed under the influence of some anaesthetic of sufficient power to prevent the animals feeling pain;

(c) that animals which, in the course of experiments under the influence of anaesthetics, are so injured that their recovery would involve serious suffering, are ordinarily destroyed while still insensible;

(d) that experiments on animals are avoided wherever it is possible to do so; as for example, in medical schools, hospitals, colleges and the like, if other teaching devices such as books, models, films and the like may equally suffice;

(e) that experiments on larger animals are avoided when it is possible to achieve the same results by experiments upon small laboratory animals like guinea-pigs, rabbits, frogs and rats;

(f) that, as far as possible, experiments are not performed merely for the purpose of acquiring manual skill;

(g) that animals intended for the performance of experiments are properly looked after both before and after experiments;

(h) that suitable records are maintained with respect to experiments performed on animals.

(3) In making any rules under this section, the Committee shall be guided by such directions as the Central Government (consistently with the objects for which the Committee is set up) may give to it, and the Central Government is hereby authorised to give such directions.

(4) All rules made by the Committee shall be binding on all individuals performing experiments outside institutions and on persons in charge of institutions in which experiments are performed.

18. Power of entry and inspection.

For the purpose of ensuring that the rules made by it are being complied with, the Committee may authorise any of its officers or any other person in writing to inspect any institution or place where experiments are being carried on and report to it as a result of such inspection, and any officer or person so authorised may—

(a) enter at any time considered reasonable by him and inspect any institution or place in which experiments on animals are being carried on; and

(b) require any person to produce any record kept by him with respect to experiments on animals.

19. Power to prohibit experiments on animals.

If the Committee is satisfied, on the report of any officer or other person made to it as a result of any inspection under section 18 or otherwise, that the rules made by it under section 17 are not being complied with by any person or institution carrying on experiments on animals, the Committee may, after giving an opportunity to the person or institution of being heard in the matter, by order, prohibit the person or institution from carrying on any such experiments either for a specified period or indefinitely, or may allow the person or institution to carry on such experiments subject to such special conditions as the Committee may think fit to impose.

20. Penalties.

If any person—

(a) contravenes any order made by the Committee under section 19; or

(b) commits a breach of any condition imposed by the Committee under that section;

he shall be punishable with fine which may extend to two hundred rupees, and, when the contravention or breach of condition has taken place in any institution, the person in charge of the institution shall be deemed to be guilty of the offence and shall be punishable accordingly.

CHAPTER V

PERFORMING ANIMALS

21. "Exhibit" and "train" defined.

In this Chapter, "exhibit" means exhibit at any entertainment to which the public are admitted through sale of tickets, and "train" means train for the purpose of any such exhibition, and the expressions "exhibitor" and "trainer" have respectively the corresponding meanings.

Note. — In the Act of 1890 there is no provision relating to performing animals.

22. Restriction on exhibition and training of performing animals.

No person shall exhibit or train—

(i) any performing animal unless he is registered in accordance with the provisions of this Chapter;

(ii) as a performing animal, any animal which the Central Government may, by notification in the Official Gazette, specify as an animal which shall not be exhibited or trained as a performing animal.

23. Procedure for registration.

(1) Every person desirous of exhibiting or training any performing animal shall, on making an application in the prescribed form to the prescribed authority and on payment of the prescribed fee, be registered under this Act unless he is a person who, by reason of an order made by the Court under this Chapter, is not entitled to be so registered.

(2) An application for registration under this Chapter shall contain such particulars as to the animals and as to the general nature of the performances in which the animals are to be exhibited or for which they are to be trained as may be prescribed, and the particulars so given shall be entered in the register maintained by the prescribed authority.

(3) The prescribed authority shall give to every person whose name appears on the register kept by them, a certificate of registration in the prescribed form containing the particulars entered in the register.

(4) Every register kept under this Chapter shall at all reasonable times be open for inspection on payment of the prescribed fee, and any person shall,

on payment of the prescribed fee, be entitled to obtain copies thereof or make extracts therefrom.

(5) Any person whose name is entered in the register shall, subject to the provisions of any order made under this Act by any Court, be entitled, on making an application for the purpose, to have the particulars entered in the register with respect to him varied, and where any such particulars are so varied, the existing certificate shall be cancelled and a new certificate issued.

24. Power of Court to prohibit or restrict exhibition and training of performing animals.

(1) Where it is proved to the satisfaction of any Magistrate on a complaint made by a police officer or an officer authorised in writing by the prescribed authority referred to in section 23, that the training or exhibition of any performing animal has been accompanied by unnecessary pain or suffering and should be prohibited or allowed only subject to conditions, the Court may make an order against the person in respect of whom the complaint is made, prohibiting the training or exhibition or imposing such conditions in relation thereto, as may be specified by the order.

(2) Any Court by which an order is made under this section shall cause a copy of the order to be sent, as soon as may be after the order is made, to the prescribed authority by which the person against whom the order is made is registered, and shall cause the particulars of the order to be endorsed upon the certificate held by that person, and that person shall produce his certificate on being so required by the Court for the purposes of endorsement, and the prescribed authority to which a copy of an order is sent under this section shall enter the particulars of the order in that register.

25. Power to enter premises.

(1) Any person authorised in writing by the prescribed authority referred to in section 23 and any police officer not below the rank of a Sub-Inspector may—

(a) enter at all reasonable times and inspect any premises in which any performing animals are being trained or exhibited or kept for training or exhibition, and any such animals found therein ; and

(b) require any person who, he has reason to believe, is a trainer or exhibitor of performing animals to produce his certificate of registration.

(2) No person or police officer referred to in sub-section *(1)* shall be entitled under this section to go on or behind the stage during a public performance of performing animals.

26. Offences.

If any person—

(a) not being registered under this Chapter, exhibits or trains any performing animal; or

(b) being registered under this Act, exhibits or trains any performing animal with respect to which, or in a manner with respect to which, he is not registered; or

(c) exhibits or trains as a performing animal, any animal which is not to be used for the purpose by reason of a notification issued under clause *(ii)* of section 22; or

(d) obstructs or wilfully delays any person or police officer referred to in section 25 in the exercise of powers under this Act as to entry and inspection ; or

(e) conceals any animal with a view to avoiding such inspection; or

(f) being a person registered under this Act, on being duly required in

pursuance of this Act to produce his certificate under this Act, fails without reasonable excuse so to do ; or

(g) applies to be registered under this Act when not entitled to be so registered ;

he shall be punishable on conviction with fine which may extend to five hundred rupees, or with imprisonment which may extend to three months, or with both.

27. Exemptions.

Nothing contained in this Chapter shall apply to—

(a) the training of animals for *bona fide* military or police purposes or the exhibition of any animals so trained ; or

(b) any animals kept in any zoological garden or by any society or association which has for its principal object the exhibition of animals for educational or scientific purposes.

CHAPTER VI

MISCELLANEOUS

28. Saving as respects manner of killing prescribed by religion.

Nothing contained in this Act shall render it an offence to kill any animal in a manner required by the religion of any community.

Note :—The section preserves religious rights of any community to kill animals in a particular manner, thus killing of an animal by a Muhamedan by a method of "halal" is not an offence under the Act.

29. Power of Court to deprive person convicted of ownership of animal.

(1) If the owner of any animal is found guilty of any offence under this Act, the Court, upon his conviction thereof, may, if it thinks fit, in addition to any other punishment, make an order that the animal with respect to which the offence was committed shall be forfeited to Government and may, further, make such order as to the disposal of the animal as it thinks fit under the circumstances.

(2) No order under sub-section *(1)* shall be made unless it is shown by evidence as to a previous conviction under this Act or as to the character of the owner or otherwise as to the treatment of the animal that the animal, if left with the owner, is likely to be exposed to further cruelty.

(3) Without prejudice to the provisions contained in sub-section *(1)*, the Court may also order that a person convicted of an offence under this Act shall, either permanently or during such period as is fixed by the order, be prohibited from having the custody of any animal of any kind whatsoever, or, as the Court thinks fit, of any animal of any kind or species specified in the order.

(4) No order under sub-section *(3)* shall be made unless —

(a) it is shown by evidence as to a previous conviction or as to the character of the said person or otherwise as to the treatment of the animal in relation to which he has been convicted that an animal in the custody of the said person is likely to be exposed to cruelty ;

(b) it is stated in the complaint upon which the conviction was made that it is the intention of the complainant upon the conviction of the accused to request that an order be made as aforesaid ; and

(c) the offence for which the conviction was made was committed in an area in which under the law for the time being in force a licence is necessary for the keeping of any such animal as that in respect of which the conviction was made.

(5) Notwithstanding anything to the contrary contained in any law for the time being in force, any person in respect of whom an order is made under sub-section *(3)* shall have no right to the custody of any animal contrary to the provisions of the order, and if he contravenes the provisions of any order, he shall be punishable with fine which may extend to one hundred rupees, or with imprisonment for a term which may extend to three months or with both.

(6) Any Court which has made an order under sub-section *(3)* may at any time, either on its own motion or on application made to it in this behalf, rescind or modify such order.

30. Presumption as to guilt in certain cases.

If any person is charged with the offence of killing a goat, cow or its progeny contrary to the provisions of clause *(l)* of sub-section *(1)* of section 11, and it is proved that such person had in his possession, at the time the offence is alleged to have been committed, the skin of any such animal as is referred to in this section with any part of the skin of the head attached thereto, it shall be presumed until the contrary is proved that such animal was killed in a cruel manner.

Note :— The burden is on the accused to prove that the animal was not killed in a cruel manner.

31. Cognizability of offences.

Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence punishable under clause *(i)*, clause *(n)* or clause *(o)* of sub-section *(1)* of section 11 or under section 12 shall be a cognizable offence within the meaning of that Code.

32. Powers of search and seizure.

(1) If a police officer not below the rank of Sub-Inspector or any person authorised by the State Government in this behalf has reason to believe that an offence under clause *(l)* of sub-section *(1)* of section 11 in respect of any such animal as is referred to in section 30 is being, or is about to be, or has been, committed in any place, or that any person has in his possession the skin of any such animal with any part of the skin of the head attached thereto, he may enter and search such place or any place in which he has reason to believe any such skin to be, and may seize such skin or any article or thing used or intended to be used in the commission of such offence.

(2) If a police officer not below the rank of Sub-Inspector, or any person authorised by the State Government in this behalf, has reason to believe that *phooka* or *doom dev* has just been, or is being, performed on any animal within the limits of his jurisdiction, he may enter any place in which he has reason to believe such animal to be, and may seize the animal and produce it for examination by the veterinary officer in charge of the area in which the animal is seized.

33. Search warrants.

(1) If a Magistrate of the first or second class or a Presidency Magistrate or a Sub-Divisional Magisratet or a Commissioner of Police or District Superintendent of Police, upon infomration in writing, and after such inquiry as he thinks necessary, has reason to believe that an offence under this Act is being, or is about to be, or has been committed in any place, he may either himself enter and search or by his warrant authorise any police officer not below the rank of Sub-Inspector to enter and search the place.

(2) The provisions of the Code of Criminal Procedure, 1898, relating to searches shall, so far as those provisions can be made applicable, apply to searches under this Act.

34. General power of seizure for examination.

Any police officer above the rank of a constable or any person authorised by the State Government in this behalf, who has reason to believe that an offence against this Act has been or is being, committed in respect of any animal, may, if in his opinion the circumstances so require, seize the animal and produce the same for examination by the nearest Magistrate or by such veterinary officer as may be prescribed, and such police officer or authorised person may, when seizing the animal, require the person in charge thereof to accompany it to the place of examination.

35. Treatment and care of animals.

(1) The State Government may, by general or special order, appoint infirmaries for the treatment and care of animals in respect of which offences against this Act have been committed, and may authorise the detention therein of any animal pending its production before a Magistrate.

(2) The Magistrate before whom a prosecution for an offence against this Act has been instituted may direct that the animal concerned shall be treated and cared for in an infirmary, until it is fit to perform its usual work or is otherwise fit for discharge, or that it shall be sent to a *pinjrapole*, or, if the veterinary officer in charge of the area in which the animal is found or such other veterinary officer as may be authorised in this behalf by rules made under this Act certifies that it is incurable or cannot be removed without cruelty, that it shall be destroyed.

(3) An animal sent for care and treatment to an infirmary shall not, unless the Magistrate directs that it shall be sent to a *pinjrapole* or that it shall be destroyed, be released from such place except upon a certificate of its fitness, for discharge issued by the veterinary officer in charge of the area in which the infirmary is situated or such other veterinary officer as may be authorised in this behalf by rules made under this Act.

(4) The cost of transporting the animal to an infirmary or *pinjrapole*, and of its maintenance and treatment in an infirmary, shall be payable by the owner of the animal in accordance with a scale of rates to be prescribed by the District Magistrate, or, in presidency-towns, by the Commissioner of Police :

Provided that when the Magistrate so orders on account of the poverty of the owner of the animal, no charge shall be payable for the treatment of the animal.

(5) Any amount payable by an owner of an animal under sub-section *(4)* may be recovered in the same manner as an arrear of land revenue.

(6) If the owner refuses or neglects to remove the animal within such time as a Magistrate may specify, the Magistrate may direct that the animal be sold and that the proceeds of the sale be applied to the payment of such cost.

(7) The surplus, if any, of the proceeds of such sale shall, on application made by the owner within two months from the date of the sale, be paid to him.

36. Limitation of prosecutions.

A prosecution for an offence against this Act shall not be instituted after the expiration of three months from the date of the commission of the offence.

Note. — Under the Act of 1890 no period of limitation was prescribed for prosecution for offences under the Act.

37. Delegation of powers.

The Central Government may, by notification in the Official Gazette, direct that all or any of the powers exercisable by it under this Act, may, subject to such conditions as it may think fit to impose, be also exercisable by any State Government.

38. Power to make rules.

(1) The Central Government may, by notification in the Official Gazette, and subject to the condition of previous publication, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, the Central Government may make rules providing for all or any of the following matters, namely:—

(a) the terms and conditions of service of members of the Board, the allowances payable to them and the manner in which they may exercise their powers and discharge their functions;

(b) the maximum load (including any load occasioned by the weight of passengers) to be carried or drawn by any animal;

(c) the conditions to be observed for preventing the over-crowding of animals;

(d) the period during which, and the hours between which, any class of animals shall not be used for draught purposes;

(e) prohibiting the use of any bit or harness involving cruelty to animals;

(f) requiring persons carrying on the business of a farrier to be licensed and registered by such authority as may be prescribed and levying a fee for the purpose;

(g) the precautions to be taken in the capture of animals for purposes of sale, export or for any other purpose, and the different appliances or devices that may alone be used for the purpose; and the licensing of such capture and the levying of fees for such licences;

(h) the precautions to be taken in the transport of animals, whether by rail, road, inland waterway, sea or air and the manner in which and the cages or other receptacles in which they may be so transported;

(i) requiring persons owning or in charge of premises in which animals are kept or milked to register such premises, to comply with such conditions as may be laid down in relation to the boundary walls or surroundings of such premises, to permit their inspection for the purpose of ascertaining whether any offence under this Act is being, or has been, committed therein, and to expose in such premises copies of section 12 in a language or languages commonly understood in the locality;

(j) the form in which applications for registration under Chapter V may be made, the particulars to be contained therein, the fees payable for such registration and the authorities to whom such applications may be made;

(k) the purposes to which fines realised under this Act may be applied, including such purposes as the maintenance of infirmaries, *pinjrapoles* and veterinary hospitals;

(l) any other matter which has to be, or may be, prescribed.

(3) If any person contravenes, or abets the contravention of, any rules made under this section, he shall be punishable with fine which may extend to one hundred rupees, or with imprisonment for a term which may extend to three months, or with both.

(4) Every rule made by the Central Government under this section shall be laid as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule, or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

39. Persons authorised under section 34 to be public servants.

Every person authorised by the State Government under section 34 shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

40. Indemnity.

No suit, prosecution or other legal proceeding shall lie against any person who is, or who is deemed to be, a public servant within the meaning of section 21 of the Indian Penal Code in respect of anything in good faith done or intended to be done under this Act.

41. Repeal of Act XI of 1890.

Where in pursuance of a notification under sub-section *(3)* of section 1 any provision of this Act comes into force in any State, any provision of the Prevention of Cruelty to Animals Act, 1890, which corresponds to the provision so coming into force, shall thereupon stand repealed.

[THE] PREVENTION OF FOOD ADULTERATION ACT, 1954
(ACT XXXVII of 1954)

[The Act printed here is as on 1-2-1961.]

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STATEMENT OF OBJECTS AND REASONS

"Adulteration of foodstuffs is so rampant and the evil has become so widespread and persistent that nothing short of a somewhat drastic remedy provided for in the Bill can hope to change the situation. Only a concerted and determined onslaught on this most anti-social behaviour can hope to bring relief to the nation. All remedies intended to be effective must be simple. I believe this Bill meets these requirements."

—Gaz. of Ind., 1950, Pt. II-Sec. 2, p. 522.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by 3 A. L. O., 1956.

[THE] PREVENTION OF FOOD ADULTERATION ACT, 1954

(ACT XXXVII OF 1954)[a]

[29th September, 1954.]

An Act to make provision for the prevention of adulteration of food.

BE it enacted by Parliament in the Fifth Year of the Republic of India as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1950, Pt. II-Sec. 2, p. 522.

PRELIMINARY

1. Short title, extent and commencement.

(1) This Act may be called THE PREVENTION OF FOOD ADULTERATION ACT, 1954.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date[a] as the Central Government may, by notification in the Official Gazette, appoint.

[a] 1st June 1955. *See* S. R. O. 1085, dated 9th May, 1955, published in Gaz. of Ind., Pt. II-Sec. 3, p. 874.

2. Definitions.

In this Act unless the context otherwise requires,—

(i) "adulterated"—an article of food shall be deemed to be adulterated—

(a) if the article sold by a vendor is not of the nature, substance or quality demanded by the purchaser and is to his prejudice, or is not of the nature, substance or quality which it purports or is represented to be;

(b) if the article contains any other substance which affects, or if the article is so processed as to affect, injuriously the nature, substance or quality thereof;

Preamble — Note 1

[1] In a prosecution under the Act, the essential requisite to be established is that the commodity alleged to be adulterated should be one intended for sale. Where it is found that the accused was merely taking the milk got from the buffaloes owned by his brother to his (brother's) hotel and it was not intended for sale as such, the accused cannot be guilty of an offence under the Act even if the milk is proved to be adulterated and in spite of the fact that the quantity of milk that was given to the sanitary inspector on demand might amount to a sale. 1959 Mad 333 (334) [AIR V 46 C 96] : 1959 Cri L Jour 997. (But the hotel keeper who sells such milk, though it is used for coffee, might be guilty of an offence under the Act.)

Section 2 (i) — Note 1

[1] Under S. 2 (i) (a) the article sold must be proved not only not to be of the nature, substance or quality demanded by the purchaser but it has also to be proved to be to his prejudice or must be proved to be not of the nature, substance or quality which it purports or is represented to be. 1959 All 500 (503) [AIR V 46 C 128] : ILR (1958) 2 All 618 : 1959 Cri L Jour 930 (DB). (Pepper grains mixed with fifty percent empty shells — *Held* not adulterated.)

[2] Under the Act, the adulterated substance need not be poisonous or injurious. Indeed, it may even be conducive to health. Hence, the plea that the adulteration was not prejudicial to health and would not injure anybody, but only added colour to the substance and made it attractive to the buyer cannot be sustained. 1959 Mad 185 (185) [AIR V 46 C 58] : ILR (1959) Mad 418 : 1959 Cri L Jour 608 (DB).

[3] No coal-tar dye can be used even to any infinitesimal part in treating dhall as under R. 29 framed under the Act, dhall is not one of the food stuffs enumerated therein. 1960 Andh-Pra 584 (586) [AIR V 47 C 188] : 1960 Cri L Jour 1417.

[4] There are no statutory standards of quality or statutory limits of component variability for mixed milk of cow and buffalo. The conviction of the accused, therefore, could not be sustained on the basis of the report of the Public Analyst since his opinion that the sample was adulterated was based upon the mean standard which was his own creation and had no statutory support. 1960 All 504 (505) [AIR V 47 C 130] : 1960 Cri L Jour 1056 (2).

[5] The contents of the milk, whether of fat or of nonfat solids, do vary. That is exactly why the law has not prescribed a cast-iron percentage, but has said that to be within the standard these ingredients should not fall below a particular percentage. One cannot go beyond it and still assume that in certain circumstances the contents may go lower than the prescribed minimum. 1960

(c) if any inferior or cheaper substance has been substituted wholly or in part for the article so as to affect injuriously the nature, substance or quality thereof;

(d) if any constituent of the article has been wholly or in part abstracted so as to affect injuriously the nature, substance or quality thereof;

(e) if the article had been prepared, packed or kept under insanitary conditions whereby it has become contaminated or injurious to health;

(f) if the article consists wholly or in part of any filthy putrid, disgusting, rotten, decomposed or diseased animal or vegetable substance or is insect-infested or is otherwise unfit for human consumption;

(g) if the article is obtained from a diseased animal;

(h) if the article contains any poisonous or other ingredient which renders it injurious to health;

(i) if the container of the article is composed, whether wholly or in part, of any poisonous or deleterious substance which renders its contents injurious to health;

(j) if any colouring matter other than that prescribed in respect thereof and in amounts not within the prescribed limits of variability is present in the article;

(k) if the article contains any prohibited preservative or permitted preservative in excess of the prescribed limits;

(l) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities which are in excess of the prescribed limits of variability;

(ii) "Central Food Laboratory" means any laboratory or institute established or specified under section 4;

(iii) "Committee" means the Central Committee for Food Standards constituted under section 3;

(iv) "Director of the Central Food Laboratory" means the person appointed by the Central Government by notification in the Official Gazette as the Director of the Central Food Laboratory and includes any person appointed by the Central Government in like manner to perform all or any of the functions of the Director under this Act;

(v) "Food" means any article used as food or drink for human consumption other than drugs and water and includes—

(a) any article which ordinarily enters into, or is used in the composition or preparation of human food, and

(b) any flavouring matter or condiments;

Section 2 (i) — Note 1 *(contd.)*

Madh-Pra 125 (126, 127) [AIR V 47 C 56] : 1960 Cri L Jour 487.

[6] 'Butter' as defined in the Prevention of Food Adulteration Rules, 1955, does not include butter which is prepared from curd. The definition cannot be extended by construing the word 'milk' as including 'milk products' like curd. ('58) I L R (1958) Bom 637 (644).

[7] If the quality or purity of butter falls below the standard prescribed by R. A. 11.05 of the Prevention of Food Adulteration Rules, 1955, or its constituents are in excess of the prescribed limits of variability, it shall be deemed to be adulterated within the meaning of S. 2. If the prescribed standard is not attained, the statute treats such butter, by fiction, as an adulterated food though in fact it is not adulterated. 1961 S C 1494 (1496) [AIR V 48 C 280] : 1961 (2) Cri L Jour 696.

[8] Sale of mixture of buffalo milk and cow milk—Proportion of mixture not known—On analysis sample found to contain less than prescribed minimum of non-fatty solids for cow milk—Mixture is adulterated milk within meaning of S. 2 (i) (l). 1961 All 590 (592, 593) [AIR V 48 C 156] (FB). (1960 Cri L Jour 1056 (2), *Overruled*.)

Section 2 (v) — Note 1

[1] An article purporting to be black-gram flour and containing 95.9 per cent. calcium carbonate and 3.6 per cent. sand with no

(*vi*) "Food (Health) Authority" means the Director of Medical and Health Services or the Chief Officer in charge of Health administration in a State by whatever name he is called;

(*vii*) "Local area" means any area, whether urban or rural, declared by the State Government by notification in the Official Gazette, to be a local area for the purposes of this Act;

(*viii*) "Local authority" means in the case of—

(*1*) a local area which is—

(*a*) a municipality, the municipal board or municipal corporation;

(*b*) a cantonment, the cantonment authority;

(*c*) a notified area, the notified area committee;

(*2*) any other local area, such authority as may be prescribed by the State Government under this Act;

(*ix*) "misbranded"—an article of food shall be deemed to be misbranded—

(*a*) if it is an imitation of, or is a substitute for, or resembles in a manner likely to deceive, another article of food under the name of which it is sold, and is not plainly and conspicuously labelled so as to indicate its true character;

(*b*) if it is falsely stated to be the product of any place or country;

(*c*) if it is sold by a name which belongs to another article of food;

(*d*) if it is so coloured, flavoured or coated, powdered or polished that the fact that the article is damaged is concealed or if the article is made to appear better or of greater value than it really is;

(*e*) if false claims are made for it upon the label or otherwise;

Section 2 (v) — Note 1 (*contd.*)

black-gram flour in it at all, did not constitute food within the meaning of S. 2 (v). 1959 Ker 217 (217) [AIR V 46 C 77] : 1959 Cri L Jour 840 (DB).

[2] If the definition in S. 2 (v) is read as a whole, it appears that an article which is not ordinarily used as food or drink is not to be treated as food. Linseed oil is not a common article of food in the country, at least in Uttar Pradesh. It does not therefore, amount to 'food' as defined by the Act and there is no question of its storing as adulterated food for sale within S. 7. ('60)1960 All LJ 94(97)(DB).

Section 2 (vii) — Note 1

[1] The definitions of 'local area' and 'local authority' supplement each other and these should be read together and not singly. It is then clear that certain existing areas were accepted as local areas by the legislature. A Municipality, a Cantonment and a Notified area were thus accepted as a local area by the legislature when it passed the statute. 1960 All 119 (121) [AIR V 47 C 23] : 1960 Cri L Jour 199 (DB). (*Held* that as the definition of 'local authority' in the U. P. Pure Foods Act, 1950, so far as it related to a Municipal Board was incorporated in the Central Act, the definition was operative even after the repeal of the U. P. Act.)

Section 2 (viii) — Note 1

[1] An 'Administrator' under S. 554 of the Bengal Municipal Act is not 'local authority' within the meaning of S. 2 (viii) of the Act. ('58) 1958 Cri L Jour 169 (2) (173) (Cal).

[2] Tripura municipality superseded—District Magistrate appointed Administrator — Sanction by him is by local authority. 1961 Tripura 18 (19) [AIR V 48 C 7] : 1961 (2) Cri L Jour 152 ✠ 1961 Tripura 52 (55) [AIR V 48 C 20] : 1961 (2) Cri L Jour 807.

Section 2 (ix) — Note 1

[1] When there is absolutely no evidence to show that the article seized is an imitation or is a substitute for such an article or that it resembles another article of food under the name of which it was sold, the report of the analyst which has only given the analysis of the contents would not go to prove that it was an imitation or a substitute. 1958 Andh Pra 681 (683) [AIR V 45 C 198] : 1958 Cri L Jour 1375. (Sale of turmeric powder for external use — No proof that it was sold as article of food or that it resembled another article — Accused held not guilty.)

[2] The term "misbranded food" as defined in S. 2 (ix) will apply to an article purporting to be black-gram flour and containing 95·9 per cent calcium carbonate and 3·6 per cent sand with no black-gram flour in it at all, though it does not constitute food within S. 2 (v). 1959 Ker 217 (217) [AIR V 46 C 77] : 1959 Cri L Jour 840 (DB).

[3] Misbranding per se is an offence. As far as S. 2 (ix) (g) is concerned, even if mustard oil of one brand is passed off as mustard oil of another brand in sealed tins it will amount to misbranding. 1961 Tripura 18 (21) [AIR V 48 C 7] : 1961 (2) Cri L Jour 152.

(f) if, when sold in packages which have been sealed or prepared by or at the instance of the manufacturer or producer and which bear his name and address, the contents of each package are not conspicuously and correctly stated on the outside thereof within the limits of variability prescribed under this Act;

(g) if the package containing it, or the label on the package bears any statement, design or device regarding the ingredients or the substances contained therein, which is false or misleading in any material particular; or if the package is otherwise deceptive with respect to its contents;

(h) if the package containing it or the label on the package bears the name of a fictitious individual or company as the manufacturer or producer of the article;

(i) if it purports to be, or is represented as being, for special dietary uses, unless its label bears such information as may be prescribed concerning its vitamin, mineral, or other dietary properties in order sufficiently to inform its purchaser as to its value for such uses;

(j) if it contains any artificial flavouring, artificial colouring or chemical preservative, without a declaratory label stating that fact or in contravention of the requirements of this Act or rules made thereunder;

(k) if it is not labelled in accordance with the requirements of this Act or rules made thereunder;

(x) "package" means a box, bottle, casket, tin, barrel, case, receptacle, sack, bag, wrapper or other thing in which an article of food is placed or packed ;

(xi) "premises" include any shop, stall, or place where any article of food is sold or manufactured or stored for sale ;

(xii) "prescribed" means prescribed by rules made under this Act;

(xiii) "sale" with its grammatical variations and cognate expressions, means the sale of any article of food, whether for cash or on credit or by way of exchange and whether by wholesale or retail, for human consumption or use, or for analysis, and includes an agreement for sale, an offer for sale, the exposing for sale or having in possession for sale of any such article, and includes also an attempt to sell any such article;

(xiv) "sample" means a sample of any article of food taken under the provisions of this Act or of any rules made thereunder ;

(xv) the words "unwholesome" and "noxious" when used in relation to an article of food mean respectively that the article is harmful to health or repugnant to human use.

Section 2 (xii) — Note 1

[1] Where an accused was convicted for selling adulterated milk on the report of the Public Analyst which was based on the mean standard created by himself and had no statutory support it was held that there being no statutory standards of quality or statutory limits of componental variability for mixed milk of cow and buffalo the conviction could not be sustained. 1960 All 504 (505) [AIR V 47 C 130] : 1960 Cri L Jour 1056 (2).

Section 2 (xiii) — Note 1

[1] Selling turmeric powder, which is an article of food, containing any foreign substance is an offence punishable under S. 16 (1) read with S. 7 and R. 44 (h). However in the absence of evidence to show that the accused sold this as an article of food, he cannot be held guilty. 1958 Andh Pra 681 (682) [AIR V 45 C 198] : 1958 Cri L Jour 1375.

CENTRAL COMMITTEE FOR FOOD STANDARDS AND CENTRAL FOOD LABORATORY

3. The Central Committee for Food Standards.

(1) The Central Government shall, as soon as may be after the commencement of this Act, constitute a Committee called the Central Committee for Food Standards to advise the Central Government and the State Governments on matters arising out of the administration of this Act and to carry out the other functions assigned to it under this Act.

(2) The committee shall consist of the following members, namely :—

(a) the Director-General, Health Services, *ex officio*, who shall be the Chairman;

(b) the Director of the Central Food Laboratory, *ex officio*;

(c) two experts nominated by the Central Government;

(d) one representative each of the Central Ministries of Food and Agriculture, Commerce and Industry, Railways and Defence nominated by the Central Government;

(e) one representative each nominated by the Government of each [a][* * *] State;

(f) two representatives nominated by the Central Government to represent the [b][Union territories];

(g) two representatives of industry and commerce nominated by the Central Government;

(h) one representative of the medical profession nominated by the Indian Council of Medical Research.

(3) The members of the Committee referred to in clauses *(c)*, *(d)*, *(e)*, *(f)*, *(g)* and *(h)* of sub-section *(2)* shall, unless their seats become vacant earlier by resignation, death or otherwise, be entitled to hold office for three years and shall be eligible for renomination.

(4) The functions of the Committee may be exercised notwithstanding any vacancy therein.

(5) The Committee may appoint such and so many sub-committees as it deems fit and may appoint to them persons who are not members of the Committee to exercise such powers and perform such duties as may, subject to such conditions, if any, as the Committee may impose, be delegated to them by the Committee.

(6) The Committee may, subject to the previous approval of the Central Government, make bye-laws for the purpose of regulating its own procedure and the transaction of its business.

[a] The words "Part A State and Part B" were *omitted* by 3 **A. L. O.**, 1956 [w. r. e. f. 1-11-1956]. [b] *Substituted* for "Part C States", *ibid.*

4. Central Food Laboratory.

(1) The Central Government may, by notification in the Official Gazette,—

(a) establish a Central Food Laboratory; or

(b) specify any laboratory or institute as a Central Food Laboratory;

to carry out the functions entrusted to the Central Food Laboratory by this Act or any rules made under this Act.

(2) The Central Government may, after consultation with the Committee, make rules prescribing—

(a) the functions of the Central Food Laboratory;

(b) the procedure for the submission to the said Laboratory of samples of articles of food for analysis or tests, the forms of the Laboratory's reports thereon and the fees payable in respect of such reports;

(c) such other matters as may be necessary or expedient to enable the said Laboratory to carry out its functions.

GENERAL PROVISIONS AS TO FOOD

5. Prohibition of import of certain articles of food.

No person shall import into India—

(i) any adulterated food;

(ii) any misbranded food;

(iii) any article of food for the import of which a licence is prescribed, except in accordance with the conditions of the licence; and

(iv) any article of food in contravention of any other provision of this Act or of any rule made thereunder.

6. Application of law relating to sea customs and powers of Customs Officers.

(1) The law for the time being in force relating to sea customs and to goods, the import of which is prohibited by section 18 of the Sea Customs Act, 1878 shall, subject to the provisions of section 16 of this Act, apply in respect of articles of food, the import of which is prohibited under section 5 of this Act, and officers of Customs and officers empowered under that Act to perform the duties imposed thereby on a Customs Collector and other officers of Customs shall have the same powers in respect of such articles of food as they have for the time being in respect of such goods as aforesaid.

(2) Without prejudice to the provisions of sub-section *(1)* the Customs Collector, or any officer of the Government authorised by the Central Government in this behalf, may detain any imported package which he suspects to contain any article of food the import of which is prohibited under section 5 of this Act and shall forthwith report such detention to the Director of the Central Food Laboratory and, if required by him, forward the package or send samples of any suspected article of food found therein to the said Laboratory.

7. Prohibition of manufacture, sale, etc., of certain articles of food.

No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute—

(i) any adulterated food;

(ii) any misbranded food;

(iii) any article of food for the sale of which a licence is prescribed, except in accordance with the conditions of the licence;

(iv) any article of food the sale of which is for the time being prohibited by the Food (Health) Authority with a view to preventing the outbreak or spread of infectious diseases; or

(v) any article of food in contravention of any other provision of this Act or of any rule made thereunder.

Section 7 — Note 1

[1] It is not the object of the Act to make storage or distribution otherwise than for sale any more than the manufacture of it. The words 'for sale' in the section should be read into the words 'store' and 'distribute' appearing in the section. Therefore it is only storage for sale that is prohibited under section 16 and not storage simpliciter. 1959 Ker 190 (194) [AIR V 46 C 65] : I L R (1959) Ker 56 : 1959 Cri L Jour 712 (DB). (Number of bags filled with pepper found in premises of its exporter—Bags marked with name of city of Calcutta—Pepper found adulterated with deteriorated and light berries—*Held* in the circumstances that it could be presumed under S. 114, Evidence Act, that pepper had been stored for sale.) ✠ 1960 Andh Pra 366 (366, 367) [AIR V 47 C 117] : 1960 Cri L Jour 886. (Mere storing of adulterated ghee by hotel keeper with intent to serve or use it in preparation of food — No evidence to show that it was actually so used—No offence under S. 7.)

[2] The provisions of Ss. 7 and 16 make it quite clear that the person who can be punished for committing the offence is not only the person who actually sells the adulterated food, but also the person on whose behalf the adulterated food is sold. 1960 All 117 (118) [AIR V 47 C 22] : ILR (1959) 2 All 121 : 1960 Cri L Jour 198 (DB). (Sale by servant—His master is also guilty of the offence.) ✠ 1959

Section 7 — Note 1 *(contd.)*
Bom 497 (498) [AIR V 46 C 148] : ILR (1959) Bom 1108 : 1959 Cri L Jour 1306. (Do.)

[3] Every person, be he an employer or an agent is prohibited from selling adulterated food and infringement of the prohibition is by S. 16, penalised. If the owner of a shop in which adulterated food is sold is without proof of mens rea liable to be punished for sale of adulterated food, there is no reason why an agent or a servant of the owner is not liable to be punished for contravention of the same provision unless he is shown to have guilty knowledge. 1961 S C 631 (632, 633) [A I R V 48 C 96] : 1961 (1) Cri L Jour 747. (AIR 1959 Mad 185, *Overruled.*) ✣ 1961 Assam 128 (129) [A I R V 48 C 40] : 1961 (2) Cri L Jour 456 (SB).

[But see 1960 Ker 13 (13) [AIR V 47 C 4] : ILR (1959) Ker 640 : 1960 Cri L Jour 69 (DB). ✣ ('60) 1960 Ker L T 773 (773) ✣ 1960 Mys 80 (82, 83) [AIR V 47 C 21] : 1960 Cri L Jour 494 (DB). (A servant who sells milk for his master comes within the mischief of the word 'distribute' contained in S. 7. 'Knowledge' is not a necessary ingredient of any offence under S. 7. A I R 1959 Mad 185, *Dissented from.*)

[4] Where the prosecution has failed to prove that an article was sold by the accused as an article of food and there is positive evidence on behalf of the accused that he sold the article for external use only, he cannot be held guilty under R. 44 (h). 1958 Andh Pra 681 (682, 683) [AIR V 45 C 198] : 1958 Cri L Jour 1375.

[5] Where a person sells mustard oil which is found to be mixed not with other edible oils but with a foreign ingredient, it is true he does not infringe R. 44, but he infringes S. 7 (i) which is an entirely different provision. ('61) 1961 (2) Cri L Jour 447 (447) (All).

[6] If an accused, a dealer in black-gram flour, was found to have stored and exposed for sale to the public in his shop some article purporting to be black-gram flour, a sample recovered from which, on chemical analysis, was found to contain 95.9 per cent. calcium carbonate and 3.6 per cent. sand with no black-gram flour in it at all, the accused stored in his shop "misbranded food" although the article stored did not constitute "food" as defined in S. 2 (v) and a conviction under S. 7 (1) read with S. 16 (1) (a) should follow. 1959 Ker 217 (217) [A I R V 46 C 77] : 1959 Cri L Jour 840 (DB). (There was, however, no conviction in this case as prosecution evidence was not believed.)

[7] Under the Act and the rules framed thereunder, the moisture content of butter should not exceed 16 per cent. The fact that in butter obtained by the hand-churning process adopted in village parts it is impossible and is not practicable to avoid the higher percentage of moisture is no justifiable defence in a prosecution for selling butter containing more than the permitted moisture content which is contrary to the Rules. ('58) 1958-2 Mad L Jour 408 (411).

[8] Sale of mixture of buffalo milk and cow milk—Proportion of mixture not known—On analysis sample found to contain less than prescribed minimum non-fatty solids for cow milk—Accused is guilty under S. 16 read with S. 19. 1961 All 590 (593) [A I R V 48 C 156] (FB). (AIR 1960 All 504, *Overruled.*)

[9] Where there is no evidence that the admixture of empty shells of pepper could have injurious effect when consumed, and there is no evidence to show what is considered to be good pepper and pepper may be good though it may not be the best quality pepper, in the absence of any standard prescribing the quality of good pepper, the conviction of the accused for selling pepper mixed with a large percentage of pepper shells, as good pepper cannot be sustained. 1959 All 500 (503, 504) [A I R V 46 C 128] : I L R (1958) 2 All 618 : 1959 Cri L Jour 930 (DB).

[10] Where there is absolutely no evidence to show that the article seized is an imitation or is a substitute for such an article or that it resembles another article of food under the name of which it was sold, the report of the analyst which has only given the analysis of the contents would not go to prove that it was imitation or a substitute. 1958 Andh-Pra 681 (683) [AIR V 45 C 198]: 1958 Cri L Jour 1375.

[11] The Court has nothing to do with the discretion of the Public Analyst in recommending or not recommending the prosecution of the accused. So far as the Courts are concerned if the milk is adulterated, it is an offence and the offenders have to be punished if they are prosecuted. It is for the Government to choose to prosecute them or not. 1960 Mys 80 (82) [A I R V 47 C 21] : 1960 Cri L Jour 494 (DB).

[12] Where three cases under S. 16 (1) (a) read with S. 7 (v) of the Act were tried jointly, with the consent of the prosecution and one set of evidence was given in the cases and the Magistrate wrote one judgment it was held that since the three offences of the same nature committed in the course of twelve months might be charged and tried together in view of the provisions of Cri. P. C., the procedure adopted by the Magistrate was proper. ('58) 1958 Cri L Jour 169 (2) (172) (Cal).

[13] Rule A. 11.05, App. B. of the Act shows that butter, as referred to in the Act implies the product prepared exclusively from the milk or cream of cow or buffalo or both. Hence even if there is some admixture of goat butter and other butter it would not fall within the definition. 1961 Mad 198 (199) [A I R V 48 C 56] : 1961 (1) Cri L Jour 675.

[14] Accused caught, filling empty tins with embossed marks of different particular brands displayed on them, with mustard oil from a barrel bearing no particular brand — After filling, tins sealed — Accused are guilty of offence of misbranding without proof of adulteration or any intention to mislead or deceive the public — Question is whether the public are likely to be deceived. 1961 Tripura 18 (21) [AIR V 48 C 7] : 1961 (2) Cri L Jour 152.

ANALYSIS OF FOOD

8. Public analysts.

The State Government may, by notification in the Official Gazette, appoint persons in such number as it thinks fit and possessing such qualifications as may be prescribed, to be public analysts and define the local areas over which they shall exercise jurisdiction :

Provided that no person who has any financial interest in the manufacture, import or sale of any article of food shall be so appointed:

Provided further that the State Government may appoint one public analyst for two or more local areas, such local areas being regarded as one unit for the purposes of this Act.

9. Food inspectors.

(1) Subject to the provisions of section 14 the State Government may, by notification in the Official Gazette, appoint persons in such number as it thinks fit, having the prescribed qualifications to be food inspectors for the purposes of this Act, and they shall exercise their powers within such local areas as that Government may assign to them:

Provided that no person who has any financial interest in the manufacture, import or sale of any article of food shall be so appointed.

(2) Every food inspector shall be deemed to be a public servant within the meaning of the Indian Penal Code.

10. Powers of food inspectors.

(1) A food inspector shall have power—

(a) to take samples of any article of food from—

(i) any person selling such article;

(ii) any person who is in the course of conveying, delivering or preparing to deliver such article to a purchaser or consignee;

(iii) a consignee after delivery of any such article to him; and

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Section 8 — Note 1

[1] A person appointed as Public Analyst under the U. P. Pure Food Act, 1950, which Act was repealed by virtue of S. 25 of this Act, cannot be deemed a Public Analyst for the purposes of this Act. 1960 All 546 (546) [AIR V 47 C 151] : 1960 Cri L Jour 1175 (FB). (AIR 1960 All 117, *Overruled* on this point.)

[2] The word 'person' in S. 8 does not necessarily mean that the person should be described by name. It is open to the State Government to appoint a person holding a particular office as a Public Analyst provided the other requirements of S. 8 are satisfied. 1960 Guj 34 (36) [AIR V 47 C 13] : 1960 Cri L Jour 1582 (DB). (Government appointing Officer in charge of Public Health Laboratory of certain Municipality as Public Analyst — Power of appointment not delegated — On leave of the officer, municipality appointing another to officiate in his place—Such person not a Public Analyst.)

Section 9 — Note 1

[1] A Food Inspector duly appointed under the previous Act, who takes samples of adulterated milk under the provisions of the present Act is a person competent to act as such when the offence takes place. 1960 All 117 (118) [AIR V 47 C 22] : ILR (1959) 2 All 121 : 1960 Cri L Jour 198 (DB). (Similar argument with regard to the appointment of Public Analyst was rejected in AIR 1960 All 546 (FB) and this case was overruled on that point.)

[2] Sanitary Inspectors can be appointed by virtue of their office as Food Inspector under S. 9. 1960 Andh-Pra 282 (282) [A I R V 47 C 86] : 1960 Cri L Jour 569.

Section 10 — Note 1

[1] Though the section is headed as "Powers of Food Inspectors" all the sub-sections of it do not deal with powers of a Food Inspector, some deal with his powers and some with his duties. A vendor can be punished for preventing an Inspector from exercising his powers under the Act but cannot be punished for preventing him from doing his duties. 1959 All 753 (754) [A I R V 46 C 222] : 1959 Cri L Jour 1382. (Refusal to accept the price of the sample taken by the Inspector is not an offence and a vendor cannot be punished for the same.)

[2] It is not obligatory on the part of the Food Inspector to seize the entire stock in the shop at the time of purchasing the article for the purpose of analysis. 1960 Andh-Pra 96 (97) [AIR V 47 C 32] : 1960 Cri L Jour 212.

[3] If a person selling the article leaves the shop he prevents the Food Inspector from

(b) to send such sample for analysis to the public analyst for the local area within which such sample has been taken;

(c) with the previous approval of the health officer having jurisdiction in the local area concerned, or with the previous approval of the Food (Health) Authority, to prohibit the sale of any article of food with a view to preventing the outbreak or spread of any infectious disease.

(2) Any food inspector may enter and inspect any place where any article of food is manufactured, stored or exposed for sale and take samples of such articles of food for analysis.

(3) Where any sample is taken under clause *(a)* of sub-section *(1)* or sub-section *(2)*, its cost calculated at the rate at which the article is usually sold to the public shall be paid to the person from whom it is taken.

(4) If any article intended for food appears to any food inspector to be adulterated or misbranded, he may seize and carry away or keep in the safe custody of the vendor such article in order that it may be dealt with as hereinafter provided.

(5) The power conferred by this section includes power to break open any package in which any article of food may be contained or to break open the door of any premises where any article of food may be kept for sale:

Provided that the power to break open the door shall be exercised only after the owner or any other person in occupation of the premises, if he is present therein, refuses to open the door on being called upon to do so:

Provided further that the food inspector shall, in exercising the powers of entry upon, and inspection of any place under this section, follow, as far as may be, the provisions of the Code of Criminal Procedure, 1898, relating to the search or inspection of a place by a police officer executing a search warrant issued under that Code.

Section 10 — Note 1 *(contd.)*

taking sample as authorised by the Act. Section 10 (4) does not deal with taking of samples at all and the fact that the Food Inspector could have taken away the entire stock under S. 10 (4) would not amount to taking of sample. Further supposing that there were two methods of obtaining sample one under S. 10 (1) and the other under S. 10 (4), it is not necessary that the prevention to be 'prevention' under S. 16 (b) should have been prevention in both the methods before action could be taken against the accused. In cases of prevention overt act on the part of the accused is not necessary. But even if considered necessary if a person disappears from the shop, he has done an overt act by means of which he has made it impossible for the Food Inspector to obtain a sample from him. 1961 All 103 (104) [A I R V 48 C 27] : 1961 (1) Cri L Jour 204 (DB). (A I R 1957 Punj 99, *Diss. from.*)

Sub-section (7)

[4] Section 10 (7) comes into play only when samples are taken. It is introduced by way of guarantee that the Sanitary Inspector has taken the particular sample from the accused. 1958 Mad 382 (383) [AIR V 45 C 122] : 1958 Cri L Jour 915.

[5] The direction given by S. 10 (7) is prefixed by the words "as far as possible" and consequently, it is not absolute in its terms. The language thus shows that the provision for calling two persons as witnesses is directory and not mandatory and consequently the irregularity in not complying with it in terms would not vitiate the whole trial. 1960 Madh-Pra 179 (180) [A I R V 47 C 86] : 1960 Cri L Jour 913+1960 Andh-Pra 96 (97) [A I R V 47 C 32] : 1960 Cri L Jour 212+('58) 1958 Andh. L T 760 (760). (Non-compliance is a curable irregularity.)

[*See also* 1960 Mys 80 (82) [AIR V 47 C 21]: 1960 Cri L Jour 494 (DB). (A contravention of S. 10 (7) does not *per se* vitiate the prosecution. Essential test is one of prejudice to the accused apart from the reliability of the evidence adduced.)]

[But see 1959 Ker 351 (352) [A I R V 46 C 117] : 1959 Cri L Jour 1323 (DB). (Where the Food Inspector has not complied with S. 10 (7) conviction cannot be entered. Even if treated as an irregularity it cannot be said that accused was not prejudiced by the omission.)+1960 Ker 356 (358) [AIR V 47 C 166] : 1960 Cri L Jour 1467 (DB). (The non-compliance with the requirements of sub-sec. (7) of S. 10 is a serious irregularity causing prejudice to accused.)]

[6] The expression "as far as possible" used in sub-s. (7) is intended to obviate the necessity of the presence of two persons and securing their signatures if the circumstances under which the Inspector takes the sample were such that there could not possibly be two persons present at the time. It does not mean that when two persons are available he can dispense with them and take protection under the expression "as far as possible".

(6) Any material found in the possession of a manufacturer of any article of food or in any of the premises occupied by him as such and being apparently of a kind which may be employed for purposes of adulteration and for the possession of which he is unable to account to the satisfaction of the food inspector, may be seized by the food inspector and if necessary a sample of such material submitted for analysis to a public analyst.

(7) Where the food inspector takes any action under clause *(a)* of sub-section *(1)*, sub-section *(2)*, sub-section *(4)* or sub section *(6)*, he shall, as far as possible, call not less than two persons to be present at the time when such action is taken and take their signatures.

(8) Any food inspector may exercise the powers of a police officer under section 57 of the Code of Criminal Procedure, 1898 for the purpose of ascertaining the true name and residence of the person from whom a sample is taken or an article of food is seized.

(9) Any food inspector exercising powers under this Act or under the rules made thereunder who—

(a) vexatiously and without any reasonable grounds of suspicion seizes any article of food ; or

(b) commits any other act to the injury of any person without having reason to believe that such act is necessary for the execution of his duty

shall be guilty of an offence under this Act and shall be punishable for such offence with fine which may extend to five hundred rupees.

11. Procedure to be followed by food inspectors.

(1) When a food inspector takes a sample of food for analysis, he shall—

(a) give notice in writing then and there of his intention to have it so analysed to the person from whom he has taken the sample ;

(b) except in special cases provided by rules under this Act separate the sample then and there into three parts and mark and seal or fasten up each part in such a manner as its nature permits ;

(c) (i) deliver one of the parts to the person from whom the sample has been taken ; and

(ii) send another part for analysis to the public analyst ; and

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Section 10 — Note 1 *(co td.)*

1959 Mad 118 (118, 119) [AIR V 46 C 38] : 1959 Cri L Jour 336.

[**But see** ('59) 1959 All L Jour 624 (625, 626). (AIR 1959 Mad 118. *Dissented from.*)]

[7] Law does not require that the witnesses called by the Food Inspector while taking action under sub-ss. 1 (a), 2, 4 or 6, or any of them should be examined at the time of trial. In the circumstances of any particular case, the prosecution may choose to examine one or more of these witnesses. If the Court is unable to place full faith on the evidence of the concerned Food Inspector the non-examination of the attestors may assume importance. 1960 Mys 80 (82) [AIR V 47 C 21]: 1960 Cri L Jour 494 (DB).

[8] Sub-section (7) of S. 10 of the Prevention of Food Adulteration Act requires a Food Inspector to do no more than call two persons to witness the seizure and the sampling of food suspected to be adulterated. He has no power to compel them to be present. The words 'as far as possible' occurring in subs. (7) of S. 10 indicate that this is a mere directory provision and not a mandatory provision, the contravention of which, would have the effect of rendering the seizure illegal and the subsequent prosecution invalid even if there be no prejudice. ('61) 1961-2 Andh W R 90 (91).

Section 11 — Note 1

[1] Section 11 does not deal with a Food Inspector's powers at all; it prescribes the procedure to be followed by him when he takes the sample; in other words, it lays down his duties. 1959 All 753 (754) [AIR V 46 C 222] : 1959 Cri L Jour 1382. (The vendors by refusing to accept the notice and one part of the sample offered by a Food Inspector, held could not be said to have prevented him from exercising his powers or even from performing his duties.)

[2] Notice in writing of taking sample for analysis should be given to accused from whom sample is taken — Notice addressed to first accused who was owner of shop, served on second accused from whom sample is taken —Not sufficient service of notice on second accused — Failure to issue notice to second accused is vital defect vitiating prosecution. 1960 Ker 356 (358) [AIR V 47 C 166] : 1960 Cri L Jour 1467 (DB).

(iii) retain the third part for production in case any legal proceedings are taken or for analysis by the Director of the Central Food Laboratory under sub-section *(2)* of section 13, as the case may be.

(2) If the person from whom the sample has been taken declines to accept one of the parts, the food inspector shall send intimation to the public analyst of such refusal and thereupon the public analyst receiving a sample for analysis shall divide it into two parts and shall seal or fasten up one of those parts and shall cause it, either upon receipt of the sample or when he delivers his report, to be delivered to the food inspector who shall retain it for production in case legal proceedings are taken.

(3) When a sample of any article of food is taken under sub-section *(1)* or sub-section *(2)* of section 10, the food inspector shall send a sample of it in accordance with the rules prescribed for sampling to the public analyst for the local area concerned.

(4) An article of food seized under sub-section *(4)* of section 10, shall be produced before a Magistrate as soon as possible :

Provided that in the case of any article of which samples have been sent to the public analyst for analysis it may be produced on or after the receipt of the report of the public analyst :

Provided further that if an application is made to the Magistrate in this behalf by the person from whom any article of food has been seized, the Magistrate shall by order in writing direct the food inspector to produce such article before him within such time as may be specified in the order.

(5) If it appears to the Magistrate on taking such evidence as he may deem necessary that the article of food produced before him under sub-section *(4)* is adulterated, he may order it—

(a) to be forfeited to the local authority, or

(b) to be destroyed at the cost of the owner or the person from whom it was seized so as to prevent its being used as human food, or

(c) to be so disposed of as to prevent its being again exposed for sale or used for food under its deceptive name, or

(d) to be returned back to the owner for being sold under its appropriate name, after taking adequate guarantee from the owner.

(6) If it appears to the Magistrate that any such article of food is not adulterated the person from whose possession the article was taken shall be entitled to have it restored to him and it shall be in the discretion of the Magistrate to award such person from such fund as the State Government may direct in this behalf, such compensation not exceeding the actual loss which he has sustained as the Magistrate may think proper.

12. Purchaser may have food analysed.

Nothing contained in this Act shall be held to prevent a purchaser of any article of food other than a food inspector from having such article analysed by the public analyst on payment of such fees as may be prescribed and from receiving from the public analyst a report of his analysis :

Provided that such purchaser shall inform the vendor at the time of purchase of his intention to have such article so analysed :

Provided further that the provisions of sub-section *(1)*, sub-section *(2)* and sub-section *(3)* of section 11 shall, as far as may be, apply to a purchaser of article of food who intends to have such article so analysed as they apply to a food inspector who takes a sample of food for analysis :

Section 12 — Note 1

[1] If the appointment of a Sanitary Inspector as a Food Inspector is valid, he cannot be a purchaser within the meaning of S. 12, as the section specifically excludes him from the category of purchasers. 1960 Andh Pra 282 (286) [AIR V 47 C 86] : 1960 Cri L Jour 569.

Provided also that if the report of the public analyst shows that the article of food is adulterated, the purchaser shall be entitled to get refund of the fees paid by him under this section.

13. Report of public analyst.

(1) The public analyst shall deliver, in such form as may be prescribed, a report to the food inspector of the result of the analysis of any article of food submitted to him for analysis.

(2) After the institution of a prosecution under this Act the accused vendor or the complainant may, on payment of the prescribed fee, make an application to the Court for sending the part of the sample mentioned in sub-clause *(i)* or sub-clause *(iii)* of clause *(c)* of sub-section *(1)* of section 11 to the Director of the Central Food Laboratory for a certificate ; and on receipt of the application the Court shall first ascertain that the mark and seal or fastening as provided in clause *(b)* of sub-section *(1)* of section 11 are intact and may then despatch the part of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the Court in the prescribed form within one month from the date of receipt of the sample, specifying the result of his analysis.

(3) The certificate issued by the Director of the Central Food Laboratory under sub-section *(2)* shall supersede the report given by the public analyst under sub-section *(1)*.

(4) Where a certificate obtained from the Director of the Central Food Laboratory under sub-section *(2)* is produced in any proceeding under this Act, or under sections 272 to 276 of the Indian Penal Code, it shall not be necessary in such proceeding to produce any part of the sample of food taken for analysis.

(5) Any document purporting to be a report signed by a public analyst, unless it has been superseded under sub-section *(3)*, or any document purporting to be a certificate signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under this Act or under sections 272 to 276 of the Indian Penal Code :

Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory shall be final and conclusive evidence of the facts stated therein.

MISCELLANEOUS

14. Import of food and sale of food in railway and other premises.

(1) The Central Government may, by notification in the Official Gazette, appoint any person to exercise the powers of a food inspector under sections 10 and 11,—

(a) at any major port, air port or land customs station in respect of any article of food which is being imported through such port or station ;

Section 13 — Note 1

[1] Though under S. 13 (5) the report of a Public Analyst is admissible in evidence, such a special rule of evidence cannot abrogate the general rule of evidence, regarding proof of facts. Facts can always be proved by oral evidence and by evidence of experts. 1960 Guj 34 (37) [AIR V 47 C 13] : 1960 Cri L Jour 1582 (DB). (Oral evidence of Food Inspector, as an expert in the analysis of food and milk, was held admissible.)

[2] There is no direction in the rules framed under the Act to the effect that the report of a Public Analyst shall not be admissible in evidence without due compliance with certain rules. Public Analyst's report can be taken into consideration even in a case where there is non-compliance with some of the rules, the rules being directory in nature. ('57) 1957 All L Jour 89 (90).

[3] Where the law has prescribed in the case of milk the minimum content of non-fat solids all lumped together, it is not necessary for the Public Analyst to give a quantitative break up of different kinds of non-fat solids in his report. 1960 Madh-Pra 125 (126) [AIR V 47 C 56] : 1960 Cri L Jour 487.

[4] The certificate issued by the Director of the Central Food Laboratory under sub-s. (2) supersedes the report given by the public analyst under sub-s. (1). ('58) 1958-2 Mad L Jour 408 (410). (Sale of country butter — Percentage of moisture and other fats as given in Director's certificate exceeding those in Public analyst's report—Former is final.)

(b) in respect of any railway station or group of railway stations where food is being sold :

Provided that the Central Government may, instead of making any appointment under this section, authorise any food inspector in any State in which the major port, air port or land customs station or railway station is situate to exercise such powers.

(2) Every person appointed or authorised under sub-section *(1)* shall be deemed to be a food inspector for the purposes of this Act.

15. Notification of food poisoning.

The State Government may, by notification in the Official Gazette, require medical practitioners carrying on their profession in any local area specified in the notification to report all occurrences of food poisoning coming within their cognizance to such officer as may be specified in the notification.

16. Penalties.

(1) If any person—

(a) whether by himself or by any person on his behalf imports into India or manufactures for. sale, or stores, sells or distributes, any article of food in contravention of any of the provisions of this Act or of any rule made thereunder, or

(b) prevents a food inspector from taking a sample as authorised by this Act, or

(c) prevents a food inspector from exercising any other power conferred on him by or under this Act, or

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Section 16 — Note 1

[1] Where an accused is charged for selling adulterated milk, the first essential requisite to be established is that the milk from which the Inspector gets a small quantity from the vendor as sample is intended for sale. 1959 Mad 333 (333, 334) [AIR .V 46 C 96] : 1959 Cri L Jour 997.

[2] Rule 49 (2) applies to any food or ingredient of food which is ultimately intended for sale whether directly as such or as part of some other food prepared with it. Hence where chilly-paste is kept in an imperfect container (untinned container) in a hotel, the rule will be attracted as the chilly-paste is intended for use in the preparation made in the hotel. ('60) 1960-1 Mad L Jour 86 (86).

[3] A co-operative society and its secretary can be separately convicted for an offence under S. 16 (1). 1958 Mad 183 (183, 184) [AIR V 45 C 53] : 1958 Cri L Jour 527.

[4] Where in a trial of an offence under S. 16 (1) against a co-operative milk society the evidence disclosed that the day to day business of selling the milk was done by the clerk of the Society and the secretary, who was only a honorary secretary, was not going to the society daily and the business was left in the hands of the clerk with a check over him by the secretary, it would not make the Secretary a person who at the time of the offence was in charge and was responsible to the Society for the conduct of the business, within the meaning of S. 17 (1). In the absence of such evidence the conviction of the secretary under S. 16 (1) cannot be upheld. 1958 Mad 183 (183, 184) [AIR V 45 C 53] : 1958 Cri L Jour 527.

[5] If a person disappears from a shop, he does an overt act by means of which he makes it impossible for the Food Inspector to obtain a sample from him. Apart from this fact, in cases of prevention an overt act is not necessary. 1961 All 103 (104) [AIR V 48 C 27] : 1961 (1) Cri L Jour 204 (DB). (AIR 1957 Punj 99, *Dissented from.*)

[But see 1957 Punj 99 (100) [AIR V 44 C 50] : 1957 Cri L Jour 656. (Refusal to give the sample even on payment is not the same thing as prevention which need not have an element of physical obstruction but involves some act which hinders an Inspector from taking a sample.)]

[6] Even if there were two methods of obtaining sample, one under S. 10 (1) and the other under S. 10 (4), is is not necessary that the prevention to be prevention under S. 16(b) should have been prevention in both the methods before action could be taken against the accused. 1961 All 103 (104) [A I R V 48 C 27] : 1961 (1) Cri L Jour 204 (DB).

[7] The refusal of the vendors to receive the price of the sample and the notice and to sign the receipt and the labels does not amount to their preventing the Inspector from taking a sample and hence, the vendors cannot be said to have committed the offence under S. 16 (1) (b) by such refusal. 1959 All 753 (754) [AIR V 46 C 222] : 1959 Cri L Jour 1382.

[8] Sale of mixture of buffalo milk and cow milk—Proportion of mixture not known—On analysis sample found to contain less than prescribed minimum of non-fatty solids for cow milk — Mixture is adulterated milk and accused is guilty under S. 16 read with S. 7.

(d) being a manufacturer of an article of food, has in his possession, or in any of the premises occupied by him, any material which may be employed for the purpose of adulteration, or

(e) being a person in whose safe custody any article of food has been kept under sub-section *(4)* of section 10, tampers or in any other manner interferes with such article, or

(f) uses any report or certificate of a test or analysis made by the Director of the Central Food Laboratory, or by a public analyst or any extract thereof for the purpose of advertising any article of food, or

(g) whether by himself or by any person on his behalf gives to the purchaser a false warranty in writing in respect of any article of food sold by him,

he shall, in addition to the penalty to which he may be liable under the provisions of section 6, be punishable—

(i) for the first offence, with imprisonment for a term which may extend to one year, or with fine which may extend to two thousand rupees, or with both ;

(ii) for a second offence with imprisonment for a term which may extend to two years and with fine :

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than one year and such fine shall not be less than two thousand rupees ;

Section 16 — Note 1 *(contd.)*

1961 All 590 (Prs 5, 7) [A I R V 48 C 156] (FB). (AIR 1960 All 504, *Overruled.*)

[9] Accused caught filling empty tins with embossed marks of different particular brands displayed on them, with mustard oil from a barrel bearing no particular brand — After filling tins sealed — Accused are guilty of offence of misbranding without proof of adulteration or any intention to mislead or deceive the public. 1961 Tripura 18 (21) [A I R V 48 C 7] : 1961 (2) Cri L Jour 152.

[10] 'Butter' as defined in the rules framed under the Prevention of Food Adulteration Act means the product prepared from the milk or cream of cow or buffalo or both. Hence even if there is some admixture of butter prepared from goats' milk with other butter, such stuff will not fall within the definition of butter as defined by the rules and the sale of such stuff would not be a punishable offence under the Act. 1961 Mad 198 (199) [A I R V 48 C 56] : 1961 (1) Cri L Jour 675.

[11] Every person, be he an employer or an agent, is prohibited from selling adulterated food and infringement of the prohibition is by S. 16 penalised. If the owner of a shop in which adulterated food is sold is without proof of *mens rea* liable to be punished for sale of adulterated food, there is no reason why an agent or a servant of the owner is not liable to be punished for contravention of the same provision unless he is shown to have guilty knowledge. 1961 S C 631 (632) [A I R V 48 C 96] : 1961 (1) Cri L Jour 747. (A I R 1959 Mad 185, *Overruled.*) ✣ 1961 Assam 128 (129) [A I R V 48 C 40] : 1961 (2) Cri L Jour 456 (SB).

[12] The words 'which may be employed for the purpose of adulteration' appearing in S. 16 (1) (d) are not used in the sense 'is capable of being employed for the purpose of adulteration.' They are really used in the sense that the material is, having regard to the circumstances of each particular case, likely to be used by the manufacturer concerned for the purpose of adulteration. What is punishable under S. 16 (1) (d) is possession, by a manufacturer of food, of an adulterant in circumstances which lead to the inference that he is keeping it for being used by him for purpose of adulteration. 1961 Ker 84 (86) [AIR V 48 C 26] : ILR (1960) Ker 1426 : 1961 (1) Cri L Jour 376.

[13] Clause (a) of S. 16 (1) relates only to the manufacture, storage, sale or distribution of an article of food. Tea waste is not an article of food. Storage of an adulterant by a person who is not a manufacturer of food is no offence even if the storage is for purposes of sale. 1961 Ker 84 (86) [A I R V 48 C 26] : I L R (1960) Ker 1426 : 1961 (1) Cri L Jour 376.

[14] Clause (ii) is not applicable unless cl. (i) has been applied once, i. e., there had been a previous conviction under this very Act. 1960 All 629 (631) [AIR V 47 C 183] : 1960 Cri L Jour 1298. (If an act was done when it was not punishable under S. 16 because it was not in force then, and is repeated after the enforcement of the Act which punishes it, it is not a repetition of an offence and the offence cannot be said to be a second offence.) ✣ 1959 All 695 (696) [AIR V 46 C 197] : 1959 Cri L Jour 1263 (DB).

[15] On the terms of S. 16 (1) including the proviso, for a second offence, first, imprisonment and fine must both be imposed; secondly, such punishment shall generally be imprisonment for not less than one year and fine not less than Rs. 2000, thirdly, special and adequate reasons must exist and must be stated in the judgment, for imposing a lesser sen-

(iii) for a third and subsequent offences, with imprisonment for a term which may extend to four years and with fine :

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than two years and such fine shall not be less than three thousand rupees.

(2) If any person convicted of an offence under this Act commits a like offence afterwards it shall be lawful for the Court before which the second or subsequent conviction takes place to cause the offender's name and place of residence, the offence and the penalty imposed to be published at the offender's expense in such newspapers or in such other manner as the Court may direct. The expenses of such publication shall be deemed to be part of the cost attending the conviction and shall be recoverable in the same manner as a fine.

Section 16 — Note 1 *(contd.)*

tence. ('61) 1961 (1) Cri L Jour 663 (663). (Where a Magistrate did not state any reason whatever in his judgment, for imposing a sentence of fine of Rs. 80 and gave an explanation that the accused was a widow and was poor it was held that widowhood, by itself had no relevance; and it was for the Magistrate primarily to exercise his discretion within the limits prescribed by law when some special circumstances had to be taken into consideration.) ✠1960 Madh Pra 125 (126) AIR V 47 C 56] : 1960 Cri L Jour 487. (The mere possibility that the offender may have got the milk from another, and sold it without knowing that it was adulterated is certainly not an adequate reason.) ✠ 1959 All 695 (695) [A I R V 46 C 197] : 1959 Cri L Jour 1263 (DB). (Any sentence less than that prescribed under the section is illegal.) ✠ ('59) 1959 All L Jour 751 (752). (Sentence of imprisonment only is illegal.)

[16] Accused, previous convict — Only sentence of 3 months rigorous imprisonment and fine of Rs. 500 awarded — State not applying for enhancement of sentence — Sentence not interfered with in appeal. 1960 Guj 34 (37) [AIR V 47 C 13] : 1960 Cri L Jour 1582 (DB).

[17] Charge for offence of selling adulterated oil clubbed with charge for enhanced punishment under S. 16 (1) (g) (ii)—Defect in charge prejudicing accused — No interference in appeal with acquittal of accused. 1960 Ker 356 (358) [AIR V 47 C 166] : 1960 Cri L Jour 1467 (DB).

[18] For the accusation of a second offence under S. 16 (1) (ii) the section provides for the enhanced penalty of imprisonment which may extend to two years. The case is, therefore, a warrant case. When the particulars of the first offence are furnished in the complaint the Magistrate should try the case under the provisions of Chap. XXI of the Cr. P. Code, and the proper stage for charging the accused, with the previous conviction and of recording evidence, if necessary in respect of that charge would be the stage mentioned in S. 255A. 1959 Ker 371 (372) [AIR V 46 C 127] : 1959 Cri L Jour 1330. (Trial of the case under Chap. XX of the Code, convicting the accused on his own admission of guilt, and ignoring the prior conviction on the ground that no evidence of that conviction was adduced before him whereas in reality he gave the prosecution no opportunity of adducing such evidence is irregular, if not stringent.)

[19] Offence under, being punishable with imprisonment which extends to two years must be tried as a warrant case—Trial as summons case—Irregularity is curable under S. 537, Criminal P. C., when accused is not prejudiced by adoption of such wrong procedure. 1961 All 590 (Pr 8) [AIR V 48 C 156] (FB).

[20] Widowhood of the accused by itself is not an adequate reason for awarding the lesser punishment. ('61) 1961 (1) Cri L Jour 663 (663) (Ker).

[21] For a conviction under S. 16 (1) (a) (ii), the second offence need not have been committed after the conviction for the previous offence. The subsequent offence might have been committed before the conviction for the previous offence. The words used in the two Cls. (i) and (ii) do not take into consideration the date of conviction for the first offence. ('59) 1959 All L Jour 751 (753).

[22] Awarding a previous convict a sentence less than the prescribed one for the reason that the accused was a poor man and was running a small dairy is not a judicial exercise of discretion. There is the same law for the rich and poor : When the legislature decided to lay down a minimum punishment to be awarded to a previous convict, that punishment must be awarded except in exceptional circumstances. Where the sample was found to be adulterated to a nominal extent or the adulteration was not an intentional act on the part of the accused, a lesser sentence could be awarded. But to say that a poor man should be given a lesser sentence than the minimum prescribed sentence would be in one way to defeat the purpose of enactment. ('59) 1959 All L Jour 624 (625).

[23] Under S. 16 (i) (a) (ii), Prevention of Food Adulteration Act, in case of a second offence, the charge of a previous conviction should be framed only after the accused had been found guilty and convicted of the main offence charged against him. ('61) ILR (1961) Ker 639 (645).

[24] Report of public analyst—Failure to mention in report what quantity of foreign substance is present in sample of article sent

17. Offences by companies.

(1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section *(1)*, where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section—

(a) "company" means any body corporate, and includes a firm or other association of individuals ; and

(b) "director" in relation to a firm means a partner in the firm.

18. Forfeiture of property.

Where any person has been convicted under this Act for the contravention of any of the provisions of this Act or of any rule thereunder, the article of food in respect of which the contravention has been committed may be forfeited to the Covernment.

19. Defences which may or may not be allowed in prosecutions under this Act.

(1) It shall be no defence in a prosecution for an offence pertaining to the sale of any adulterated or misbranded article of food to allege merely that the vendor was ignorant of the nature, substance or quality of the food sold by him or that the purchaser having purchased any article for analysis was not prejudiced by the sale.

Section 16 — Note 1 *(contd.)*

for analysis—Conviction cannot be based on such report. ('61) 63 Pun L R 37 (39).

Section 17 — Note 1

[1] The Secretary of a co-operative milk Society, having only supervisory duty, the day to day business of selling the milk being done by the clerk of the society, cannot be said to be a person who at the time of the offence was in charge and was responsible to the Society for the conduct of the business within the meaning of S. 17 (1). 1958 Mad 183 (184) [AIR V 45 C 53] : 1958 Cri L Jour 527.

[2] Where a co-operative milk society is prosecuted for an offence under the Act, the liability of its officers is an absolute liability as seen from S. 17 (1). It is unnecessary for the prosecution to prove that the officers knew that the milk offered for sale was adulterated. 1960 Mys 80 (81) [AIR V 47 C 21] : 1960 Cri L Jour 494 (DB).

[See however 1960 Andh Pra 584 (586) [AIR V 47 C 188] : 1960 Cri L Jour 1417. (Where there was no evidence to show that the accused, a Managing Director of certain Company, knew that the article in question was misbranded, held that since the essential element of knowledge has not been shown to have existed, the accused could not be said to have consented to or connived at the sale.)]

[3] Where at the time when a sample of the adulterated article was taken, it was found that the accused, one of the partners of the firm, was in charge of the shop and was transacting business on behalf of the firm, it was held that the Court below had fallen into a grave error in holding that the company alone and not the individual partner could be prosecuted under the Act. ('59) 1959-2 Andh W R 479 (480, 481.)

Section 19 — Note 1

[1] By S. 19 (1) in a prosecution for offence pertaining to the sale of any adulterated article of food, it is no defence merely to allege that the vendor was ignorant of the nature of the substance or quality of the food sold by him. Such a defence can only succeed if the person charged with selling adulterated food

(2) A vendor shall not be deemed to have committed an offence if he proves—

(i) that the article of food was purchased by him as the same in nature, substance and quality as that demanded by the purchaser and with a written warranty in the prescribed form, if any, to the effect that it was of such nature, substance and quality ;

(ii) that he had no reason to believe at the time when he sold it that the food was not of such nature, substance and quality ; and

(iii) that he sold it in the same state as he purchased it :

Provided that such a defence shall be open to the vendor only if he has submitted to the food inspector or the local authority a copy of the warranty with a written notice stating that he intends to rely on it and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to that person :

Provided further that the warranty given by a person resident in any area in which this Act is not in force, shall be a defence to the vendor only if the vendor proves to the satisfaction of the Court that he had taken reasonable steps to ascertain and did in fact believe in, the accuracy of the statement contained in the warranty.

(3) Any person by whom a warranty as is referred to in sub-section *(2)*, is alleged to have been given shall be entitled to appear at the hearing and give evidence.

20. Cognizance and trial of offences.

(1) No prosecution for an offence under this Act shall be instituted except by, or with the written consent of, the State Government or a local authority or a person authorised in this behalf by the State Government or a local authority :

Provided that a prosecution for an offence under this Act may be instituted by a purchaser referred to in section 12, if he produces in Court a copy of the report of the public analyst along with the complaint.

(2) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

Section 19 — Note 1 *(contd.)*

proves that the article of food was purchased as the same in nature, substance and quality as that demanded by the purchaser with a written warranty in the prescribed form. 1961 S C 631 (632) [AIR V 48 C 96] : 1961 (1) Cri L Jour 747.

[2] Warranty should form part of contract or should accompany the consignment—Warranty given after the seizure of goods and produced in court is not good. 1961 Assam 128 (Pr 5) [A I R V 48 C 40] : 1961 (2) Cri L Jour 456 (SB).

Section 20 — Note 1

[1] The sanction required by S. 20 is not an empty formality. The sanction must show that the authority giving the sanction had applied his mind to the alleged commission of an offence by the accused person and was satisfied that the accused has to be prosecuted for the said offence. The sanction must be for the prosecution of specified individuals and for specific offences. Hence a general sanction authorising the Food Inspector to Prosecute all offenders under the Act before a particular Court is invalid. 1960 Ker 356 (357) [AIR V 47 C 166] : 1960 Cri L Jour 1467 (DB) ✠

1961 Ker 84 (85) [AIR V 48 C 26] : ILR (1960) Ker 1426 : 1961 (1) Cri L Jour 376.

[2] Where prosecutions are filed on the basis of written consents granted by the competent person or authority, the specification of the name of the complainant is not a statutory requirement — the consent being to a specified prosecution. The written consent has to be filed by the complainant to be entertained and it is not as if the written consent will be available to all and sundry to be filed before the Magistrate. 1961 S C 1 (4) [AIR V 48 C 1] : 1961 (1) S C R 458 : 1961 (1) Cri L Jour 170. (AIR 1960 Bom 244, *Reversed.*)

[3] There is nothing in S. 20 which requires that a person should be appointed by the name before he can be authorised to lodge complaints. He can also be appointed by virtue of his office. Therefore, Sanitary Inspectors validly appointed under S. 9 as Food Inspectors have the power under S. 20 to file written complaints by virtue of their office. 1960 Andh Pra 282 (285) [AIR V 47 C 86] : 1960 Cri L Jour 569.

[4] The Commissioner of a Municipality does not fall within any of the seven categories of persons or authorities under S. 20. Therefore, the prosecution instituted on a

21. Magistrate's power to impose enhanced penalties.

Notwithstanding anything contained in section 32 of the Code of Criminal Procedure, 1898, it shall be lawful for any Presidency Magistrate or any Magistrate of the first class to pass any sentence authorised by this Act, in excess of his powers under section 32 of the said Code.

22. Protection of action taken in good faith.

No suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Section 20 — Note 1 *(contd.)*

complaint in writing by the Commissioner was held to be not valid, even though the Sanitary Inspector and the Health Officer of the Municipality had subscribed their signatures to the complaint. 1960 Andh Pra 27 (28) [A I R V 47 C 6] : 1960 Cri L Jour 46 ✣ 1960 Ker 356 (357) [A I R V 47 C 166] : 1960 Cri L Jour 1467 (DB).

[*See also* ('58) 1958 Cri L Jour 169 (2) (173) (Cal). (A prosecution instituted upon the sanction of the Administrator of the Howrah Municipality was held legally defective, not being a sanction of 'local authority' within the meaning of S. 2 (viii).)]

[5] Order by Administrator, Municipal Board, empowering Medical Officer of Health, Municipal Board, to launch prosecutions — Complaint lodged by Medical Officer is proper complaint. 1960 All 117 (118) [A I R V 47 C 22] : I L R (1959) 2 All 121 : 1960 Cri L Jour 198 (DB). (*Overruled* in AIR 1960 All 546 (FB) on another point.)

[6] Lucknow Municipality was held competent to institute prosecution even before Government Notification appointing local authorities was published on the ground that the definition of 'local authority,' so far as it related to a Municipal Board, which existed in the U. P. Pure Food Act, 1950, was incorporated in the Central Act without being repealed and was, therefore, operative even after the U. P. Act was repealed. 1960 All 119 (122) [AIR V 47 C 23] : 1960 Cri L Jour 199.

[7] A Sanitary Inspector authorised to launch prosecution under the Madras Prevention of Adulteration Act is not competent to launch a prosecution under S. 20 of the Act. ('57) 1957 Cri L Jour 75 (76) (Mad).

[8] Assistant Medical Officer of Health could not institute a complaint prior to the enforcement of the rules made by the State Government under the Act, as the Government had not authorised him by that date to prosecute any person for an offence under the Act. 1957 All 343 (1) (343) [A I R V 44 C 105] : 1957 Cri L Jour 615 (DB).

[9] On the terms of S. 20 (1) a prosecution could be instituted with the written consent not merely of the State Government but 'of a local authority' or 'a person authorized in this behalf by the State Government or a local authority'. On the language of the sub-section no other construction is possible. 1961 S C 1 (3) [AIR V 48 C 1] : 1961 (1) S C R 458 : 1961 (1) Cri L Jour 170. (1957 Cri L Jour 75 (Mad), *Overruled*.)

[10] Sanction by Administrator of Municipality — Presumption is that it was given on date on which it was shown to have been given — Allegation that it was antedated not made in grounds of appeal nor taken before trial Court—Appellate Court should not deal with allegation and hold that it was antedated. 1961 Tripura 18 (20) [AIR V 48 C 7] : 1961 (2) Cri L Jour 152✣1961 Tripura 52 (55) [AIR V 48 C 20] : 1961 (2) Cri L Jour 807.

[11] Where the Agartala Municipality was superseded by the Chief Commissioner under S. 292 of the Tripura Municipal Act and the Collector and District Magistrate of Tripura was appointed the Administrator, all the duties and powers which the Chairman, the Vice-Chairman, the Commissioners or Board of Commissioners were entitled to perform were to be performed or exercised by the administrator so appointed. Sanction accorded under S. 20 of the Prevention of Food Adulteration Act by the Administrator for the prosecution of persons under the Act, was therefore the sanction accorded by the 'local authority' within the meaning of the section. 1961 Tripura 18 (19, 20) [A I R V 48 C 7] : 1961 (2) Cri L Jour 152.

Section 21 — Note 1

[1] Section 21 of the Act is not a disabling provision. All that it does is to authorise a Magistrate of the first class to award a sentence beyond the limits prescribed for him under S. 32 of the Code. It does not affect the provisions of Ss. 207 and 347 of the Code nor has it anything to do with the jurisdiction of a Court of Session. The section does not make the commitment by a Magistrate competent to award the full sentence prescribed by the Act, a nullity ; nor does the section interfere with the jurisdiction of a Court of Session to deal with a matter committed to it in spite of its provisions. 1960 S C 905 (906) [AIR V 47 C 159] : 1960-3 S C R 427 : 1960 Cri L Jour 1378. (Where a Judicial Magistrate competent to award full sentence under S. 16 (1) (g) (iii) by virtue of S. 21 of the Act, commits the accused to stand his trial before the Court of Session, presumably acting under S. 347, Cr. P. Code, under impression that his power as a Magistrate of the first class to impose sentence was limited by S. 32 of the Code and the Sessions Judge tries the case and convicts and sentences the accused, neither is the commitment void, nor is the trial by the Sessions Judge without jurisdiction. AIR 1959 All 778, *Reversed*.)

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23. Power of the Central Government to make rules.

(1) The Central Government may, after consultation with the Committee and subject to the condition of previous publication, make rules[a]—

(a) specifying the articles of food or classes of food for the import of which a licence is required and prescribing the form and conditions of such licence, the authority empowered to issue the same and the fees payable therefor;

(b) defining the standards of quality for, and fixing the limits of variability permissible in respect of, any article of food;

(c) laying down special provisions for imposing rigorous control over the production, distribution and sale of any article or class of articles of food which the Central Government may, by notification in the Official Gazette, specify in this behalf including registration of the premises where they are manufactured, maintenance of the premises in a sanitary condition and maintenance of the healthy state of human beings associated with the production, distribution and sale of such article or class of articles;

(d) restricting the packing and labelling of any article of food and the design of any such package or label with a view to preventing the public or the purchaser being deceived or misled as to the character, quality or quantity of the article;

(e) defining the qualifications, powers and duties of food inspectors and public analysts;

(f) prohibiting the sale or defining the conditions of sale of any substance which may be injurious to health when used as food or restricting in any manner its use as an ingredient in the manufacture of any article of food or regulating by the issue of licences the manufacture or sale of any article of food;

(g) defining the conditions of sale or conditions for licence of sale of any article of food in the interest of public health;

(h) specifying the manner in which containers for samples of food purchased for analysis shall be sealed up or fastened up;

(i) specifying a list of permissible preservatives, other than common salt and sugar, which alone shall be used in preserved fruits, vegetables or their products or any other article of food as well as the maximum amounts of each preservative;

(j) specifying the colouring matter and the maximum quantities thereof which may be used in any article of food;

(k) providing for the exemption from this Act or of any requirements contained therein and subject to such conditions, if any, as may be specified, of any article or class of articles of food;

Section 23 — Note 1

[1] Only one presumption is permissible under the rules framed under the section and it is that contained in R. A. 01.03 and is to the effect that where milk is sold or offered for sale without any indication as to whether it was derived from cow, buffalo, goat or sheep, the standard prescribed for buffalo milk shall apply. This presumption cannot apply when it is known that the milk sold or offered for sale is a mixture of cow milk and buffalo milk, even if the proportion in which the two kinds of milk are mixed is not known. The presumption applies only when the source is unknown. 1961 All 590 (Pr 6) [AIR V 48 C 156] (FB).

[2] Rule 44 prohibits sale of milk which contains any added water ; therefore sale of milk, to which water has been added, is an offence punishable under S. 16 (1) (a) regardless of the question of adulteration. 1961 All 590 (592) [AIR V 48 C 156] (FB).

[3] Rule A 11.05 shows that butter, as referred to in the Act, implies the product prepared exclusively from the milk or cream of cow or buffalo or both. Hence even if there is admixture of goat butter and other butter, such stuff would not fall within the definition. 1961 Mad 198 (199) [A I R V 48 C 56] : 1961 (1) Cri L Jour 675.

(l) prohibiting or regulating the manufacture, transport or sale of any article known to be used as an adulterant of food;

(m) prohibiting or regulating—

(i) the addition of any water, or other diluent or adulterant to any article of food;

(ii) the abstraction of any ingredient from any article of food;

(iii) the sale of any article of food to which such addition or from which such abstraction has been made or which has been otherwise artificially treated;

(iv) the mixing of two or more articles of food which are similar in nature or appearance;

(n) providing for the destruction of such articles of food as are not in accordance with the provisions of this Act or of the rules made thereunder.

(2) All rules made by the Central Government under this Act shall, as soon as possible after they are made, be laid before both Houses of Parliament.

[a] For the Prevention of Food Adulteration Rules, 1955, *see* Gaz. of India., Extra., 1955, Pt. II-Sec. 3, p. 2089.

24. Power of the State Government to make rules.

(1) The State Government may, after consultation with the Committee and subject to the condition of previous publication, make rules for the purpose of giving effect to the provisions of this Act in matters not falling within the purview of section 23.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may—

(a) define the powers and duties of the Food (Health) Authority and local authority and jurisdiction of food inspectors and public analysts;

(b) prescribe the forms of licences for the manufacture for sale, for the storage, for the sale and for the distribution of articles of food or any specified article of food or class of articles of food, the form of application for such licences, the conditions subject to which such licences may be issued, the authority empowered to issue the same and the fees payable therefor;

(c) direct a fee to be paid for analysing any article of food or for any matter for which a fee may be prescribed under this Act;

(d) direct that the whole or any part of the fines imposed under this Act shall be paid to a local authority on realisation;

(e) provide for the delegation of the powers and functions conferred by this Act on the State Government or the Food (Health) Authority to subordinate authorities or to local authorities.

(3) All rules made by the State Governments under this Act shall, as soon as possible after they are made, be laid before the respective State Legislatures.

25. Repeal and saving.

(1) If, immediately before the commencement[a] of this Act, there is in force in any State to which this Act extends any law corresponding to this Act, that corresponding law shall upon such commencement stand repealed.

Section 25 — Note 1

[1] Licensing of manufacture or sale of mustard oil in relation to a particular premises is fully covered by the provisions of the Act read with the rules made thereunder and if S. 442 of the Calcutta Municipal Act is held to cover licensing of premises for the manufacture or sale of mustard oil, to that extent it must be deemed to be the corresponding State law which is repealed by S. 25 (1). 1960 Cal 388 (390) [A I R V 47 C 97] : 1960 Cri L Jour 817.

(2) Notwithstanding the repeal by this Act of any corresponding law all rules, regulations and bye-laws relating to the prevention of adulteration of food, made under such corresponding law and in force immediately before the commencement of this Act shall, except where and so far as they are inconsistent with or repugnant to the provisions of this Act, continue in force until altered, amended or repealed by rules made under this Act.

[a] That is, 1st June, 1955.

[THE] PREVENTION OF SEDITIOUS MEETINGS ACT, 1911

(ACT X of 1911)

[The Act printed here is as on 1-2-1961.]

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SECTIONS

1. Short title and extent.
2. Power of State Government to notify proclaimed areas.
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6. Penalties.
7. Penalty for delivery of speeches in public places.
8. Cognizances of offences.
9. *[Repealed].*

STATEMENT OF OBJECTS AND REASONS

"The Prevention of Seditious Meetings Act, 1907, which was continued by the Continuing Act, 1910, until the thirty first day of March 1911, will expire on the last named date unless further continued. It is now deemed advisable, instead of merely continuing or making permanent the existing Act, to introduce a Bill to consolidate and amend the law relating to the prevention of public meetings likely to promote sedition or to cause disturbance of public tranquillity. * * * *."

—Gaz. of Ind. 1911, Part V, page 100.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended in Bombay by Bom. Act XXIII of 1951.
—Adapted by A. O. 1937; 2 A. L. O., 1956.
—Extended by Acts LIX of 1949; XXX of 1950.
—Extended in Bombay by Bom. Act IV of 1950.
—Extended in Punjab by Punj. Acts V of 1950; XXX of 1958.
—Repealed in part by Act XII of 1927.

Section 25 — Note 1 *(contd.)*

[2] As the Madras Prevention of Adulteration Act stood repealed the moment the Central Act was passed, the local Executive Officers who were exercising powers under the Madras Act, ceased to have such powers. The saving clause contained in S. 25 (2) had no application to the case. 1958 Andh Pra 348 (348, 349) [AIR V 45 C 103] : 1958 Cri L Jour 729.

[3] The entire Bihar Prevention of Food Adulteration Act was repealed by the Central Act and any complaint filed by the inspector under the Bihar Act must be deemed to be a complaint filed by a person who was not authorised to do so. 1959 Pat 182 (183) [A I R V 46 C 45] : 1959 Cri L Jour 508.

[4] The contention that by virtue of S. 25 (2) the power which the Assistant Medical Officers exercised under U. P. Pure Food Act, and the rules thereunder, could be exercised by them under the Central Act was held not tenable because Food Inspectors appointed under the U. P. Act were conferred the power to prosecute by the Act itself. They did not derive this power under any rules. 1957 All 343 (1) (343) [A I R V 44 C 105] : 1957 Cri L Jour 615 (DB).

[5] The prior rules under S. 20 of the Madras Act III of 1918 must be considered to be in force under the Act till they are replaced by other rules by virtue of the saving clause contained in S. 25 (2). 1957 Mad 736 (737) [A I R V 44 C 234] : 1957 Cri L Jour 1294.

[*See also* 1957 Mad 268 (269) [A I R V 44 C 87] : 1957 Cri L Jour 516. (Accused convicted for infraction of R. 37 (E) (b), Madras Prevention of Adulteration Rules prior to coming into force of Rules framed under Act of 1954—Accused would not be saved from conviction by reason of the coaltar derivative used falling within one or more of the five categories mentioned in new Rule 28 by virtue of S. 25 (2).)]

[THE] PREVENTION OF SEDITIOUS MEETINGS ACT, 1911
(ACT X OF 1911)[a]

[22nd March, 1911.]

An Act to consolidate and amend the law relating to the prevention of public meetings likely to promote sedition or to cause a disturbance of public tranquillity.

WHEREAS it is expedient to consolidate and amend the law relating to the prevention of public meetings likely to promote sedition or to cause a disturbance of public tranquillity; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons. *see* Gazette of India, 1911, Pt. V, p. 100; for Report of Select Committee, *see ibid.*

This Act has been declared to be in force in the Khondmals district by the Khondmals Laws Regulation, 1936 (IV of 1936), S. 3 and Sch.; and in the Angul district by the Angul Laws Regulation, 1936 (V of 1936), S. 3 and Sch.

The Act has been extended to the new Provinces of Merged States by the Merged States (Laws) Act, 1949 (LIX of 1949), S. 3 [1-1-1950] and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (XXX of 1950), S. 3 [16-4-1950].

It has also been extended to States merged in the State of—

Bombay : *See* Bom. Act IV of 1950, S. 3 [30-3-1950].

Punjab : *See* Punj. Act V of 1950, S. 3 [15-4-1950.]

It has also been extended to the transferred territories (that is, Pepsu) in Punjab by Punj. Act XXX of 1958, S. 4 and Sch. II [7-11-1958.]

1. Short title and extent.

(1) This Act may be called THE PREVENTION OF SEDITIOUS MEETINGS ACT, 1911.

(2) It extends to the whole of India except [a][the territories which, immediately before the 1st November, 1956, were comprised in Part B States], but shall have operation only in such States or parts of States as the [A][State Government] may from time to time notify in the [A][Official Gazette].

[a] *Substituted* for "Part B States" by 2 A. L. O., 1956 [1-11-1956].

The following were Part B States : Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin.

2. Power of State Government to notify proclaimed areas.

(1) The [A][State Government] may, [a][* * *] by notification in the [A][Official Gazette], declare the whole or any part of a [A][State], in which this Act is for the time being in operation, to be a proclaimed area.

(2) A notification made under sub-section *(1)* shall not remain in force for more than six months, but nothing in this sub-section shall be deemed to prevent the [A][State Government] [a][* * *] from making any further notifications in respect of the same area from time to time as it may think fit.

[a] The words "with the previous sanction of the Governor-General in Council" were *omitted* by A. O., 1937 [1-4-1937].

3. Definition.

(1) In this Act, the expression "public meeting" means a meeting which is open to the public or any class or portion of the public.

(2) A meeting may be a public meeting notwithstanding that it is held in a private place and notwithstanding that admission thereto may have been restricted by ticket or otherwise.

4. Notice to be given of public meetings.

(1) No public meeting for the furtherance or discussion of any subject likely to cause disturbance or public excitement, or for the exhibition or distribution of any writing or printed matter relating to any such subject, shall be held in any proclaimed area —

(a) unless written notice of the intention to hold such meeting and of the time and place of such meeting has been given to the District Magistrate

or the Commissioner of Police, as the case may be, at least three days previously ; or

(b) unless permission to hold such meeting has been obtained in writing from the District Magistrate or the Commissioner of Police, as the case may be.

Power of Magistrate to cause report to be taken.

(2) The District Magistrate or any Magistrate of the first class authorised by the District Magistrate in this behalf may, by order in writing, depute one or more police-officers, not being below the rank of head constable, or other persons, to attend any such meeting for the purpose of causing a report to be taken of the proceedings.

Exception.

(3) Nothing in this section shall apply to any public meeting held under any statutory or other express legal authority, or to public meetings convened by a Sheriff, or to any public meetings or class of public meetings exempted for that purpose by the [A][State Government] by general or special order.

5. Power to prohibit public meetings.

The District Magistrate or the Commissioner of Police, as the case may be, may at any time, by order in writing, of which public notice shall forthwith be given, prohibit any public meeting in a proclaimed area if, in his opinion, such meeting is likely to promote sedition or disaffection or to cause a disturbance of the public tranquillity.

6. Penalties.

(1) Any person concerned in the promotion or conduct of a public meeting held in a proclaimed area contrary to the provisions of section 4 shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) Any public meeting which has been prohibited under section 5 shall be deemed to be an unlawful assembly within the meaning of Chapter VIII of the Indian Penal Code and of Chapter IX of the Code of Criminal Procedure, 1898.

7. Penalty for delivery of speeches in public places.

Whoever, in a proclaimed area, in a public place or a place of public resort, otherwise than at a public meeting held in accordance with, or exempted from, the provisions of section 4, without the permission in writing of the Magistrate of the district or of the Commissioner of Police, as the case may be, previously obtained, delivers any lecture, address or speech on any subject likely to cause disturbance or public excitement to persons then present, may be arrested without warrant and shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

8. Cognizances of offences.

No Court inferior to that of a Presidency Magistrate or of a Magistrate of the first class or Sub-divisional Magistrate shall try any offence against this Act.

Section 6 — Note 1

[1] The word "promotion" implies some action anterior to the existence or occurrence of the thing promoted and, therefore, when the thing is actually taking place, it cannot be said to have been promoted. There is a distinction between the promotion and conduct of a public meeting. 1923 Lah 342 (343) [AIR V 10] : 25 Cri L Jour 225.

Section 7 — Note 1

[1] 'Chabutra' private property adjoining public thoroughfare—Public having no right to enter it either by right, permission, usage or otherwise — But public could see what was happening inside the place—*Held* the chabutra was not a public place. ('95) 17 All 166 (167) (DB). (*See* case decided under S. 159, I. P. C.).

STATE AMENDMENTS

GUJARAT

Same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay (which expression shall stand unmodified), *delete* the words "or Sub-divisional Magistrate".

— Bom. Act XXIII of 1951, S. 2 and Sch. [1-7-1953].

9. Repeals. *[Repealed by the Repealing Act, 1927 (XII of 1927), S. 2 and Sch.]*

[THE] PREVENTIVE DETENTION ACT, 1950

(ACT IV of 1950)

[The Act printed here is as on 1-2-1961.]

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STATEMENT OF OBJECTS AND REASONS

"There has been a crop of litigation in various States since the 26th January, 1950, challenging orders of detention passed under various State enactments dealing with public safety. In a recent judgment, the Bihar High Court has held that the provisions of the Bihar Act dealing with preventive detention are void as they are not in accordance with the Constitution. Similar points are being raised before other High Courts and it is considered necessary that the matter should be set at rest by Central legislation.

2. The object of the Bill is to provide for detention with a view to preventing persons from acting in a manner prejudicial to the Defence of India, the relations of India with foreign powers, the security of India or a State, the maintenance of public order or the maintenance of supplies and services essential to the community. Provision is made, as enjoined by the Constitution, for the setting up of Advisory Boards. Provision has also been made under Art. 22 (7) (a) of the Constitution for cases in which persons may be detained for longer than three months without obtaining the opinion of an Advisory Board."

—Gaz. of Ind., 1950, Extra., page 834.

THE PREVENTIVE DETENTION (SECOND AMENDMENT) ACT, 1952

STATEMENT OF OBJECTS AND REASONS

"...The primary reason for the enactment of this legislation was to protect the country against activities intended to subvert the Constitution and the maintenance of law and order or to interfere with the maintenance of Supplies and Services essential to the community. Attempts to do so, though considerably reduced in tempo, have not ceased and it is considered essential that the powers conferred by the Preventive Detention Act should be continued.....[Now] a maximum period of detention has been provided in the Bill, so that no person will hereafter be detained for more than twelve months from the date of confirmation of the detention order, while those already in detention may be detained until the 1st April, 1953 or until the expiry of twelve months from the date on which their detention orders were confirmed, whichever period expires later [*see* section 11A of the Act]. The Bill also contains the following other main provisions—

(i) The existing Act authorises District Magistrates, Additional District

Magistrates specially empowered in this behalf by the State Government, Commissioners of Police in Bombay, Calcutta, Madras and Collectors in Hyderabad State to pass detention orders. These orders have to be reported by them for the information of the State Government but are not subject to confirmation. Provision has now been made that the orders passed by them hereafter shall be subject to the approval of the State Governments..... [*see* section 3 (3) of the Act].

(ii) To enable the Central Government effectively to discharge where necessary, its functions under section 13 of the Act, provision has been made for a copy of the order of detention issued or approved by State Governments to be sent to the Central Government [*see* section 3 (4) of the Act].

(iii) The Act provides that an Advisory Board may hear a detenu in person if in any particular case it considers it essential to do so. In addition, provision has now been made in the Bill that a detenu shall be heard in person if he desires to be so heard. [*see* section 10 (1) of the Act].

(iv) It has recently been pointed out by a High Court that clause *(b)* of section 6 of the Act does not permit the arrest of an absconding person wherever he is found because the offence under that clause is not cognizable and there is no knowing where the absconder will discover himself and the police officer arresting him may not have the detention order with him in all cases. To obviate this difficulty, it is now being provided that the offence shall be cognizable. [*see* section 6 (2) of the Act]."

—Gaz. Ind., 1952, Pt. II-Section 2, page 246.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by 3 A. L. O., 1956.
—Amended by Acts L of 1950; IV of 1951; XXXIV of 1952; LXI of 1952; LI of 1954; LIV of 1957; LXI of 1960.

[THE] PREVENTIVE DETENTION ACT, 1950
(ACT IV OF 1950)[a]

[25th February, 1950.]

An Act to provide for preventive detention in certain cases and matters connected therewith.

BE it enacted by Parliament as follows :—

[a] For Statement of Objects and Reasons, see Gaz. of Ind., 1950, Extra ; p. 834.

1. Short title, extent and duration.

(1) This Act may be called THE PREVENTIVE DETENTION ACT, 1950.

[a][*(2)* It extends to the whole of India except the State of Jammu and Kashmir.]

(3) It shall cease to have effect on the [b][31st day of December, 1963], save as respects things done or omitted to be done before that date.

[a] *Substituted* for the former sub-section *(2)* by the Preventive Detention (Amendment) Act, 1954 (LI of 1954), S. 2 [24-12-1954]. [b] *Substituted* for "31st day of December, 1960" by the Preventive Detention (Continuance) Act, 1960 (LXI of 1960), S. 2 [28-12-1960].

Preamble — Note 1

[1] The Preventive Detention Act is not *ultra vires* the Constitution with the exception of S. 14 which, being severable from the rest of the Act, does not affect the validity of the latter in any way. 1953 S C 451 (451, 452) [A I R V 40 C 107] : 1953 Cri L Jour 1921 ✠ 1950 S C 27 (88) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383 ✠ ('54) I L R (1954) 1 Cal 1 (17) (FB) ✠ ('50) 29 Pat 502 (517, 518) (FB) ✠ 1951 All 838 (842) [AIR V 38 C 210] : 1952 Cri L Jour 3 (DB) ✠ 1951 Pepsu 123 (124) [AIR V 38 C 48] : 2 Pepsu L R 370 : 52 Cri L Jour 1076 (DB).

Section 1 — Note 1

[1] The Preventive Detention Act, 1950, being a special Act passed for special purposes and giving wide discretion to Government, has to be strictly construed; the wider the powers the greater is the caution needed for their exercise. 1951 Punj (Simla) 157 (164) [A I R V 38 C 27] : 52 Cri L Jour 17 (DB) ✠ 1956 Bom 490 (491) [AIR V 43 C 189] : I L R (1956) Bom 792 : 1956 Cri L Jour 875 (DB).

[2] Per *Meredith C. J.* — The Act nowhere specifies the existence of an emergency or that it is emergency legislation. The principles of interpretation laid down for emergency legislation have no application at all, and the Courts must follow the ordinary principle of construction that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown, or in India, against the Government. ('50) 29 Pat 502 (515) (FB).

[3] The words "things done or omitted to be done" in S. 1 (3) mean acts or omissions

2. Definitions.

In this Act, unless the context otherwise requires, —

[a][*(a)* "State Government" in relation to a Union territory means the administration thereof;]

(b) "detention order" means an order made under section 3 [b][; and]

[b][*(c)* "appropriate Government" means, as respects a detention order made by the Central Government or a person detained under such order, the Central Government, and as respects a detention order made by a State Government or by an officer subordinate to a State Government or as respects a person detained under such order, the State Government.]

[a] *Substituted* for the original clause *(a)* by 3 A. L. O., 1956 [1-11-1956]. [b] *Added* by the Preventive Detention (Amendment) Act, 1951 (IV of 1951), S. 3 [22-2-1951].

3. Power to make orders detaining certain persons.

(1) The Central Government or the State Government may —

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to—

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community, or

(b) if satisfied with respect to any person who is a foreigner within the meaning of the Foreigners Act, 1946, that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,

it is necessary so to do, make an order directing that such person be detained.

Section 1 — Note 1 *(contd.)*

and that the expression "save" is the liability or the immunity, as the case may be, in respect of such acts or omissions. 1955 Cal 374 (376) [(S) AIR V 42 C 110] : 1955 Cri L Jour 1055 (DB).

[4] Per *Guha Ray J.* — The true meaning of S. 1 (3) appears to be that even after the expiry of the Act, things done under the Act i.e. done legally or within the limits prescribed by the Act will run their course as prescribed by the Act. The over-all limit seems subject to this qualification only that if certain things are done legally under the Act before its expiry, they need not necessarily cease to have effect like the rest of the Act on the date mentioned in the section. This construction of S. 1 (3) will save from expiry with the expiry of the Act an order of detention which is directed to continue for a period ending on a date which is subsequent to the Act. 1955 Cal 374 (380, 381) [(S) A I R V 42 C 110] : 1955 Cri L Jour 1055 (DB).

[5] The Preventive Detention Act is a temporary Act and as a general rule, and unless it contains a special provision to the contrary, a temporary Act on its expiry ceases to have any further effect. It follows that any detention under the Act must, in the absence of anything to the contrary, be co-terminous with the life of the Act. Therefore an order of detention for a period beyond the life of the temporary Act under which it is made is illegal. 1955 Cal 374 (376) [(S) AIR V 42 C 110] : 1955 Cri L Jour 1055 (DB).

SECTION 3 — SYNOPSIS

1. Constitutional validity.
2. Preventive detention.
3. Satisfaction of detaining authority.
4. Scope of inquiry.
5. Detention order.
6. Legality of order.
7. Past acts.
8. Prosecution or detention.
9. Order of detention against person already in jail.
10. Contents of order.
11. Correctness of order.
12. Mala fides.
13. Scope of S. 3 (1) (a).
14. Defence of India—Relations with foreign powers—S. 3 (1) (a) (i).
15. Security of State—S. 3 (1) (a) (ii).
16. Public order—S. 3 (1) (a) (ii).
17. "Maintenance of supplies and services essential to the community" — S. 3 (1) (a) (iii).
18. Arrangements for expulsion—S. 3 (1) (b).
19. Foreigners Act—S. 3 (1) (b).
20. Jurisdiction to pass order—S. 3 (2).

(2) [a][Any of the following officers, namely : —

(a) District Magistrates,

(b) Additional District Magistrates specially empowered in this behalf by the State Government,

[b][*(c)* the Commissioner of Police for Bombay, Calcutta, Madras or Hyderabad,

(d) Collectors in the [c][territories which, immediately before the 1st November, 1956, were comprised in the State of Hyderabad]], may,]

if satisfied as provided in sub-clauses *(ii)* and *(iii)* of clause *(a)* of sub-section *(1)*, exercise the power conferred by the said sub-section.

(3) When any order is made under this section [d][by an officer mentioned in sub-section *(2)*,] he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as in his opinion [e][have a bearing on the matter, and no such order made after the commencement[f] of the Preventive Detention (Second Amendment) Act, 1952, shall remain in force for more than twelve days after the making thereof unless in the meantime it has been approved by the State Government].

[g][*(4)* When any order is made or approved by the State Government under this section, the State Government shall, as soon as may be, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as in the opinion of the State Government have a bearing on the necessity for the order.]

[a] *Substituted* fôr "Any District Magistrate or Sub-divisional Magistrate, or, in a presidency-town, the Commissioner of Police, may," by the Preventive Detention (Amendment) Act, 1950 (L of 1950), S. 2 [14-8-1950]. [b] *Substituted* for clauses *(c)*, *(d)* and *(e)*, *ibid*, 1951 (IV of 1951), S. 4 [22-2-1951]. [c] *Substituted* for "State of Hyderabad" by 3 A. L. O., 1956 [1-11-1956]. [d] *Substituted* for "by a District Magistrate, Sub-divisional Magistrate or Commissioner of Police" by Act L of 1950, S. 2. [e] *Substituted* for "have a bearing on the necessity for the order" by the Preventive Detention (Second Amendment) Act, 1952 (LXI of 1952), S. 4 [30-9-1952]. [f] That is 30th September, 1952. [g] *Inserted* by Act LXI of 1952, S. 4.

Section 3 — Synopsis *(contd.)*

21. "Forthwith."
22. Report to State.
23. "Approval."
24. Grounds for order.
25. Power of Court.
26. Power of Court—Sufficiency of grounds.
27. State and Central Government.

1. Constitutional validity.—[1] Section 3 cannot be impugned on the ground that it does not provide an objective standard which the Court can utilize for determining whether the requirements of law have been complied with. 1950 S C 27 (43) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383.

[2] Classification made by S. 3 is reasonable and fair — Classification is not hit by equality clause in Art. 14 of Constitution — Section is *intra vires*. 1952 S C 324 (327, 328) [A I R V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503 ✣ 1956 All 589 (594) [A I R V 43 C 196] : 1956 Cri L Jour 1152 (DB).

[*See also* ('54) ILR (1954) 1 Cal 1 (28) (FB). (The fact that the order of detention can be made by the officers mentioned in S. 3 (2) of the Act or that the detained person can be removed to and detained in any place does not make the Act unreasonable if it was otherwise reasonable.)✣1951 Orissa 251 (254) [AIR V 38 C 59] : I L R (1951) Cut 387 : 52 Cri L Jour 679 (DB). (The principle of reasonable restriction or reasonableness of law imposing restriction upon the liberty of citizens has no application to the law prescribing preventive detention.)]

[3] Article 19 of the Constitution has no application dealing with preventive or punitive detention as its direct object. 1950 SC 27 (98, 113) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383✣('54) ILR (1954) 1 Cal 1 (12) (FB).

[4] The Preventive Detention Act on its specific terms and language does not amount to delegation of legislative power by the Indian Parliament to the authorities mentioned in S. 3 thereof and is not *ultra vires* on that ground. ('54) ILR (1954) 1 Cal 1 (27, 28) (FB)✣1954 Cal 591 (594) [AIR V 41 C 202] : 1954 Cri L Jour 1722 (DB). (Section 3 (1) (a) (iii) is not bad as being an instance of unwarranted delegation of legislative power.)

[5] The theory of principle of preventive detention is not repugnant to the Constitution. 1959 Andh Pra 73 (75) [A I R V 46 C 23] : 1959 Cri L Jour 160 (DB).

[6] It cannot be contended that S. 3 offends the Constitution because Arts. 22 (4) and (7) do not envisage the direct intervention of Parliament in a whole batch of cases. Parliament can prescribe the minimum period for a class taken as a whole as it has done in S. 3. 1952 S C 324 (327, 328) [A I R V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503.

Section 3 — Note 1 *(contd.)*

[7] It cannot be said that S. 3 is repugnant to the Constitution and, in any event, a fraud upon it, as it fixes no time limit, because the section specifies the exact period of the detention, namely, till the expiry of the Act. 1952 S C 324 (328) [AIR V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503.

[8] Article 21 of the Constitution is applicable to preventive detention. 1950 SC 27 (75) [AIR V 37 C 6] : 1950 SCR 88 : 51 Cri L Jour 1383.

2. Preventive detention. — [1] The purpose and policy of the Act is to prevent anti-social and subversive element from imperilling the welfare of the Republic. 1956 All 589(594) [A I R V 43 C 196] : 1956 Cri L Jour 1152 (DB).

[2] There is no authoritative definition of the term "preventive detention". The word "preventive" is used in contradistinction to the word "punitive". The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. 1950 S C 27 (91, 92) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383.

[3] Bearing in mind the provisions of Art. 22 of the Constitution read with Art. 246 and Sch. 7, List I, Entry 9, and List III, Entry 3, it is clear that Parliament is empowered to enact a law of preventive detention (a) for reasons connected with defence, (b) for reasons connected with foreign affairs, (c) for reasons connected with the security of India, (d) for reasons connected with security of State, (e) for reasons connected with maintenance of public order, or (f) for reasons connected with the maintenance of supplies and services essential to the community. 1950 S C 27 (42) [AIR V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383.

[4] For preventive detention action must be taken on good suspicion. It is a subjective test based on the cumulative effect of different actions, perhaps spread over a considerable period. For the purposes of preventive detention it would be difficult, if not impossible, to lay down objective rules of conduct failure to conform which should lead to such detention. As the very term implies, the detention in such cases is effected with a view to prevent the person concerned from acting prejudicially to certain objects which the legislation providing for such detention had in view. 1950 S C 27 (43, 77) [A I R V 37 C 6] : 1950 S C R 88 : 51 Cri L Jour 1383.

[*See also* 1952 Pat 185 (198) [A I R V 39] : 31 Pat 97 : 1952 Cri L Jour 493 (FB). (Preventive detention depends on suspicion—Suspicion inferred from circumstances and it is for the detaining authority to be satisfied about the inference to be drawn.) ✠ 1951 Pat 439 (442) [AIR V 38 C 115] : 1952 Cri L Jour 543 (DB).]

[5] The expression "preventive detention" means that restraint whose object is to prevent probable, and in some cases possible, activity on the part of the person which is deemed prejudicial and which is apprehended from him on grounds of his past conduct. 1950 Hyd 66 (67) [A I R V 37 C 20] : I L R (1951) Hyd 196 (DB).

[6] Preventive detention does not necessarily mean that the detention should be according to the subjective satisfaction of the executive. ('54) ILR (1954) 1 Cal 1 (32) (FB).

[7] Preventive detention is not a device to evade the scrutiny of the ordinary criminal Courts into allegations that the detaining authority itself does not seem to believe. 1951 Vindh Pra 36 (37) [AIR V 38 C 9] : 52 Cri L Jour 894.

[8] Action under S. 3 is preventive and not punitive and can be taken only with a view to preventing a person from doing something prejudicial to public order. 1953 Pepsu 111 (112) [AIR V 40 C 48] : ILR (1952) Patiala 620 : 1953 Cri L Jour 1210 ✠ ('61) 1961 (2) Cri L Jour 547 (551) (Punj). (Object is not to lock up the detenu and punish him for something done, but to intercept him before he does it and to prevent him from doing it.) ✠ 1955 Madh B 36 (40) [AIR V 42 C 9] : ILR (1955) Madh B 98 : 1955 Cri L Jour 476 (DB). (The object of the Act is no doubt preventive and not punitive detention.) ✠ 1954 Madh B 125 (128) [AIR V 41 C 58] : ILR (1954) Madh B 445 : 1954 Cri L Jour 1062 (DB) ✠ 1952 Mys 85 (88) [AIR V 39] : ILR (1951) Mys 455: 1952 Cri L Jour 1526 (DB). (Government having grounds to believe that detenu was associating himself actively with named leader of gang of dacoits—Dacoits concerned in certain named dacoities — Detention held was preventive and not of punitive character.) ✠ 1951 Madh B 56 (59) [AIR V 38 C 16] (DB).

[9] By its very nature preventive detention is aimed at preventing the commission of an offence or preventing the detained person from achieving a certain end. 1951 S C 157 (160) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373.

[10] Preventive detention is by its very nature different from what may be called punitive detention. The latter results on a trial of the person concerned for committing a crime after his guilt has been established in a competent court of justice, whereas the former is not a punitive but a precautionary measure the object of which is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. 1956 All 589 (593) [AIR V 43 C 196] : 1956 Cri L Jour 1152 (DB).

[11] The distinction between punitive and preventive detention is fundamental, and should not be allowed to be obliterated. Its disregard leads to his constitutional right and other safeguards given to the accused under the Criminal Procedure Code being rendered nugatory and does not serve the object for which this detention is allowed. The two forms of detention cannot be concurrent, and a choice must be made between the two. 1950 Hyd 66 (68) [AIR V 37 C 20] : I L R (1951) Hyd 196 (DB).

Section 3 — Note 2 *(contd.)*

[12] If detention is lawful, detenu cannot be released even if his prior detention and custody was unlawful. 1952 Hyd 112 (116) [AIR V 39] : I L R (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB). (AIR 1945 F C 18, *Rel. on.*)

[13] If the main ground of detention be investigation of a crime the detention under the Preventive Detention Act would be colourable, improper and amount to circumventing important provisions of the Constitution, and as such it cannot be allowed. 1950 Hyd 68 (69) [AIR V 37 C 21] : I L R (1951) Hyd 183 (DB).

[14] Where the facts alleged by the State Government exist but two inferences are possible it is for the State Government to make up its mind as to the inference to be drawn. The Court cannot say that a particular inference should have been drawn from the facts. But if the affidavit on behalf of the detenu discloses such specific circumstances as to show that the alleged facts or grounds are non est, then the order has no legs to stand upon. 1951 Pat 47 (56) [AIR V 38 C 6]: 30 Pat 630 : 52 Cri L Jour 406.

[15] Detention under local Act — Fresh order under Preventive Detention Act — It is not extension of previous order. ('53) I L R (1953) Madh B 138 (141) ✣ 1951 Orissa 27 (27) [AIR V 38 C 10] : 52 Cri L Jour 110 (DB).

[16] Person bound over under provisions of Part IV of Criminal P. C.– District Magistrate is not barred from having recourse to Preventive Detention Act. ('53) ILR (1953) Madh-B 116 (121, 122) (DB).

[17] Delay in filing petition satisfactorily accounted for — Court would not be justified in rejecting petition on ground of delay. 1957 All 782 (791) [(S) AIR V 44 C 217] : I L R (1957) 2 All 42 : 1957 Cri L Jour 1361 (DB).

3. Satisfaction of detaining authority.— [1] Before the Government can pass an order of preventive detention under S. 3, it must be satisfied with respect to the individual person that his activities are directed against one or other of the objects mentioned in the section and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. It is the satisfaction of the Central Government or the State Government on the point which alone is necessary to be established. 1951 S C 157 (160) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373.

[2] Under S. 3 of the Preventive Detention Act, it is the satisfaction of the appropriate authority which is necessary for an order of detention and if the grounds, on which the appropriate authority has said that it is so satisfied, have a rational connection with the objects which are to be prevented from being attained, the question of satisfaction cannot be challenged in a Court of law except on the ground of mala fides. 1958 S C 163 (171) [AIR V 45 C 29] : 1958 S C R 460 : I L R (1958) Punj 46 : 1958 Cri L Jour 283 ✣ ('61) 1961 (2) Cri L Jour 547 (551) (Punj). ●

[3] Satisfaction contemplated by S. 3 is the satisfaction of the detaining authority and not that of the Court. 1951 Pepsu 164 (168) [AIR V 38 C 60] : 52 Cri L Jour 1438 (DB). (From this it follows that the question that the material placed before the detaining authority upon which his satisfaction was based was false or true or that he was misled in forming the satisfaction is irrelevant.) ✣ 1953 Bom 59 (61) [AIR V 40 C 17] : I L R (1953) Bom 182 : 1953 Cri L Jour 322 (DB) ✣ 1953 Pepsu 16 (16) [AIR V 40 C 7] : I L R (1952) Patiala 107 : 1953 Cri L Jour 120. (Single instance of obstruction to police held was not sufficient.) ✣ 1952 Bhopal 1 (5) [AIR V 39] : 1952 Cri L Jour 660 ✣ 1952 Bhopal 6 (10) [AIR V 39] : 1952 Cri L Jour 683 ✣ 1952 Cal 26 (29) [AIR V 39] : I L R (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB). (Such satisfaction as is laid down in section 3 is not limited to be based on the existing laws of the land.) ✣ 1952 Hyd 186 (187) [AIR V 39] : I L R (1952) Hyd 770: 1952 Cri L Jour 1756 (DB) ✣ 1952 Hyd 112 (119) [AIR V 39] : I L R (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB) ✣ 1952 Mys 85 (87) [AIR V 39] : I L R (1951) Mys 455 : 1952 Cri L Jour 1526 (DB) ✣ 1952 Orissa 52 (58) [AIR V 39] : ILR (1951) Cut 441 : 1952 Cri L Jour 1039 (DB) ✣ 1951 All 838 (844) [AIR V 38 C 210] : 1952 Cri L Jour 3 (DB) ✣ 1951 Bom 161 (164, 165) [AIR V 38 C 31] : I L R (1950) Bom 738 : 52 Cri L Jour 62 (DB) ✣ 1951 Madh B 51 (53) [AIR V 38 C 15] (DB) ✣ 1951 Mad 182 (184) [AIR V 38 C 17] : 52 Cri L Jour 688 (DB) ✣ 1951 Pat 439 (442) [AIR V 38 C 115]: 1952 Cri L Jour 543 (DB) ✣ 1951 Pat 47 (55) [AIR V 38 C 6] : 30 Pat 630 : 52 Cri L Jour 406 (DB) ✣ ('51) I L R (1951) Cut 624 (630) (DB) ✣ 1950 All 709 (711) [AIR V 37 C 276] : I L R (1951) 2 All 493 : 52 Cri L Jour 732.

[4] The power to issue a detention order under S. 3 depends entirely upon the satisfaction of appropriate authority specified in that section. 1954 S C 179 (181) [AIR V 41 C 37] : 1954 S C R 418 :1954 Cri L Jour 456 ✣ ('55) Madh B L Jour 1955 H C R 774 (777) (DB).

[5] Satisfaction is a matter for subjective decision and can never be subjected to an objective test. 1952 Hyd 112 (119) [A I R V 39] : I L R (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB) ✣ 1951 Mad 182 (184) [A I R V 38 C 17] : 52 Cri L Jour 688 (DB) ✣ ('51) 4 Sau L R 45 (47) (DB).

[6] The satisfaction of the authority making the order as to matters specified in the Act is the only condition for the exercise of his powers and the Court cannot substitute its satisfaction for that of the authority. 1958 S C 451 (452) [AIR V 40 C 107] : 1953 Cri L Jour 1921 ✣ 1951 Hyd 162 (162) [AIR V 38 C 58] : 52 Cri L Jour 1527 (FB) ✣ 1955 Raj 6 (10) [(S) A I R V 42 C 4] : ILR (1954) 4 Raj 51 : 1955 Cri L Jour 95 (DB) ✣ 1952 Hyd 112 (119) [AIR V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB) ✣ 1951 Pat 47 (55) [AIR V 38 C 6] : 30 Pat 630 : 52 Cri L Jour 406 (DB).

[7] If the State Government on the evidence placed before it is satisfied that the applicants are, unless detained, likely to act in a manner prejudicial to the maintenance of supplies and services essential to the community the High Court cannot go into evidence and can-

Section 3 — Note 3 *(contd.)*

not question the satisfaction of the detaining authority. 1952 All 180 (182) [AIR V 39] : 1952 Cri L Jour 372 ✣ ('54) ILR (1954) 1 Cal 1 (29) (FB). (Court cannot go behind satisfaction.) ✣ 1951 Nag 1 (2) [AIR V 38 C 1] : I L R (1951) Nag 1 (FB) ✣ 1952 Sau 12 (13) [AIR V 39] (DB).

[8] The action of the detaining authority should not be *ultra vires* the law empowering detention; the power should not be exercised in bad faith or in an arbitrary manner or for collateral purpose but the detaining authority should be honestly satisfied. 1959 Andh Pra 73 (75, 76) [AIR V 46 C 23] : 1959 Cri L Jour 160 (DB).

[9] As the Legislature has under the Preventive Detention Act empowered the authorities to make an order of detention on being satisfied that one of the conditions laid down in S. 3 of the Act exists, it is entirely at the discretion of the authority making the order to satisfy itself in that behalf by whatever means that may be available to it. After the authority making the order of detention has so satisfied itself, the propriety of that satisfaction in some respects comes for scrutiny by the procedure laid down by the Act. 1951 All 456 (457) [AIR V 38 C 98].

[10] Where power is vested in a statutory authority to deprive the liberty of a subject on its subjective satisfaction with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. If some out of them are found to be non-existent or irrelevant the Court cannot predicate what satisfaction of the said authority would have been on the exclusion of those grounds or reasons. 1957 S C 164 (168) [(S) AIR V 44 C 20] : 1956 S C R 948 : 1957 Cri L Jour 316.

[11] Detention order by District Magistrate under S. 3 (2)—Grounds of detention described as grounds of detention under S. 3 (1) (a) (iii)—*Held*, that even if the District Magistrate made a mistake in this regard, this did not show that he did not apply his mind to the facts before passing the detention order. 1954 Cal 591 (600) [A I R V 41 C 202] : 1954 Cri L Jour 1722 (DB).

[12] Where the detaining authority is in point of fact satisfied that the persons sought to be detained were likely to act in a prejudicial manner unless detained, it is not for the Court to question its satisfaction. The satisfaction of that authority must no doubt be honest satisfaction. So long as that is honest it would not matter if some inaccurate material was placed before the authority and the latter acted upon it as being correct. 1952 All 180 (182) [A I R V 39] : 1952 Cri L Jour 372.

[13] The word "satisfied" does not import an arbitrary or irrational state of being satisfied. It means "reasonable satisfaction." But this condition of "reasonable satisfaction" is not an objective condition precedent of fact capable of determination by a Court of law like any other positive fact. 1951 Madh B 51 (53, 54) [A I R V 38 C 15] (DB) ✣ 1951 Assam 43 (44) [AIR V 38 C 20] : ILR (1950) 2 Assam 470 : 52 Cri L Jour 434 (DB). (The satisfaction has to be honest, careful and deliberate, arrived at by the detaining authority after exercising due care and caution.)

[14] Where an order of detention *ex facie* shows that the authority making the order of detention was satisfied, a presumption arises in favour of that authority and the burden lies on him who challenges the bona fides of that authority to show not that there was no reasonable satisfaction but to show that as a matter of fact the order of detention was passed without such satisfaction as is required. 1951 Madh B 51 (53) [AIR V 38 C 15] (DB).

[15] By use of the words 'must be satisfied' in S. 3, the Parliament has shown the intention of the satisfaction to be subjection and the Court cannot hold the satisfaction to be wrong as based on evidence which it considers to be false. 1951 Hyd 128 (131) [A I R V 38 C 53] : ILR (1951) Hyd 654 : 52 Cri L Jour 1402 (FB).

[16] The satisfaction in S. 3 is that of the detaining authority and the High Court can only scrutinise the grounds furnished to see whether they are in fact relevant to the object sought to be achieved. 1957 Andh Pra 143 (146) [AIR V 44 C 53] : ILR (1957) Andh Pra 167 : 1957 Cri L Jour 703 (DB).

[17] Where the Government of a State being satisfied that any person is acting in a manner prejudicial to public safety and maintenance of public order makes an order detaining him, it is not open to the detenu to invite the Court to go into the question as to whether the satisfaction of the detaining authority was on proper or reasonable grounds. 1951 Hyd 83 (86) [AIR V 38 C 34] : 52 Cri L Jour 710 (DB).

[18] The detaining authority must be satisfied that it was necessary to detain the person at the date when the order was made. 1951 Bom 161 (168) [AIR V 38 C 31] : ILR (1950) Bom 736 : 52 Cri L Jour 62 (DB).

[19] The satisfaction that the law requires under S. 3 (1) and (2) of the Preventive Detention Act is that there must be at least a reasonable probability of the person against whom an order is sought to be made acting in a prejudicial manner. It is not necessary that the detaining authority must feel absolute certainty that if the person concerned was not detained he would act in a prejudicial manner. 1951 Bom 161 (164, 165) [AIR V 38 C 31] : ILR (1950) Bom 736 : 52 Cri L Jour 62 (DB).

[20] When admittedly a most important material is placed before the detaining authority, but the material turns out to be a material which did not exist it cannot be said that the detaining authority applied its mind to all the relevant and proper circumstances which he must do before he makes the order contemplated by the Act, and that there was a proper satisfaction which would justify the making of the order. 1956 Bom 490 (492)

Section 3 — Note 3 *(contd.)*
[AIR V 43 C 189] : ILR (1956) Bom 792 : 1956 Cri L Jour 875 (DB).

[21] The satisfaction of the Government must be based on some grounds. There can be no satisfaction if there are no grounds for the same. If the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of mala fides cannot be challenged in a Court. 1951 S C 157 (160) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 ✠ 1951 S C 174 (177) [AIR V 38 C 25] : 1951 S C R 212 : 52 Cri L Jour 400 ✠ 1952 Pat 374 (376) [AIR V 39] : 1952 Cri L Jour 1382 (DB).

[22] The question whether or not the Deputy Commissioner at the time he passed order under S. 3, Preventive Detention Act, was satisfied that it was necessary to arrest the petitioner with a view to preventing him from acting in any manner prejudicial to the public peace and order is a question of fact and if the petitioner's position was that such a satisfaction did not exist he should definitely assert the fact in the petition. 1953 Pepsu 145 (146) [AIR V 40 C 63] : ILR (1952) Patiala 445 : 1953 Cri L Jour 1519.

[23] As a matter of abstract law, the state of man's mind can be proved by evidence other than that of the man himself and if the Home Secretary has requisite means of knowledge, for example, if the Minister had told him that he was satisfied or he had indicated satisfaction by his conduct or acts, and the Home Secretary's affidavit was regarded as sufficient in the particuar case, then that would constitute legally sufficient proof of the satisfaction of the Home Minister. 1952 S C 317 (319) [AIR V 39] : 1952 S C R 674 : 1952 Cri L Jour 1269.

[24] The burden is upon the person who challenges the bona fides of the officer to show that as a matter of fact the order whatever the officer might have stated in it with regard to his satisfaction was passed without such satisfaction. 1949 Bom 319 (325) [AIR V 36 C 83] : ILR (1949) Bom 508 : 51 Cri L Jour 184 (FB) ✠ 1953 Pepsu 190 (192) [AIR V 40 C 77] : ILR (1953) Patiala 1 : 1953 Cri L Jour 1710.

[25] Although the onus is initially upon the State to prove that the authority who made the order of detention was satisfied in respect of its necessity, the onus shifts to the other side if an order expressed to be made in the name of the Rajpramukh and duly authenticated by a person authorised in this behalf has been produced. 1951 Pepsu 126 (129) [AIR V 38 C 49] : 2 Pepsu L R 402 : 52 Cri L Jour 1081 ✠ 1953 Pepsu 190 (192) [AIR V 40 C 77] : ILR (1953) Patiala 1 : 1953 Cri L Jour 1710.

[26] Where it is mentioned in the order of detention, that the detaining authority was satisfied within the meaning of S. 3, that it was necessary to make the order with a view to prevent the detenu from acting in manner prejudicial to the security of the State and maintenance of public order, the mere fact that the grounds supplied make no reference to the security of the State, does not justify the inference that the satisfaction of the detaining authority required under S. 3 was wanting. ('51) 3 Pepsu L R 238 (244) (DB).

[27] Having regard to Art. 166 (3) of the Constitution and R. 8 of the main Rules of Business made by the Governor, the satisfaction of the concerned Minister must be taken to be the satisfaction of the State Government. But there is no legal provision at all for delegation of that responsibility from the Minister to the Home Secretary. 1952 Orissa 200 (202) [AIR V 39] : ILR (1952) Cut 353 : 1952 Cri L Jour 1051 (DB) ✠ 1953 Orissa 33 (37) [AIR V 40 C 17] : 1953 Cri L Jour 349 (DB). (AIR 1952 Orissa 200, *Approved.*)

4. Scope of inquiry. — [1] The scope of judicial enquiry in the proceedings challenging the order under the Act is a limited one. 1952 Hyd 112 (115) [AIR V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB).

[2] Allegation of illegal detention and application of third degree methods are outside the scope of an enquiry under S. 3. Police Officers cannot be allowed to be cross-examined by the detenu on affidavits submitted by them denying the detenu's allegations of torture. 1952 Hyd 112 (117) [AIR V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB).

[3] Detenu alleging illegal detention and torture prior to his being served with detention order — Police officers filing affidavits denying allegations of torture but admitting questioning detenu regarding activities and addresses of his alleged associates — Detenu cannot be allowed to cross-examine police officers submitting affidavits since allegations of illegal detention and alleged torture prior to lawful detention are outside the scope of the enquiry into legality of detention. 1952 Hyd 112 (116) [AIR V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB).

[4] Whether there is sufficient material for arriving at the conclusion that the detenu is likely to indulge in prejudicial activities is a question solely to be decided by the detaining authority. It is not necessary that such a conclusion should be arrived at on legal proof. It is well settled that the question whether the detaining authority was right in view of the material before it in issuing the order of detention is not justiciable. 1952 Hyd 112 (115) [AIR V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB).

5. Detention order. — [1] There is nothing in the Act which would debar a District Magistrate from making an order under S. 3 of the Act if he is satisfied of the necessity of making of such an order merely because the person against whom the order is to be made has been arrested by any police officer under S. 151, Cr. P. C. ('53) ILR (1953) Madh B 116 (120) (DB).

[2] Preventive detention is intended and indicated only for cases that cannot be dealt with by the ordinary law of the land. 1951

Section 3 — Note 5 *(contd.)*

Vind Pra 36 (37) [AIR V 38 C 9]: 52 Cri L Jour 894.

[3] Preventive detention is not a device to evade the scrutiny of the ordinary criminal courts into allegations which the detaining authority itself does not seem to believe. 1951 Vindh Pra 36 (37) [AIR V 38 C 9]: 52 Cri L Jour 894.

[4] The detention order under S. 3 in cases where the prosecution is pending is a serious step for the executive authorities to take. It must be made with full appreciation of the fact that the order in such cases has grave consequences on the judicial trial and must bear scrutiny of the courts on footing that such an order was called for notwithstanding such appreciation. A detention order passed without such appreciation may well be held to be lacking in *bona fides* on the facts of an individual case. 1952 Orissa 52 (57, 58) [AIR V 39]: ILR (1951) Cut 441: 1952 Cri L Jour 1039 (DB).

[5] The detention of which the detenu complains by his application is the detention in the jail on the date when he makes the application and it is immaterial for the determination of the question in issue as to whether his prior alleged ill-treatment by the police is or is not legal. This alleged ill-treatment cannot affect the merits of the detention order, the validity of which is to be determined independently of any such considerations. 1952 Sau 12 (14) [AIR V 39] (DB).

[6] There is nothing in law which would debar a District Magistrate from making an order under the Act against a person who was bound down to keep the peace and be of good behaviour under the Cri. P. C., if he is satisfied that security proceedings have proved to be ineffectual and conditions required for making the order under S. 3 are proved to exist. ('53) ILR (1953) Madh B 116 (122, 123).

[7] Where an order of detention passed by the District Magistrate is revoked, it is open to the State Government to issue a fresh order of detention against the same person. 1951 Pat 68 (70, 71) [AIR V 38 C 9]: 52 Cri L Jour 603 (DB) ✤ 1952 All 180 (181) [A I R V 39]: 1952 Cri L Jour 372.

[8] Where the detaining authority revoked his first order and passed a second order, the very fact that there was some variation in the grounds of detention and in one respect even the order in which the facts were alleged to have taken place was also changed goes to show that the detaining authority did go into the matter afresh and he passed the new order after he was satisfied of the necessity of it. 1953 Pepsu 145 (146) [AIR V 40 C 63]: ILR (1952) Patiala 445: 1953 Cri L Jour 1519.

[9] Preaching of violence or open incitement thereto is not *sine qua non* for an order under S. 3. 1959 Andh Pra 73 (77) [AIR V 46 C 23]: 1959 Cri L Jour 160 (DB).

[10] When an order is made under the Preventive Detention Act, the order continues to be in force until it is cancelled, just as any order lawfully passed must remain in force until it is revoked by a proper authority. 1951 Bom 33 (35, 36) [AIR V 38 C 13]: ILR (1951) Bom 546 : 52 Cri L Jour 418 (DB).

[11] An order of detention was passed by *A*, a District Magistrate on 29-3-1950. In pursuance of this order the detenu was arrested on 14-6-1950. But at the time when the order of detention was actually served on the detenu, *A* had left charge and another District Magistrate *B* was in charge of the District. The grounds of detention were furnished to the detenu on 19-16-1950. *Held*, that an order passed by a District Magistrate who is subsequently transferred and relieved of his duties, does not lose its value and cease to be an order of a District Magistrate that the delay of two and a half months which occurred in this case between the date of the order of detention and the date of arrest was not an unreasonable length of time which required the passing of a fresh detention order, by *B*. 1951 Bom 33 (84) [A I R V 38 C 13]: I L R (1951) Bom 546: 52 Cri L Jour 418 (DB).

[12] An order for preventive detention directs a person to be detained. The detention may be of various kinds. It may be limited to a certain place and for a certain period. Whatever may be the form of the order, the order primarily deprives the detenu of his personal liberty. ('54) ILR (1954) 1 Cal 1 (10) (FB).

[13] The question as to whether the detenu should be detained for the full period mentioned in the order passed by the detaining authority or whether before the termination of that period he may be released is a matter that is to be considered by the Government. 1951 Trav-Co 217 (221) [AIR V 38 C 87]: ILR (1951) Trav-Co 1: 52 Cri L Jour 1089 (DB).

[14] The Act gives the detaining authority plenary discretion to make an order of detention, if according to his judgment, he has a reasonable cause to believe that the applicant as a member of a hostile association should not be allowed to be at large and that it is imminent that in the interests of the safety of the State he should exercise control over his activities. 1952 Hyd 112 (120) [A I R V 39]: ILR (1952) Hyd 122: 1952 Cri L Jour 1076 (DB).

[15] Where all that appears from the order is that it has been properly authenticated, that by itself does not show that the order of detention was validly made. If, as is clear from the evidence, the materials upon which the order of detention in question is based are not placed before the proper authority who has to decide such matters and it appears that that authority did not apply his mind with a view to satisfy himself about the necessity for such detention, then the condition precedent to the making of the order of detention is lacking and the order can consequently be successfully challenged as a nullity. ('51) ILR (1951) Cut 624 (630, 631) (DB).

[16] Modification would not include an attempt at validation of the order which was illegal at its inception. 1955 Raj 6 (11) [(S) AIR V 42 C 4]: ILR (1954) 4 Raj 51: 1955 Cri L Jour 95 (DB).

[17] Where the Government itself while confirming the detention in exercise of its

Section 3 — Note 5 *(contd.)*

power under S. 11 admits that one of the two grounds mentioned in the original order is substantial or non-existent, to say that the other ground which still remains, is quite sufficient to sustain the order would be to substitute an objective judicial test for the subjective decision of the executive authority which is against the legislative policy underlying the statute. In such cases, the position would be the same as if one of these two grounds was irrelevant for the purpose of the Act or was wholly illusory and this would vitiate the detention order as a whole. 1954 S C 179 (181) [A I R V 41 C 37]: 1954 S C R 418: 1954 Cri L Jour 456.

[18] Where an order of detention is passed under S. 3, Preventive Detention Act and served on a detenu under detention under U. P. Maintenance of Public Order Act (on the same materials) and the matter went up to the Advisory Board under S. 9 of the Preventive Detention Act and on its report the Government confirmed the detention and directed a further detention of eleven months, on a question as to the legality of the orders. *Held*, it cannot be said that the order of detention is invalid merely because it was made on the same materials and that there was no fresh material for passing the order: 1951 All 18 (20, 21) [AIR V 38 C 5] : 1952 Cri L Jour 422 (DB).

[19] Section 4 whether of the original Act or the amending Act of 1951 does not empower the detention of the petitioner as distinguished from his detention in a particular place. The order of detention actually is passed under the provisions of S. 3, and S. 12 of the amending Act makes it quite clear that what is continued after the coming into operation of the amending Act is the detention order. Consequently the failure to detain a detenu in a place determined in accordance with the provisions of S. 4 of the original Act or the Act as amended would not render the detention order, that is the order passed under S. 3, an invalid order. 1952 Bom 1 (4) [AIR V 39] : ILR (1952) Bom 134 : 1952 Cri L Jour 81 (DB).

[20] In an application for habeas corpus where the legality of an order of detention under the Preventive Detention Act is challenged any anterior ill-treatment, arrest, detention, etc., of detenu by the police is not at all relevant and cannot affect the validity of the detention order. 1952 Sau 12 (14) [AIR V 39] (DB).

[21] Where the mistake as to the surname and the slip in the spelling of the father's name of the detenu had been sufficiently accounted for and these mistakes did not affect his identity as the person meant to be detained was the detenu and none other. *Held*, that the contention that the District Magistrate had not applied his mind with due diligence before issuing the order of detention was altogether unsustainable. 1952 Sau 12(15) [AIR V 39] (DB).

[22] If the main ground of detention be investigation of a crime, detention of a person under the Preventive Detention Act would be colourable, and improper. But where the grounds have been definitely mentioned with sufficient precision and details there is little scope for the allegation that the detention is for a collateral purpose. 1952 Sau 12 (14) [AIR V 39] (DB).

[23] Vagueness and indefiniteness in the grounds of detention communicated to the detenu for the purpose of enabling him to make a representation to the State is a ground for holding the detention to be invalid and ordering his release. 1951 Punj (Simla) 8 (9) [AIR V 38 C 2].

[24] An order of detention preventing a person from making speeches prejudicial to the maintenance to the public order is valid even though it has the result of abridging his right under Art. 19 (1) (a) of the Constitution by such detention. 1951 S C 270 (272) [A I R V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904.

[25] When nothing else is known, a mere membership of the Communist Party, if it has not been declared an unlawful body, would not attract the provisions of the Preventive Detention Act. 1952 Hyd 112 (118) [A I R V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB)✣ 1952 Pepsu 126 (127) [AIR V 39] : 3 Pepsu L R 77 : 1952 Cri L Jour 1485 (DB).

[26] Where the evidence clearly shows that a person is not merely a passive member of the Communist organisation but an active participant in its various subversive activities, it will be proper for the Government to order his detention under the Act. In such a case the state of mind of the detaining authority is pre-eminently a question of fact. 1952 Hyd 112 (119) [AIR V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB).

[27] A bare allegation that the detenu is a relation of a member of a gang of dacoits and that he is co-operating with another dacoit is much too general to form the basis of a detention order under S. 3 (1) of the Act. 1951 Vindh Pra 36 (37) [AIR V 38 C 9] : 52 Cri L Jour 894.

[28] Where it comes to the question as to whether an order was anti-dated or was passed on the date mentioned therein, the Court would accept the affidavit of the District Magistrate that the order was passed on the date shown in the order. 1949 Bom 319 (323) [AIR V 36 C 83] : I L R (1949) Bom 508 : 51 Cri L Jour 184 (FB).

6. Legality of order. — [1] No person shall be deprived of his life or personal liberty except according to the procedure established by law, as prescribed under Art. 21 of the Constitution of India. It is, therefore, for the Government to show that an order of detention passed by it is perfectly valid and in strict adherence to the law as laid down. 1952 Assam 187 (188) [AIR V 39] : ILR (1952) 4 Assam 134 : 1952 Cri L Jour 1706.

[2] The illegality of the arrest does not *per se* make the order of detention invalid. 1953 Cal 81 (84) [AIR V 40 C 24] : 1953 Cri L Jour 310 (DB).

[3] An order of detention under the Preventive Detention Act is not illegal merely because

Section 3 — Note 6 *(contd.)*

it nullifies a previous order of discharge or acquittal by a Court in a criminal or a quasi-criminal case. 1952 Cal 26 (30) [AIR V 39] : I L R (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB).

[4] If in a case where the legality of an order of detention under S. 3 of the Preventive Detention Act is challenged, the State produces a copy of the order purporting to have been made by the Rajpramukh and signed by the Deputy Secretary of the Government, the State only produces *prima facie* evidence in support of the legality of the arrest and detention, which is liable to be rebutted. If, therefore, in order to rebut the evidence afforded by the production of the copy of the order of arrest the detenu applies to the Court to have the Deputy Secretary brought before it and examined in respect of the allegations contained in his affidavit, the Court has no right to refuse his request. 1951 Pepsu 121 (123) [AIR V 38 C 47] : 2 Pepsu L R 299 : 52 Cri L Jour 1068.

[5] It is, no doubt, salutary that a copy of the order along with the grounds of detention should also be served on the detenu, particularly if one is demanded, but the mere fact that no copy was supplied does not make the arrest or detention illegal. 1951 Pepsu 147 (149) [AIR V 38 C 56] : 52 Cri L Jour 1215.

[6] As in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of the proceeding. In the absence of proof of bad faith, the detaining authority can supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complies with the requirements of the law in that behalf. The question of bad faith, if raised, would certainly have to be decided with reference to the circumstances of each case but the observations in one case cannot be regarded as a precedent in dealing with other cases. 1952 S C 106 (108) [AIR V 39] : 1952 S C R 395 : 1952 Cri L Jour 656.

[7] Order of detention under, passed by the minister and authenticated by Deputy Secretary and purported to be issued on behalf of His Highness the Rajpramukh cannot be held to be illegal merely because the matter did not go to the Rajpramukh for consideration. 1951 Pepsu 147 (150) [AIR V 38 C 56] : 52 Cri L Jour 1215.

[8] If a person is arrested on a charge of offence or misbehaviour likely to prejudice the public peace under S. 107, Cr. P. Code, and then those proceedings are dropped and recourse is had to S. 3 (1) of the Preventive Detention Act, for his detention, and then after a long time, he is supplied with very vague grounds, he is entitled to have it adjudged that the grounds are not true and that he is detained illegally or improperly, so as to entitle him to be released under S. 491, Cr. P. Code. 1951 Orissa 20 (21) [AIR V 38 C 8] : I L R (1950) Cut 540 : 52 Cri L Jour 104 (DB).

[9] Detention is not legal where in response to the request of the petitioner a copy of the order of detention was not given to him to enable him to see whether it is proper order or not and when there is no legal proof that such an order was passed by the District Magistrate. 1951 Trav-Co 130 (132) [AIR V 38 C 45] : I L R (1951) Trav-Co 114 : 52 Cri L Jour 845 (DB).

[10] Detention of person on ground of his being a member of gang of dacoits and association of dangerous criminals — Detention held legal. 1950 Sind 18 (18) [AIR V 37 C 7] : 51 Cri L Jour 715 (DB).

[11] Where the order of detention has provided that a notice of the said order shall be given to the detenu by delivering a copy of the order to him, and no such copy is delivered to him, the order of detention is bad. 1955 J & K 7 (8) [AIR V 42 C 3] : 1955 Cri L Jour 1071 (DB).

7. Past acts. — [1] The instances of past activities are relevant to be considered in giving rise to the subjective mental conviction of the authority making the order of detention that the persons sought to be detained were likely to indulge in objectionable activities. 1951 S C 481 (483) [AIR V 38 C 65] : 1952 S C R 18 : I L R (1952) Punj 1 : 1952 Cri L Jour 75 ✣ ('55) Madh B L J 1955 H C R 774 (Pr 8) (DB).

[2] What a person is likely to do in future can only be a matter of inference from various circumstances and his past record will be valuable, and often the only record on which it could be made. Accordingly, it cannot be contended that past activities could not constitute grounds for detention in future. 1957 S C 28 (34) [(S) AIR V 44 C 6] : 1956 S C R 653 : 1957 Cri L Jour 10 ✣ 1951 Pepsu 123 (126) [AIR V 38 C 48] : 2 Pepsu L R 370 : 52 Cri L Jour 1076 (FB) ✣ 1959 Andh Pra 73 (76) [AIR V 46 C 23] : 1959 Cri L Jour 166 (DB) ✣ 1955 Madh B 36 (40) [AIR V 42 C 9] : I L R (1955) Madh B 98 : 1955 Cri L Jour 476 (DB) ✣ 1954 Madh B 125 (128) [AIR V 41 C 58] : I L R (1954) Madh B 445 : 1954 Cri L Jour 1062 (DB). (It is erroneous to infer that past penal acts of the would-be detenu cannot be taken into account in finding out his likely course of action in future.) ✣ 1952 Bhopal 6 (10) [AIR V 39] : 1952 Cri L Jour 683 ✣ 1952 Mys 85 (87) [AIR V 39] : I L R (1951) Mys 455 : 1952 Cri L Jour 1526 (DB) ✣ 1951 Pepsu 147 (151) [AIR V 38 C 56] : 52 Cri L Jour 1215.

[3] That the detaining authority must apply its mind afresh to the materials in its possession before the new order is passed is implicit in the terms of S. 3, Preventive Detention Act, 1950. There must, therefore, be a de novo scrutiny of the case of each detenu before the satisfaction which the law requires is reached; and it follows that it is not open to the detaining authority to pass an order of detention under the Act of 1950 on the mere ground that it had passed an order under an earlier enactment. 1951 Nag 1 (5, 6) [AIR V 38 C 1] : I L R (1951) Nag 1 (FB) ✣ 1951

Section 3 — Note 7 *(contd.)*
Bom 161 (164, 165) [AIR V 38 C 31] : I L R (1950) Bom 736 : 52 Cri L Jour 62 (DB).

[**But see** 1951 Mad 182 (186) [AIR V 38 C 17] : 52 Cri L Jour 688 (DB). (AIR 1951 Bom 161, *Diss. from.*)]

[4] It is open to the detaining authority to apply its mind to the past activities of the detenus to draw the inference from the past activity that if the detenus be allowed to remain at large they will indulge in activities to the prejudice of public safety and maintenance of public order. 1951 Pat 68 (73) [AIR V 38 C 9] : 52 Cri L Jour 603 (DB).

[5] Petitioner was all along detained in jail as an under-trial prisoner in three cases for about six months. In one of them he was acquitted and in another he was discharged. Immediately after his acquittal and while the third case was pending against him he was served with an order of preventive detention under S. 3 mentioning his past activities prior to his detention extending for a period of two years as the grounds of detention — *Held*, that the order of detention was made for a collateral purpose as there was likelihood that the object was either to punish him for his past acts or to prejudice his defence in the case pending against him. The order of detention was, therefore, illegal. 1953 Pepsu 111 (112) [AIR V 40 C 48] : I L R (1952) Patiala 620 : 1953 Cri L Jour 1210.

[6] The past conduct or the antecedents of the person detained would always afford sufficient data in order to judge about the propensities and the criminal proclivities of the detenu. They may be safe criteria for determining about his propensities and likely future activities. 1952 Hyd 112 (120) [AIR V 39] : I L R (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB) ✣ 1951 Orissa 27 (28) [AIR V 38 C 10] : 52 Cri L Jour 110 (DB).

[7] Where the detenu was complained of being in the habit of harbouring dacoits and affording them protection, and particular instances of when and where he had harboured certain dacoits were mentioned in support of the belief that he was likely to do so in future also with a view to avoid which the detention was considered necessary, it cannot be successfully contended that the Act being only preventive and not punitive the detenu could have been tried for harbouring the dacoits and should not have been detained under the Act. Harbouring of dacoits is a matter for consideration for the maintenance of public order. 1951 Pepsu 147 (151) [AIR V 38 C 56] : 52 Cri L Jour 1215 ✣ 1951 All 838 (844) [AIR V 38 C 210] : 1952 Cri L Jour 3 (DB).

[8] Justification for action under Preventive Detention Act is suspicion or reasonable probability and not criminal conviction. Such a suspicion may well be based on any past actions of the person concerned, and they may be even actions committed outside the jurisdiction of the authority passing the order of detention. 1956 All 589 (593) [A I R V 43 C 196] : 1956 Cri L Jour 1152 (DB).

[9] The correctness of the statement of facts relating to the past activities of the detenu in the grounds of detention cannot be challenged by the detenu in a Court of law. He must accept them as disclosed by the authorities. 1951 Hyd 128 (131) [AIR V 38 C 53]: ILR (1951) Hyd 654 : 52 Cri L Jour 1402 (FB).

[10] The authorities concerned can apprehend prejudicial activities on the part of a detenu from his past conduct, even though such conduct may have been long time ago and he has in the interval been in jail when the authorities are apprehensive of such future conduct, their satisfaction is subjective and is not justiciable. 1951 Hyd 128 (129) [A I R V 38 C 53]: ILR (1951) Hyd 654 : 52 Cri L Jour 1402 (FB)✣1951 Hyd 162 (162) [A I R V 38 C 58] : 52 Cri L Jour 1527 (FB)✣1952 Hyd 112 (115) [AIR V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB).

[11] That the detaining authorities had taken notice of activities in remote past is immaterial when prejudicial activities were alleged to continue till time of arrest. 1952 Hyd 112 (115) [AIR V 39] : I L R (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB).

[12] As a rule, the antecedent conduct and past activities of a person or a body of persons or an organisation would furnish reasonable grounds for finding out the present attitude of that person or the body of persons or organisation for coming to the conclusion whether he or the organisation is acting or likely to act in a manner prejudicial to the security of the State and the maintenance of public order. 1959 Andh Pra 73 (76) [AIR V 46 C 23] : 1959 Cri L Jour 160 (DB).

[13] The distance of time is immaterial unless there is practically no question between the past and the present activities. 1959 Andh Pra 73 (76) [AIR V 46 C 23] : 1959 Cri L Jour 160 (DB).

[14] Where the historical background too weighed with the detaining authority in judging the implications and tendencies of the present acts of the detenu, the order is not bad in law in obtaining satisfaction warranted by S. 3. 1959 Andh Pra 73 (77) [AIR V 46 C 23]: 1959 Cri L Jour 160 (DB).

[15] Where past acts form a chain with the connected acts which might imperil the security of the State or the maintenance of public order, and all the acts show the mental make-up of the would-be detenu at the relevant dates and are useful aids in finding out the potential activities of the would-be detenu, such past acts form the basis of the subjective satisfaction of the detaining authority. The degree of relevancy is not a matter which is justiciable. 1953 Cal 81 (82) [AIR V 40 C 24]: 1953 Cri L Jour 310 (DB). (After past acts would-be detenu enrolled as member of volunteer corps and given military training — This does not show radical change in mental tendencies of would-be detenu.)

[16] Past acts even if they have gone beyond the stage of preparation or of attempts to commit penal offences and have even re-

Section 3 — Note 7 *(contd.)*
sulted in the commission of penal offences, are relevant for sustaining an order of detention. 1953 Cal 81 (82) [AIR V 40 C 24]: 1953 Cri L Jour 310 (DB).

8. Prosecution or detention. — [1] There is nothing to prevent authorities from proceeding under the Act even when there are specific proceedings under the ordinary criminal law against a particular person. ('56) I L R (1956) 2 Cal 610 (615) (DB) ✣ 1957 Cal 74 (76) [A I R V 44 C 21] : 1957 Cri L Jour 172 (DB)✣1955 NUC (Bom) 5548 [AIR V 42] (DB).

[2] Where the applicant is in jail awaiting trial of a criminal offence which is non-bailable and the period during which he will remain in jail is indefinite depending upon the length of the trial; and his bail application has already been rejected, it is improper that the detention order should be passed against the applicant under S. 3 while he was awaiting his trial. ('52) ILR (1952) 2 Raj 842 (849) (DB).

[*See also* 1953 Cal 129 (134) [A I R V 40 C 42] : 1953 Cri L Jour 361 (DB).]

[3] Where it is alleged that a person has contravened the provisions of S. 3 of the Essential Supplies (Temporary Powers) Act, 1946, the authorities concerned must make a choice either to preventively detain the offender under the provisions of the Preventive Detention Act, 1950 or to prosecute him for the offence alleged in Court of law. They cannot resort to both the courses, i. e., to detain him as well as to prosecute him and seek a conviction in a criminal Court. 1951 Hyd 94 (95) [A I R V 38 C 42] : I L R (1952) Hyd 71 : 52 Cri L Jour 916 (DB)✣1951 Pat 47 (52) [A I R V 38 C 6] : 30 Pat 603 : 52 Cri L Jour 406 (DB).

[4] It cannot be stated as a rule of law that when a person is accused of an offence, the only alternative is to prosecute him and there is no legal authority to detain him. It is a fallacy to say that the right to prosecute a person under the ordinary criminal law and the right to detain him are mutually exclusive. No doubt there may be cases in which there will be a clash between the different rights, if and when both detention and prosecution are made and pursued at the same time. In such cases, if the State Government wish to pursue the prosecution it must be prepared to comply with the safeguards of the Code of Criminal Procedure and must give to the undertrial prisoner such rights as he may have under the law. It would not be open to the State Government to fall back on cl. (3) of Art. 22 and hold an investigation or trial in disregard of the provisions of the Code of Criminal Procedure. Apart, however, from this difficulty which may arise in some cases, the test whether a detention order is or is not *mala fide* depends on whether the order is for the purpose mentioned in the order itself, namely, the maintenance of public order, or whether it is for any ulterior or collateral purpose. 1951 Pat 68 (75) [AIR V 38 C 9] : 52 Cri L Jour 603 (DB) ✣1952 Pat 185 (192, 193) [AIR V 39]: 31 Pat 97 : 1952 Cri L Jour 493 (FB)✣1953 Pepsu 190 (192) [A I R V 40 C 77] : I L R (1953) Patiala 1 : 1953 Cri L Jour 1710.

[5] Whether the person should be prosecuted under the ordinary law, or the Government should exercise their powers under the Preventive Detention Act is a matter for the authorities to decide. 1952 Sau 12 (16) [AIR V 39] (DB).

[6] There is no rule of law that unless a choice of one of two alternatives, prosecution or detention is made at the earliest moment, the order of detention must be held to be invalid. The proper approach is to consider the facts of each case and then consider whether the order of detention is mala fide or not. 1951 Pat 68 (74) [AIR V 38 C 9] : 52 Cri L Jour 603 (DB).

[7] There is no reason why acquittal must necessarily mean that the acquitted person nevertheless cannot be acting in a manner prejudicial to national security or maintenance of essential supplies and services as mentioned in S. 3. It is entirely erroneous to think that the ordinary criminal laws of the country and the P. D. Act are substitutes for each other. If anything, they are complimentary. 1952 Cal 26 (30) [A I R V 39] : ILR (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB).

[8] Where the petitioner was acquitted in a criminal case not because there was no basis for the charge against him but because the Court which tried him found that the case against him was not proved beyond reasonable doubt and, therefore, the benefit of that doubt had to be conferred upon him, these facts can nevertheless form sufficient data before the detaining authority upon which the satisfaction required under S. 3 can be founded. 1960 Guj 43 (47) [A I R V 47 C 16] : 1960 Cri L Jour 1588 (DB).

[9] Person arrested and detained in police custody with intention of being prosecuted for certain crime — Government changing its mind and preventively detaining him—Detention is not mala fide. The Government have the choice either to prosecute the person arrested or to preventively detain him. Where a person is arrested and kept in police custody under lawful orders of remand in connection with a certain incident, for the purposes of investigation and ultimately prosecuting him, but subsequently the Government decides to preventively detain him and drop further criminal proceeding against him, the fact that he was interrogated while in police custody prior to the serving of the detention order on him does not show that the detention was for some collateral purpose and mala fide. 1952 Hyd 112 (113) [A I R V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB).

[10] Per *Ram Labhaya J.* — When what is alleged against the accused in the ground of detention is the subject of a pending prosecution the order of detention is improper as the matter is still to be proved by the prosecution in the pending case and the decision of the Court cannot be anticipated. 1951 Assam 43 (44) [A I R V 38 C 20] : ILR (1950) 2 Assam 470 : 52 Cri L Jour 434 (DB).

Section 3 — Note 8 *(contd.)*

[11] Section 97, Bombay Industrial Relations Act, 1946, speaks of certain conditions which would make a strike illegal and if a detaining authority acting under the Preventive Detention Act, 1950, thinks that one or the other of those conditions exists and the strike which is incited to be resorted to by the person to be detained is illegal on that score, it is open to the detaining authority to take action under the Prenentive Detention Act against the person concerned. In this connection, it is not correct to argue that no action for detaining a person can be taken under the Preventive Detention Act unless there is a prior determination by a Labour Court or the Industrial Court that the strike is an illegal one. 1951 Bom 33 (40, 41) [A I R V 38 C 13] : I L R (1951) Bom 546 : 52 Cri L Jour 418 (DB).

[12] The mere fact that the arrest was originally ordered for a specific offence but it was not followed by prosecution for that offence cannot affect the power of the detaining authority to take preventive action after the interim or final release of the person detained. It cannot be held that where an arrest unaccompanied by prosecution is followed by an order of detention, the Court must hold that the detention was mala fide. 1951 All 838 (842) [A I R V 38 C 210] : 1952 Cri L Jour 3 (DB).

[13] Where a person is already detained in jail awaiting his trial in respect of certain offences, alleged to have been committed by him a warrant issued under S. 3 would be illegal. 1950 Hyd 66 (68) [AIR V 37 C 20] : ILR (1951) Hyd 196 (DB).

[14] Whether detention of a person and prosecution started against him can be simultaneously made, does not depend on any rule of law and the question is to be approached and answered in each case on the footing whether the order of detention in view of the pending prosecution is *bona fide* or not. 1953 Pepsu 111 (112) [AIR V 40 C 48] : ILR (1952) Patiala 620 : 1953 Cri L Jour 1210 ✠ 1951 Pat 47 (52) [AIR V 38 C 6] : 30 Pat 603 : 52 Cri L Jour 406 (DB).

9. Order of detention against person already in jail. — [1] There is nothing in the language of the provisions contained in the Act which would debar a detaining authority from passing an order against the person who is in detention. 1953 Assam 97 (99) [A I R V 40 C 42] : ILR (1953) 5 Assam 66 : 1953 Cri L Jour 770.

[2] It cannot be laid down as a matter of law that an order of detention under the Preventive Detention Act can in no circumstances be passed when a person is already in custody. Whenever a detention order is passed for the detention of a person who is already in detention, the question that would arise would be whether the detaining authority could feel satisfied that the order was necessary for the purposes of the Act. This essentially is a question the determination of which must depend on the circumstances of each case. 1953 Assam 97 (99) [AIR V 40 C 42 : I L R (1953) 5 Assam 66 : 1953 Cri L Jour 770 ✠ ('55) Madh B L J 1955 H C R 774 (Pr 7) (DB).

[3] When a person is not free to act at all, as when he is in jail custody, the question of satisfaction in terms of S. 3 of the Preventive Detention Act does not arise. By reason of his confinement as an under-trial prisoner in jail custody, he is already prevented from acting in any manner prejudicial to the purposes mentioned in S. 3 of the Act. When a person is already prevented from so acting by reason of his detention in jail custody, it is futile to say that the detaining authority is satisfied with respect to him that it is necessary to pass an order of detention against him. The element of satisfaction must necessarily relate to a point of time when a person has freedom of action. 1952 Assam 175 (176) [AIR V 39] : I L R (1952) 4 Assam 381 : 1952 Cri L Jour 1670 ✠ 1954 Assam 93 (94) [AIR V 41 C 33] : I L R (1953) 5 Assam 109 : 1954 Cri L Jour 747 ✠ 1951 Assam 43 (44) [AIR V 38 C 20] : ILR (1950) 2 Assam 470 : 52 Cri L Jour 434 (DB).

[4] An order of detention can be passed against a person who is already under detention and there is nothing inherently illegal about successive orders passed on the same grounds where the sufficiency of the grounds is not examinable by the Courts. 1953 Mad 41(50) [AIR V 40 C 17]: 1953 Cri LJ 224(DB).

[5] Though a person might have been detained under S. 4 of the Rajasthan Public Security Ordinance, he can be detained under the Preventive Detention Act, 1950, after S. 4 of the State Ordinance became void after 26th January 1950. The detention order will be valid though the acts were committed prior to the first order of detention. 1951 Raj 69 (73) [A I R V 38 C 29] : 1952 Cri L Jour 425 (DB).

[6] Where the detenu was arrested on 2-3-1950 for two months under Madhya Bharat Maintenance of Public Order Act, 1949, and subsequently on 14-3-1950 while he was in jail another order was served on him under the Preventive Detention Act for indefinite period : *Held*, that the fresh period of detention after the 14th March was not an extension of the previous order of detention under the M. B. Act. ('53) ILR (1953) Madh B 138 (142).

[7] A person was detained for doing smuggling business in rice. The District Magistrate, in the grounds supplied to the person, referred to the case, as one of the grounds, alleged to have been sub judice in May 1951, to bring out that, the person was an incorrigible smuggler, as his smuggling activities continued even in June and July, 1951 : *Held*, that the order did not rest on this ground alone and the detention was not illegal. 1953 Assam 63 (64) [AIR V 40 C 26] : 1953 Cri L Jour 507.

[8] Unless it is impossible to hold that the order of detention passed against the petitioner was for the purpose of frustrating his trial for the substantive offence the detention order cannot be held to be invalid. ('55) Madh B L J 1955 S C R 774 (Pr 7) (DB). (29 Pat 502 (FB), *Rel. on.*)

Section 3 — Note 9 *(contd.)*

[9] The words of S. 3 do not justify an inference that an order of detention cannot be passed against a person who may be already in detention in some other connection. Nor is there anything in any part of the Act to lead to the conclusion that an order of detention passed under S. 3 would be illegal simply because the person to be detained was already in custody in some other connection. ('52) ILR (1952) 2 Raj 842 (845) (DB).

[10] Where a person is under detention for a non-bailable offence and is being prosecuted on a criminal charge in a Court of law, and his period of detention in that connection is of indeterminate length, it is improper that the executive authorities should intervene with an order of detention under S. 3 pending the decision of the criminal case. The man to be detained is already under detention under the criminal law and there is, in the first place, no necessity of his being put under another detention under the Act which detention would run concurrently with his detention under the criminal law. ('52) I L R (1952) 2 Cal 842 (848, 849) (DB).

10. Contents of order. — [1] The detenu has to be served with a copy of the order passed by the authority contemplated by sub-s. (2) of S. 3, containing, firstly, recitals in terms of one or more of the sub-clauses of cls. (a) and (b) of S 3 (1), which may be called the 'preamble', and secondly, the grounds contemplated by S. 7, namely, the conclusions of fact which have led to the passing of the order of detention, informing the detenu as to why he was being detained. 1959 S C 1335 (1340, 1341) [AIR V 46 C 188]: 1960-1 S C R 411 : 1959 Cri L Jour 1501.

[2] Where the preamble of the detention order clearly states the purpose with which the order is passed, viz., to prevent the detenu from acting in a manner prejudicial to the maintenance of the public order and the security of the State, nothing more is required to be stated in the order. The mere fact that the order omitted to state that the order was passed under sub-cl. (ii) of cl. (a) of sub-s. (1) of S. 3 of the Act, does not indicate any carelessness on the part of the detaining authority. If at all it indicates anything it may be said to be a typing or clerical omission. 1952 Bhopal 6 (9) [AIR V 39] : 1952 Cri L Jour 683.

[3] The Government is not bound to supply the facts and particulars of the detenu's acts, on the basis of which it forms the satisfaction that it is necessary to make a detention order with a view to preventing the detenu from acting in any manner prejudicial to public peace, etc. 1953 Pepsu 190 (191) [AIR V 40 C 77] : ILR (1953) Patiala 1 : 1953 Cri L Jour 1710.

[4] The omission in an order of detention to specify the place of the objectionable activities of the detenu, which are made the grounds for the order, does not necessarily lead to the inference that the authority ordering the detention has not applied its mind to the case. 1952 Bhopal 6 (10) [AIR V 39]: 1952 Cri L Jour 683.

[5] Failure to mention in the detention order the place where the detenu is going to be detained does not render the order vague or invalid. 1952 Bom 1 (4) [A I R V 39] : I L R (1952) Bom 134 : 1952 Cri L Jour 81 (DB).

[6] The non-specification of any definite period in the detention order is not a material omission rendering the order itself invalid. 1952 S C 350 (352) [AIR V 39] : 1952 S C R 756 : 1953 Cri L Jour 146 ✣ 1951 S C 276 (274) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 ✣ 1953 Hyd 288 (288) [AIR V 40 C 147] : ILR (1951) Hyd 821 : 1953 Cri L Jour 1875 (DB) ✣ 1952 All 180 (180) [AIR V 39] : 1952 Cri L Jour 372 ✣ 1952 Bom 1 (7) [AIR V 39] : ILR (1952) Bom 134 : 1952 Cri L Jour 81 (DB) ✣ 1952 Punj 408 (407) [AIR V 39] : ILR (1952) Punj 481 : 1953 Cri L Jour 26 (DB) ✣ 1951 All 18 (19) [AIR V 38 C 5] : 1952 Cri L Jour 422 (DB) ✣ 1951 Pat 389 (391) [AIR V 38 C 99] : 29 Pat 992 : 52 Cri L Jour 282 (DB) ✣ 1951 Raj 69 (72) [AIR V 38 C 29] : 1952 Cri L Jour 425 (DB).

[*See also* 1952 S C 324 (328) [AIR V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503. (The section specifies the exact period of the detention, namely, till the expiry of the Act.)]

[**But see** 1951 All 357 (358) [A I R V 38 C 57] : 52 Cri L Jour 115 ✣ 1951 Pepsu 1 (3) [AIR V 38 C 1] : 2 Pepsu L R 421 : 52 Cri L Jour 33.]

[7] It is not always necessary that the time of a particular activity must be given in order to make a ground explicit, if otherwise it is clear enough to make the detenu understand what is being complained against him. 1951 Pepsu 134 (135) [AIR V 38 C 52] : 52 Cri L Jour 1100.

11. Correctness of order.—[1] In respect of detention orders under Preventive Detention Act there is always a presumption of the correctness of an order of a Court. The maxim '*omnia acta rite esse praesumuntur*' would apply and unless it is proved that what purports to be the order was not actually passed by the authority the Court will presume the document to be a genuine one. 1952 Hyd 112 (119) [AIR V 39] : ILR (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB).

[2] If a challenge is made about the accuracy of the prima facie correctness and regularity of the order, it is upon the State Government to satisfy the Court that the order complained against does not suffer from any obvious infirmity or irregularity. ('51) ILR (1951) Cut 624 (630) (DB).

12. Mala fides.—[1] An order of detention passed under the law of preventive detention can be challenged on the ground that there is lack of bona fides on the part of the authority exercising the power. 1953 Mad 41 (45) [AIR V 40 C 17] : 1953 Cri L Jour 224 (DB).

[2] Merely because there are other proceedings under the ordinary criminal law against a detenu, it cannot be said that the proceeding under the Act is mala fide. ('56) ILR (1956) 2 Cal 610 (615) (DB).

[3] If the Court is satisfied that the order in question is passed in conformity with the

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provisions of the Act, and is not outside the scope or the object and purpose of the Act, no question of mala fides would arise. 1960 Guj 43 (46) [AIR V 47 C 16] : 1960 Cri L Jour 1588 (DB).

[4] The detention orders are not mala fide simply because the District Magistrate passed them shortly after the previous detention orders were set aside by the High Court ; nor can they be held to be mala fide or bad on the ground that only the past activities of the detenus were relied upon. 1954 Cal 591 (600) [AIR V 41 C 202] : 1954 Cri L Jour 1722 (DB).

[5] The question of bad faith, if raised, would certainly have to be decided with reference to the circumstances of each case but the observations in one case cannot be regarded as a precedent in dealing with other cases. 1952 S C 106 (108) [AIR V 39] : 1952 S C R 395 : 1952 Cri L Jour 656.

[6] Where the Government chose to bring the offender to book under the criminal laws of the country and the Government was told by the Courts that he was outside the reach of such laws, then, it is not mala fides but bona fides of the Government when it applies the Preventive Detention Act only as a means of last resort where the ordinary laws of land have failed. It only shows that the Government acted with good faith and was reluctant to apply its summary powers of preventive detention in the first instance. 1952 Cal 26 (30) [AIR V 39] : ILR (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB).

[7] Subsequent order of detention mentioning same grounds as prior order — Detenu all the while in jail in intervening period — Subsequent order cannot be said to be mala fide. 1952 S C 350 (382) [AIR V 39] : 1952 S C R 756 : 1953 Cri L Jour 146.

[8] The mere closure of a shop of a petitioner or even the temporary seizure of his goods is no ground for holding that the order of detention is mala fide. 1952 Pat 185 (193) [AIR V 39] : 31 Pat 97 : 1952 Cri L Jour 493 (FB).

[9] A detention order passed without appreciation of the fact that the order may have grave consequences on the judicial trial may well be held to be lacking in bona fides on the facts of an individual case. 1952 Orissa 52 (58) [AIR V 39] : ILR (1951) Cut 441 : 1952 Cri L Jour 1039 (DB).

[10] The sole fact that the petitioner was arrested under some provision of the ordinary law and subsequently detained under the Preventive Detention Act would not by itself make the act of the Government 'mala fide'. 1953 Hyd 277 (279) [AIR V 40 C 142] : ILR (1953) Hyd 459 : 1953 Cri L Jour 1845 (DB).

[11] When the law gives the State Government the power to issue a fresh order of detention after the revocation of the order of the District Magistrate the exercise of that power cannot be held to be mala fide merely because the State Government passed the orders of detention at a time when a habeas corpus application was pending in the High Court. 1951 Pat 68 (71) [AIR V 38 C 9] : 52 Cri L Jour 603 (DB).

[12] Detention order under S. 3 is not mala fide merely because it is passed in respect of person who is undergoing trial for substantive offence or has been convicted for such offence. ('50) 29 Pat 502 (544, 545) (FB).

[13] When the question of the validity of an order of detention is being decided by the High Court in an application for a writ of habeas corpus the Government passes a fresh order to arrest the detenu if he is set at liberty and alleges as its reason for passing the order the difficulty of arresting the detenu, a dangerous communist whose subversive activities would be a threat to the security of the State, as he would go underground immediately, the reason is unconvincing. Further the omission to inform the Court of the fresh order and reasons for passing it is a serious circumstance reflecting upon the bona fides of the Government in passing the order. 1953 Mad 41 (46, 47) [AIR V 40 C 17] : 1953 Cri L Jour 224 (DB).

[14] Although the matter as to whether the Government would have recourse to preventive detention or a criminal prosecution is a matter left to the discretion of the Government the law enjoins that the Government should elect to take one step or the other. If there is a pending prosecution then the question might arise as to whether the order of detention is bona fide or not. The test would be whether the order of detention is for an ulterior purpose. This would have to be decided on the particular facts and circumstances of the case. No hard and fast rule can be laid as to when and in what cases a criminal case ought to be continued and the detention proceedings not resorted to. 1953 Hyd 277 (279) [AIR V 40 C 142] : ILR (1953) Hyd 459 : 1953 Cri L Jour 1845 (DB).

[15] On the question of mala fides of an order of detention, it is not a relevant consideration whether the activities of the appellant were liked or disliked by the authorities concerned. The only relevant consideration is if the order of detention was made for ulterior purposes or purposes other than those mentioned in the detention order. 1958 S C 163 (172) [AIR V 45 C 29] : 1958 S C R 460 : ILR (1958) Punj 46 : 1958 Cri L Jour 283 ✠ ('60) 1960 Jab L J 522 (525) (DB).

[16] An order may be challenged as having been mala fide when there is malice in law though there may be no malice in fact and malice in law may be deemed to exist when an order is made contrary to the objects and purposes of the Act or when the detaining authority permits itself to be influenced by considerations which are outside the scope of the Act. But it cannot be said that the order is invalid in law merely because it was made on a day that the petitioner was in detention. 1953 Assam 97 (99) [AIR V 40 C 42] : ILR (1953) 5 Assam 66 : 1953 Cri L Jour 770.

[17] Malice and mala fide in connection with an order of detention are cognate terms expressive of the same legal idea. Malice in law can mean nothing more than intention to injure another by doing an act in disregard of

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the latter's right wilfully and wrongfully without reasonable and probable cause. These terms in relation to an order of detention express the legal idea of an intention on the part of the Government to misuse or abuse the power vested in it and are not necessarily connotative of moral turpitude on the part of the Government or anybody connected with it. 1953 Mad 41 (49) [AIR V 40 C 17] : 1953 Cri L Jour 224 (DB).

[18] It is open to the detenu to establish, if he can, that the order was made mala fide and in abuse of the powers and the order of detention may be declared invalid if it could be proved to have been made by the authorities concerned in mala fide exercise of their power. 1953 S C 451 (453) [AIR V 40 C 107]: 1953 Cri L Jour 1921.

[19] There is no rule of law that unless a choice of one of two alternatives, prosecution or detention, is made at the earliest moment, the order of detention must be held to be invalid as mala fide. 1952 Pat 185 (192) [AIR V 39] : 31 Pat 97 : 1952 Cri L Jour 493 (FB).

[20] The police are not the detaining authority and however malicious they may be, however wrongly they might have acted in the affairs of the petitioner the mala fides alleged must be directly or indirectly brought home to the detaining authority. It cannot be held that the detaining authority was necessarily actuated by malice because they chose to treat the petitioner as a class II prisoner. 1955 N U C (Bom) 5548 [AIR V 42].

[21] The Court can examine the grounds in order to see if the order of detention is bona fide or whether the grounds on which the order of detention is founded are based on materials of rationally probative value. If the alleged grounds or the facts on which they are stated to be based, do not exist at all, then the order of detention cannot be said to be bona fide order. When it is stated that the order is mala fide, no dishonest motive is necessarily imputed. It merely means that the order is bad for want of necessary care and caution, or is for some purpose other than what is stated in the order of detention. If an order of detention is stated to be based on certain grounds but on uncontroverted facts it appears that those grounds do not really exist, then it follows that the order of detention is made for reasons other than those disclosed in the grounds; in that sense the order will be a mala fide order and will also contravene Art. 22 (5) of the Constitution. 1951 Pat 47 (55) [AIR V 38 C 6] : 30 Pat 630: 52 Cri L Jour 406 (DB).

[22] When the State Government has unequivocally stated that it is satisfied that it is necessary to pass an order of detention to prevent the detenu from acting in a manner prejudicial to the maintenance of supplies and services essential to the community, and has also withdrawn the prosecution against him, it cannot be held that it was for any purpose other than that stated by the Government. 1952 Pat 185 (193) [AIR V 39]: 31 Pat 97 : 1952 Cri L Jour 493 (FB).

[23] A detention order issued for the purpose of flouting the decision of the Court holding the previous order of detention invalid on merits would be a mala fide order. 1953 Mad 41 (49) [AIR V 40 C 17] : 1953 Cri L Jour 224 (DB).

[24] Where the District Magistrate specifically ordered that the persons against whom an order of detention was passed were to be committed to custody of the Inspector-General of Jails after 14 days of police custody but the police kept them in their custody continuously till their production in the High Court, it was held that the detention was itself illegal and mala fide. 1951 Punj 157 (163) [AIR V 38 C 27] : 52 Cri L Jour 17 (DB).

[25] Held that under the circumstances of the case it could not be said that the fact that a large number of fresh orders of detention were made "overnight" indicated bad faith on the part of authorities. 1951 S C 174 (177) [AIR V 38 C 25] : 1951 S C R 212 : 52 Cri L Jour 400.

[26] Where an order of detention is challenged on the ground of mala fides, what has got to be made out is not the want of bona fides on the part of the police, but want of bona fides, as well as the non-application of mind, on the part of the detaining authority, viz., the Government, which for this purpose must be taken to be different from the police. 1956 S C 531 (534) [(S) AIR V 43 C 91] : 1956 S C R 382 : 1956 Cri L Jour 935✠ ('60) 1960 Jab L J 522 (525) (DB).

[27] Where on the basis of the grounds of detention stated against a detenu, the Court is unable to hold that the order of detention was for an ulterior purpose or collateral purpose and not for the purpose of preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the community, the order of detention cannot be held to be mala fide. 1952 Pat 185 (193) [AIR V 39] : 31 Pat 97 : 1952 Cri L Jour 493 (FB).

[28] Detention order during pendency of case against person or immediately after his discharge — Not mala fide. ('52) ILR (1952) 2 Cal 78 (82) (DB).

(a) Proof of mala fides

[29] The mere fact that the person was first arrested under the ordinary law and later ordered to be detained, is not in itself, sufficient to prove that the order of detention was mala fide. There must be other circumstances or evidence to show that the detaining authority acted mala fide. 1951 Madh B 56 (57, 58) [AIR V 38 C 16] (DB).

[30] The failure of the Government to take steps to appeal against the order of the High Court declaring the detention order under which the detenu is detained invalid is not proof of the mala fides of the fresh order passed by it. 1953 Mad 41 (51) [AIR V 40 C 17] : 1953 Cri L Jour 224 (DB).

[31] Mere suspicion is no proof of mala fides. 1953 S C 451 (453) [AIR V 40 C 107] : 1953 Cri L Jour 1921✠ ('61) 1961 (2) Cri L Jour 547 (552) (Punj).

[32] It is not a rule of law that when a person is accused of an offence the only

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alternative is to prosecute him, and there is no legal authority to detain him. It cannot therefore be said that because prosecutions have been started against a person under the Essential Supplies (Temporary Powers) Act, 1946, a detention order in his case is mala fide inasmuch as it is made when the evidence against him is found too weak to support a prosecution. It is a question of fact in each case whether the detention order is mala fide or not. 1951 Pat 153 (154, 155) [AIR V 38 C 22] : 30 Pat 653 : 52 Cri L Jour 1231 (DB).

[33] The case of bona fides of the exercise of the power or the abuse of the power when raised on proper material is justiciable. A case of want of bona fides may be made out, not merely by proof that the order of detention was in fact made for ulterior purposes, that is, for purposes outside the needs of prevention, but also when the order is made without taking into consideration any important circumstances which rationally and legitimately arise for consideration, when making an order of detentton in a particular case. 1952 Orissa 52 (58) [AIR V 39] : I L R (1951) Cut 441 : 1952 Cri L Jour 1039 (DB).

[34] In order that the petitioner can succeed on a plea of mala fides, mala fides must be brought home to the detaining authority. The High Court must be satisfied that there was no proper satisfaction on the part of the detaining authority and that the decision arrived at by the detaining authority was not an honest one. 1955 N U C (Bom) 5548 [AIR V 42].

[35] There can be no better proof of mala fides on the part of the executive authorities than a use of the extraordinary provisions in the Act for purposes for which ordinary law is quite sufficient. 1953 S C 451 (453) [AIR V 40 C 107] : 1953 Cri L Jour 1921.

[36] That the detaining authority has relied on the previous history or antecedents of the detenu is not a sufficient ground for holding that the satisfaction under S. 3 was mala fide. 1952 Bhopal 6 (10) [AIR V 39] : 1952 Cri L Jour 683.

[37] If any irregularity was committed before the Board by the Government, it cannot be treated to be evidence of mala fides on the part of the Government. ('60) 62 Pun L R 257 (263).

[38] It is true that the order of detention can be challenged on the ground of mala fides. But it is practically impossible for any detenu to prove that the order was made mala fide if the Court is not allowed to go into the facts. ('54) I L R (1954) 1 Cal 1 (29) (FB).

(b) Burden of proof

[39] The burden of substantiating the plea that order is mala fide is primarily upon the detenu. 1953 Hyd 277 (279) [AIR V 40 C 142] : I L R (1953) Hyd 459 : 1953 Cri L Jour 1845 (DB) ✣ 1951 S C 270 (274) [AIR V 38 C 45] : 1951 S C R 451 : 52 Cri L Jour 904 ✣ (61) 1961 (2) Cr L Jour 547 (552) (Punj) ✣ 1960 Guj 43 (46) [AIR V 47 C 16] : 1960 Cri L Jour 1588 (DB) ✣ 1953 Cal 81 (83) [AIR V 40 C 24] : 1953 Cri L Jour 310 (DB). (The Court cannot base its decision on suspicion.) ✣ 1952 Mys 85 (88) [AIR V 39] : I L R (1951) Mys 455 : 1952 Cri L Jour 1526 (DB) ✣ 1952 Orissa 52 (58) [AIR V 39] : I L R (1951) Cut 441 : 1952 Cri L Jour 1039 (DB). (Such burden is not so serious as that on the prosecution in a criminal case.) ✣ 1951 All 838 (842) [AIR V 38 C 210] : 1952 Cri L Jour 3 (DB) ✣ 1951 Madh B 56 (58) [AIR V 38 C 16] (DB). (Mere suspicion is not enough to discharge the heavy burden.) ✣ 1951 Pat 47 (55) [AIR V 38 C 6] : 30 Pat 630 : 52 Cri L Jour 406 (DB) ✣ 1950 Sind 18 18) [AIR V 37 C 7] : 51 Cri L Jour 715 (DB) ✣ ('51) 4 Sau L R 45 (47) (DB).

[40] The burden of proof of the absence of good faith is upon the detenu and it is certainly a heavy burden to discharge. 1953 S C 451 (453) [AIR V 40 C 107] : 1953 Cri L Jour 1921 ✣ 1951 Pat 47 (55) [AIR V 38 C 6] : 30 Pat 630 : 52 Cri L Jour 406 (DB) ✣ 1951 Pat 68 (71) [AIR V 38 C 9] : 52 Cri L Jour 603 (DB).

[41] The mere fact that the detenu challenges the factum or bona fides of the order or the fact that in such cases the Government is in possession of information on the subject does not shift the onus on the Government. 1953 Hyd 277 (279) [AIR V 40 C 142] : I L R (1953) Hyd 459 : 1953 Cri L Jour 1845 (DB).

[42] The heavy burden that lies on a petitioner is not discharged by a mere denial or by asserting that he is not aware of any reasons or that he does not know why he has been detained or that he has done anything wrong. 1951 Madh B 51 (54) [AIR V 38 C 15] (DB).

(c) Inference

[43] The fact that the police were unable to furnish a detailed report till a date very near the one on which the order was passed cannot lead to the inference that the order was passed mala fide in the absence of materials. 1951 Pat 439 (442) [AIR V 38 C 115] : 1952 Cri L Jour 543 (DB).

[44] A prior unsuccessful application of the ordinary criminal laws of the country to a citizen does not make a subsequent application of the Preventive Detention Act to that citizen ipso facto mala fide. 1952 Cal 26 (31) [AIR V 39] : I L R (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB)

[45] Failure of prosecution under the ordinary criminal law cannot by itself be said to make the subsequent application of the Preventive Detention Act mala fide. 1952 Cal 26 (30) [AIR V 39] : I L R (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB).

[46] Where the grounds of detention have been definitely mentioned with sufficient precision and details there is very little scope for the allegation that the detention is for a collateral purpose. 1952 Sau 12 (14) [AIR V 39] (DB).

[47] Even after the acquittal of the detenu in a regular criminal trial Government can proceed to take action under the Preventive Detention Act. The action under the Act after the acquittal does not necessarily lead to the conclusion that the action of the Government is mala fide. 1955 Madh B 65 (66) [AIR V 42 C 17] (DB).

Section 3 *(contd.)*

13. Scope of S. 3 (1) (a).—[1] To satisfy the requirements of S. 3 (1) (a) (ii) the premise and the conclusion both must fall within the four corners of its provisions. 1952 Bhopal 1 (6) [AIR V 39] : 1952 Cri L Jour 660.

[2] A person detained in the custody of a superintendent of a jail under an order of the Governor under S. 3 (1) (a) (ii) of the P. D Act is not a prisoner within the meaning of S 52 of the Prisons Act and therefore is not liable to be punished under that provision. 1954 All 626 (629) [AIR V 41 C 242] : 1954 Cri L Jour 1326 (DB).

[3] Section 3 (1) (a), provides for the detention of any person if the conditions laid down therein are satisfied, whereas clause (b) prescribes for the detention of any person who is a foreigner within the meaning of the Foreigners Act for the purposes mentioned therein, namely, with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India. Clause (a) applies to any person and the word 'person' is comprehensive enough to take in citizen as well as foreigners. The mischief sought to be averted by Clause (a) applies equally to a citizen as well as to a non-citizen. While Clause (a) is concerned with the internal and external security of the State, Cl. (b) deals with the preliminary steps necessary to take action under the Foreigners Act, 1940. The scope of the two sub-sections is different and they were intended to meet different contingencies and, therefore, they cannot be so read as to exclude a foreigner from the operation of the word 'person' in Cl. (a). 1957 Andh Pra 143 (145) [AIR V 44 C 53] : ILR (1957) Andh Pra 167 : 1957 Cri L Jour 703 (DB).

14. Defence of India — Relations with foreign powers — S. 3 (1) (a) (i). — [1] The language of S. 3 is plain enough that the intention of the Legislature is not to send persons to jail for acts of offences committed by them in the past but to ensure that no person within the territory of India indulges in subversive activities or activities that are likely to provoke a breach of the public tranquillity or likely to be prejudicial to the defence of India. 1951 Pepsu 123 (126) [AIR V 38 C 48] : 2 Pepsu L R 370 : 52 Cri L Jour 1076 (FB).

[2] The defence of India, the relations of India with foreign powers or the security of India is a matter regarding which a District Magistrate under S. 3 (2) cannot make an order of detention. 1951 Punj (Simla) 157 (166) [A I R V 38 C 27] : 52 Cri L Jour 17 (DB).

[3] Border skirmishes involving firing on both sides of the border are matters concerned with the defence of India and, as such are covered by the first words of S. 3 (1) (a) (i) and the dangers of misunderstanding and bad relations between the two countries are clearly covered by the words "the relation of India with foreign powers" also occurring in the same sub-section. 1951 Punj (Simla) 157 (161) [AIR V 38, C 27] : 52 Cri L Jour 17 (DB).

[4] On a correct interpretation of the meaning of the words "the relations of India with foreign powers" in S. 3, Pakistan must be regarded as a foreign power although that country may be a part of the Commonwealth. 1960 S C 625 (628) [A I R V 47 C 98] : 1960-2 S C R 784 : 1960 Cri L Jour 764 + 1957 Andh Pra 143 (146) [A I R V 44 C 53] : I L R (1957) Andh Pra 167 : 1957 Cri L Jour 703 (DB).

[5] Where the gravamen of the charge against the petitioner was that he aimed at setting up a parallel government in the Uran Peta area and that in order to achieve that end he did various acts such as intimidating the workers in the salt pans with threats of murder and his own workers with threats of death, unless they carried out his orders; and among the lesser instances given to illustrate the exercise of parallel governmental authority were the ones set out in the first ground, namely the infliction of fines with the sanction of excommunication and boycott to ensure their payment and due obedience to his orders—*Held*, that the ground was covered by S. 3 (1) (a). 1952 S C 324 (328) [AIR V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503.

[6] Where in the grounds of detention it was stated that the activities of the petitioner were prejudicial to the relations of India with foreign powers in general and, in particular, in regard to the cause of India in respect of the State of Jammu and Kashmir, it was held that the grounds were connected in some manner with the object mentioned in S. 3 (1) (a) (i). ('60) 62 Pun L R 257 (263). (Prejudicial activities—It may be, that in some of the publications there are hardly any offending portions but what has to be seen is the cumulative effect of all the publications.)

15. Security of State — S. 3 (1) (a) (ii).— [1] Where the detenu is detained as his remaining at large constituted a great danger to the security of the State the further fact mentioned in ground of detention that he was also a danger to the maintenance of communal harmony serves only to show how he was a danger to the security of the State. 1951 Raj 69 72) [AIR V 38 C 29] : 1952 Cri L Jour 425 (DB).

[2] Ordinarily bail should not be granted in cases under the Act but in extraordinary cases where the extreme urgency arising out of the commencement of the elections wherein the detenu is a candidate and the repeated dilatory tactics adopted by the Government not being ready for the final hearing of the petitions granting of bail is justified to enable the detenu to contest the elections in his constituency subject to certain necessary restrictions consistent with the security of the State. ('51) I L R (1951) Cut 624 (633, 634) (DB).

[3] An attempt by a political party to raise a people's army is nothing short of setting the stage for a civil war. It is one thing for the Government established by law to raise any force, be it the regular army or the territorial army or the Home Guards. But it is indubitably a different matter if the various political parties started having armies of

Section 3 — Note 15 *(contd.)*
their own and it is the primary duty of every Government to prevent it. Moreover, such an activity on the part of a member of the party contravenes the Arms Act. There can, therefore, be no question of the matter falling under S. 3 (1) (a) (ii) of the Preventive Detention Act. 1951 Nag 1 (2) [AIR V 38 C 1] : ILR (1951) Nag 1 (FB).

[4] Affiliation to the Communist party which is not banned but whose avowed objects are said to be the overthrowing of Government by subversive and terroristic activities would have a relation to the security of the State and the maintenance of public order and would afford ground for detention of the person. 1951 Mad 182 (187) [AIR V 38 C 17] : 52 Cri L Jour 688 (DB).

[5] Where the ground of detention of the applicant was that the disclosure in Pakistan of the secrets which the applicant had in his possession was likely to affect the security of the State, it was held that the question whether the secrets were such that they would not affect the security of the State could not be enquired into in the proceedings. 1951 All 456 (489) [AIR V 38 C 96].

[6] Bringing of the Government of India and the Government of the State of Jammu and Kashmir into hatred and contempt does involve the security of India. 1960 S C 625 (628) [A I R V 47 C 98] : 1960-2 S C R 784 : 1960 Cri L Jour 764.

16. Public order — S. 3 (1) (a) (ii). — [1] The Act is intended for several emergencies, one of which is prejudice to the maintenance of public order. 1951 Vindh-Pra 36 (37) [AIR V 38 C 9] : 52 Cri L Jour 894.

[2] 'Public order' must be taken in a comprehensive sense so as to include public safety in its relation to the maintenance of public order and that maintenance of public order undoubtedly involves consideration of public safety. 1951 Pat 389 (391) [AIR V 38 C 99] : 29 Pat 992 : 52 Cri L Jour 282 (DB) ✠ 1951 Pat 439 (441) [AIR V 38 C 115] : 1952 Cri L Jour 543 (DB).

[*See also* ('51) 3 Pepsu L R 238 (249). (Term "public order" is very wide and is incapable of exhaustive definition.)]

[3] When the grounds supplied to the detenu do not suggest that there were other grounds besides those mentioned, it cannot be said that they do not disclose all the grounds merely because they were described as concerning maintenance of public order of detention while the order of detention stated that the detention was for the security of the State as well. 1951 Pat 439 (441, 443) [A I R V 38 C 115] : 1952 Cri L Jour 543 (DB) ✠ 1952 Hyd 186 (187) [AIR V 39] : I L R (1952) Hyd 770 : 1952 Cri L Jour 1756 (DB).

[4] Where "maintenance of public order" is the reason mentioned in the order of detention of a detenu, the Court is entitled to examine the grounds to see whether there is any direct and causal connection between them and the maintenance of public order. If there is no such direct and causal connection the Court cannot be said to have acted in law honestly. 1950 All 709 (711) [A I R V 37 C 276] : I L R (1951) 2 All 493 : 52 Cri L Jour 732.

[5] The justification for imposing a ban or laying restrictions on the activities of an association may cease to exist but the right of the Government to exercise its powers under the Preventive Detention Act with regard to a particular individual in the interest of maintenance of public order or for the sake of public security will continue as long as the Government is responsible for the security of the state and for the maintenance of the law or order. 1953 Hyd 277 (280) [A I R V 40 C 142] : ILR (1953) Hyd 459 : 1953 Cri L Jour 1845 (DB).

[6] In S. 3 there is no enumeration of specific acts followed by a general clause which might justify an application of the ejusdem generis principle. Therefore, the "acts prejudicial to the maintenance of public order" cannot be read to mean acts tending to create such disorder as would be prejudicial to the security of the State. ('56) ILR (1956) 2 Cal 610 (614, 615) (DB).

[7] Where the only allegation against the detenu was that he obstructed a police Sub-Inspector in recovering an abducted Muslim woman from his house, for which offence a case under S. 353, I. P. C., was registered against him, it was held that this solitary instance could not form the basis for thinking that the detenu was likely to engage in future in activities prejudicial to the maintenance of public order. 1953 Pepsu 16 (16) [AIR V 40 C 7]: ILR (1952) Patiala 107 : 1953 Cri L Jour 120.

[8] Spreading of disaffection against a party Government cannot be said to be a ground for inferring that the public order would not be maintained. 1956 All 589 (592) [A I R V 43 C 196] : 1956 Cri L Jour 1152 (DB).

[9] The statements calling upon persons to 'build up strong movement against the implementation of Nehru-Noon Pact,' and to 'rouse passions by alleging that the Indian Prime Minister had no sympathy for West Bengal,' cannot be said to be wholly unconnected with the maintenance of public order. Similarly, denouncing the agreement between the two Prime Ministers and stressing the need of forming a militia with the youths of the country, cannot be said to have no repercussions on the maintenance of public order. And any instigation against the personal safety of the Prime Minister of India cannot but have a deleterious effect on the maintenance of public order. 1959 S C 1335 (1341) [A I R V 46 C 188] : 1960-1 SCR 411 : 1959 Cri L Jour 1501.

[10] Publishing indecent and defamatory statements against un-named reputable citizens, intended to blackmail them, cannot be said to come within the words "maintenance of public order." ('50) 3 Sau L R 151 (152) (DB).

[11] *Prima facie* there is no connection between smuggling which is essentially a secret operation and the maintenance of public order in which the operative word is 'public' and hence there is no justification for ordering the detention of persons on the allegations of

Section 3 — Note 16 *(contd.)*

smuggling by them for the purpose of maintaining public order. 1951 Punj (Simla) 157 (161) [AIR V 38 C 27] : 52 Cri L Jour 17 (DB).

[12] There is no real difference between the word *suvyavastha* and *vyavastha*. *Suvyavastha* does mean "public order" and an order of detention mentioning the word '*suvyavastha*' does come within the purview of the section. ('51) 4 Sau L R 45 (46) (DB).

[13] Where the detenus were alleged to have published and distributed pamphlets which were couched in the most filthy and abusive language and amounted to a vitriolic attack upon the character and integrity of the then Chief Justice of Pepsu who was accused *inter alia* of gross partiality and communal bias in the matter of recruiting officers for judicial posts and also in deciding cases between the litigants : *Held* that the orders of detention should be held to be illegal and must be set aside as the publication or distribution of the pamphlets could not have any rational connection with the maintenance of law and order in the State or prevention of acts leading to disorder or disturbance of public tranquillity. 1954 S C 276 (277) [A I R V 41 C 64] : 1954 Cri L Jour 735.

[14] The disturbance of public order is in theory a word of wide import and all acts involving disturbance of public tranquillity are in theory disturbances of public order, the difference between them being only a difference of degree. 1955 Raj 6 (9) [(S) AIR V 42 C 4] : ILR (1954) 4 Raj 51 : 1955 Cri L Jour 95 (DB).

[15] The Constitution requires a line to be drawn in the field of public order or tranquillity marking off, more or less roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of purely local significance, treating for this purpose differences in degree as if they were differences in kind. 1955 Raj 6 (9) [(S) AIR V 42 C 4] : I L R (1954) 4 Raj 51 : 1955 Cri L Jour 95 (DB).

[16] No distinction between "public tranquillity" and "public order"—Use of expression "public tranquillity" in grounds supplied to detenu — Grounds are not invalid. ('53) ILR (1953) Madh-B 116 (125) (DB).

[17] The pleading of any cause which an individual may think it beneficial is permitted by Art. 19 of the Constitution and if some person pleads his cause by lawful means, it cannot be said that he was acting in any manner prejudicial to public tranquillity. 1955 Raj 6 (9, 10) [(S) AIR V 42 C 4] : I L R (1954) 4 Raj 51 : 1955 Cri L Jour 95 (DB).

[18] While mere belief in or acceptance of any political ideology may not be a ground for detention under the Act, affiliation to a party which is alleged to be spreading its doctrine of violence rendering life and property insecure and trying to seize power by violence may, in circumstances, lead to an inference that the person concerned is likely to act in a manner prejudicial to the public safety, order or tranquillity. The fact that the party had not been outlawed is immaterial, that being a matter of expediency: 1950 F C 129 (131) [AIR V 37 C 12]: 1949 F C R 827: 51 Cri L Jour 1480.

[19] Trying to organise meetings, processions and hartals is covered by Cls. (b), (c) and (d) of Art. 19 (1) of the Constitution and so long as there is no allegation of violence the disturbance of public order or tranquillity does not come in. 1955 Raj 6 (10) [(S) A I R V 42 C 4] : ILR (1954) 4 Raj 51 : 1955 Cri L Jour 95 (DB) ✠ 1951 Mad 115 (116) [A I R V 38 C 13] : 52 Cri L Jour 396 (DB).

[20-21] Normally, a single dacoity or a number of dacoities cannot be held to affect prejudicially the maintenance of public order to an extent calling for the application of the Act. It is, however, possible, that with a single, or a number of gangs, acting, in co-ordination, over extensive areas, maintenance of public order is so prejudiced as to call for application of this extraordinary law. 1951 Vindh Pra 36 (37) [AIR V 38 C 9] : 52 Cri L Jour 894.

[22] It cannot be said that if a person associates himself actively with named notorious and proclaimed dacoits and gangs of dacoits, aids, abets and harbours them in various ways, extracts money from relations of persons held to ransom by the dacoits and terrorizes witnesses from giving evidence against persons accused of serious offences then his activities are not prejudicial to the maintenance of public order. 1954 Madh-B 125 (127) [AIR V 41 C 58] : ILR (1954) Madh B 445 : 1954 Cri L Jour 1062 (DB) ✠ ('51) 3 Pepsu L R 238 (249, 250).

[23] Meeting a dacoit or making efforts to get a person arrested for the offence of dacoity released on bail is not per se an act prejudicial to the maintenance of public order. 1954 Madh B 125 (127) [A I R V 41 C 58] : I L R (1954) Madh B 445 : 1954 Cri L Jour 1062 (DB).

[24] Where there are other activities attributed to the detenu different and independent of the alleged charge of dacoity (wherein he was discharged), the detaining authority is at liberty to continue the detention in spite of the fact that he had been discharged from the offence of dacoity, if he finds that such detention is still necessary for the maintenance of public peace and order. 1952 Hyd 186 (187) [AIR V 39] : I L R (1952) Hyd 770 : 1952 Cri L Jour 1756 (DB).

[25] If the applicant was a member of the communist party which itself was indulging in unlawful and subversive activities, that by itself would be sufficient for the Government to come to the conclusion that his being at large would be prejudicial to the maintenance of public order in the State. 1951 Mad 611 (611, 612) [A I R V 38 C 176] : 52 Cri L Jour 252 (DB).

[26] Merely because a person is a dangerous character or is breaking the law in one manner or the other it does not mean that the

Section 3 — Note 16 *(contd.)*
maintenance of public order is being threatened unless the activities are of such a nature and the situation prevailing in a particular part of the country is such that if he is not detained, the maintenance of public order cannot be maintained or it would be endangered. 1960 Punj 332 (334) [AIR V 47 C 116] : 1960 Cri L Jour 981.

[27] Criticism of the Government however strong it may be or deprecating the action of the Government is not to be regarded as a justifying ground for taking action under the Preventive Detention Act, unless it is such as to undermine security or would tend to overthrow the Government. Freedom of speech and of the press lies at the foundation of all democracy. Disapprobation and criticism of any policy or administrative action of the Government with a view to obtaining redress by lawful means cannot be regarded as an act which is likely to create disaffection in the minds of the people so as to result in disturbance of public safety and the maintenance of public order. 1953 Hyd 295 (296) [AIR V 40 C 149]: ILR (1953) Hyd 568 : 1954 Cri L Jour 52 (DB).

[28] Spread of disaffection against a party Government cannot be said to be a ground for inferring that the public order would not be maintained. 1951 All 459 (459) [A I R V 38 C 97].

[29] An order of detention issued on behalf of His Highness the Raj pramukh is legal, although it is not proved that he was personally satisfied that the detention was necessary with a view to preventing the detenu from acting in a manner prejudicial to public order. 1951 Pepsu 147 (150) [AIR V 38 C 56]: 52 Cri L Jour 1215. (The order is only a formal expression of the fact that the State Government was so satisfied.)

17. "Maintenance of supplies and services essential to the community."— S. 3 (1) (a) (iii)—[1] Section 3 (1) (a) (iii) need not be construed on the principle of ejusdem generis as being related to cl. (ii) which precedes cl. (iii) and which relates to the security of the State or the maintenance of public order. Hence the contention that the maintenance of supplies and services essential to the community referred to in cl. (iii) must have some relation to the maintenance of public order or the security of State mentioned in the preceding cl. (ii) cannot be accepted as it leads to a narrow construction of cl. (iii). 1951 Pat 47 (52) [A I R V 38 C 6] : 30 Pat 630 : 52 Cri L Jour 406 (DB).

[**But see** 1951 Pat 134 (136) [AIR V 38 C 17] : 30 Pat 716 : 52 Cri L Jour 1175 (FB).]

[2] The word "and" between the words "supplies and services" in S. 3 (a) (iii) is used in the ordinary sense and it is not equivalent to "or". Accordingly, when a person is detained under S. 3 (a) (iii), the detaining authority must be satisfied that the detention is essential with a view to preventing the person concerned from acting in any manner prejudicial to the maintenance of supplies as well as services essential to the community. The word "services" used in S. 3 (a) (iii) merely means the means and methods necessary for regulating and maintaining supplies. 1951 Pepsu 164 (168) [AIR V 38 C 60] : 52 Cri L Jour 1438 (DB).

[3] The words "maintenance of supplies and services essential to the community" in S. 3 (1) (a) (iii) of the Preventive Detention Act have to be construed independently of what is stated in Items 3 and 18 in the concurrent list of the Seventh Schedule to the Constitution and what is contained in R. 81 of the Defence of India Rules, 1939. The words clearly mean 'the upkeep of the needs and the provisions essential to the community.' The words cannot reasonably be read as meaning that any one who adulterates foodstuffs would be acting in a manner prejudicial to the maintenance of supplies or the continuity of supplies. Supplying adulterated foodstuffs though it may be harmful to the health of the community would not be prejudicing the maintenance of supplies, and an order of detention cannot be sustained on that ground under S. 3 (1) (a) (iii). 1951 Pat 134 (135, 136) [AIR V 38 C 17]: 30 Pat 716 : 52 Cri L Jour 1175 (FB).

[4] The word "and" between the words "supplies" and "services" is not used in any restrictive sense, but in a comprehensive sense. The manifest intention of Parliament, therefore, in the use of the expression "maintenance of supplies and services essential to the community" in S. 3 (1) (a) (iii), is to provide for preventive detention for reasons connected with the maintenance of supplies essential to the community or the maintenance of services essential to the community or both. Hence any activity which directly interferes with or threatens the maintenance of the supply of such primary necessities of life as food or cloth attracts the operation of S. 3 (1) (a) (iii). 1951 Pat 47 (51) [AIR V 38 C 6] : 30 Pat 630 : 52 Cri L Jour 406 (DB).

[5] Any apprehended act of black marketing or hoarding will directly affect maintenance of supply and service essential to the community. 1951 Pat 47 (51) [AIR V 38 C 6]: 30 Pat 630 : 52 Cri L Jour 406 (DB) ✠ 1951 Orissa 251 (254) [AIR V 38 C 59]: ILR (1951) Cut 387 : 52 Cri L Jour 679 (DB) ✠ 1951 Pat 153 (154) [AIR V 38 C 22] : 30 Pat 653 : 52 Cri L Jour 1231 (DB) ✠ 1951 Trav-Co 217 (219) [AIR V 33 C 87] : I L R (1951) Trav-Co 1 : 52 Cri L Jour 1089 (DB).

[6] The word "supplies" carries with it the meaning "to fill the needs of or to supply provisions to the community". In other words, the meaning of the words "maintenance of supplies and services essential to the community in cl. (iii) of S. 3 (1) (a) must be the upkeep of the needs and the provisions essential to the community." 1952 Pat 185 (188) [AIR V 39] : 31 Pat 97 : 1952 Cri L Jour 493 (FB) ✠ 1951 Pat 134 (136) : [AIR V 38 C 17] : 30 Pat 716 : 52 Cri L Jour 1175 (FB).

[7] The object of the Government in passing the Essential Supplies (Temporary Powers) Act (1946) and regulating the control of production and distribution of certain essential commodities, including iron and steel, was

Section 3 — Note 17 *(contd.)*
to ensure a fair and equitable distribution among the public. Where the activities carried on by the detenu were such as to interfere with the scheme underlying the Act and the Government orders they can rightly be regarded as prejudicial to the maintenance of supplies of essential commodities to the community. 1951 All 838 (845) [AIR V 38 C 210]: 1952 Cri L Jour 3 (DB).

[8] Where the State Government has unequivocally stated that it is satisfied that it is necessary to pass an order of detention to prevent him from acting in a manner prejudicial to the maintenance of supplies and service essential to the community, it cannot be held that it was for any purpose other than that stated by the Government. 1952 Pat 185 (193) [AIR V 39] : 31 Pat 97 : 1952 Cri L Jour 493 (FB).

[9] Smuggling of certain articles of luxury such as gold thread, art silk etc. does not endanger the supply of essential commodities in the country and does not justify an 'order of detention under S. 3 (1) (a) (iii) on this ground. 1951 Punj (Simla) 157 (161) [AIR V 38 C 27] : 52 Cri L Jour 17 (DB).

[10] Whether it is necessary to detain a person on account of his prejudicial activities under Ss. 3 and 4 of the Preventive Detention Act is really a matter for the detaining authority which will consider the nature and degree of seriousness of the prejudicial activities. It is not open to the Court to consider a difference in degree as a difference in class and treat some prejudicial activities as coming within the ambit of the expression 'acting in any manner prejudicial to the maintenance of supplies and services essential to the community' and some as not coming within it though in the ordinary grammatical sense they all come within the expression. 1952 Pat 185 (189) [AIR V 39] : 31 Pat 97 : 1952 Cri L Jour 493 (FB).

[11] In order to justify the making of an order under S. 3 (1) (a) (iii) it must be shown that a reasonable apprehension exists that if the person against whom the order is made is permitted to remain at large, he will do something which is calculated to reduce the quantity of supplies. 1951 Pat 134 (136, 137) [AIR V 38 C 17] : 30 Pat 716 : 52 Cri L Jour 1175 (FB).

[12] Soda ash is a commodity the maintenance of the supply of which is essential to the community. Therefore, the action of a District Magistrate in ordering detention of a person who sells soda ash at prices higher than the controlled prices falls within the purview of S. 3 (1) (a) (iii). 1952 Punj 124 (128) [AIR V 39] : 1952 Cri L Jour 416 (DB).

[13] As essential commodities have not been defined by S. 3 what is regarded by the Executive as an essential commodity must be subject to review by the Courts, though no doubt proper weight would be attached to the views of the Executive if supported by proper materials. 1952 Punj 124 (126) [AIR V 39] : 1952 Cri L Jour 416 (DB).

[14] The petitioner was arrested and detained under S. 3 (1) (a) (iii), Preventive Detention Act for action prejudicial to the maintenance of supplies and services essential to the community. The grounds of detention served on him alleged that the petitioner was smuggling rice into his mill and was carrying on black-marketing activities in rice on a large scale in the course of which he was estimated to have made illegal profits amounting to about five lakhs of rupees,— *Held* that the grounds alleged against the petitioner came within the scope of S. 3 (1) (a) (iii), Preventive Detention Act and as such the detention was not illegal. 1952 Mad 157 (158) [AIR V 39] : 1952 Cri L Jour 306 (DB).

18. Arrangements for expulsion — Section 3 (1) (b). — [1] The classification of foreigners into those who are British subjects and others so as to make the former not foreigners for the purposes of the foreigners Act and the P. D. Act is a reasonable and rational classification and so does not offend Art. 14 of the Constitution. 1955 S C 367 (373) [(S) AIR V 42 C 65] : 1955 S C R 1284 : 1955 Cri L Jour 876.

[2] The right to make arrangements for an expulsion includes the right to make arrangements for preventing any evasion or breach of the order, and the P. D. Act confers the power to use the means of preventive detention as one of the methods of achieving this end. When criminal charges for offences, said to have been committed in India and abroad, are levelled against a person, an apprehension that he is likely to disappear and evade an order of expulsion cannot be called either unfounded or unreasonable. Detention in such circumstances can be rightly termed preventive and falls within the ambit of the Act and is reasonably related to the purpose of the Act. 1955 S C 367 (371, 372) [(S) AIR V 42 C 65] : 1955 S C R 1284 : 1955 Cri L Jour 876.

[3] The right to satisfy itself that the drastic method of preventive detention is necessary to enable suitable arrangements for expulsion to be made is expressly conferred on the State Government by S. 3 (i) (b), and as a State Government cannot expel, the conferral of the right can only mean that the State Government is given the power to decide and to satisfy itself whether expulsion is desirable or necessary, and if it thinks it is, then to detain until proper arrangements for the expulsion are made, one of them, and an essential one, being reference to the Central Government for final orders. It cannot, therefore, be argued that the arrangements contemplated by S. 3 (1) (b) must follow and not precede the order, especially as they involve curtailment of a man's personal liberty. 1955 S C 367 (372) [(S) AIR V 42 C 65] : 1955 S C R 1284 : 1955 Cri L Jour 876.

19. Foreigners Act —S. 3 (1) (b).—[1] The Foreigners Act is not governed by the provisions of the Extradition Act. As Government is given the right to choose, no question of want of good faith can arise merely because it exercises the right of choice which the law confers in ordering detention of the person under S. 3 (1) (b) of the Preventive Detention

Section 3 — Note 19 *(contd.)*
Act. 1955 S C 367 (376) [(S) AIR V 42 C 65]: 1955 SCR 1284: 1955 Cri L Jour 876.

20. Jurisdiction to pass order.—S. 3 (2)—[1] The expression "as provided in sub-Cls. (ii) and (iii) of Cl. (a) of sub-s. (1)" appearing in sub-s. (2) of S. 3 attracts items (ii) and (iii) of Cl. (a) of sub-s. (1) of S. 3. Anyone of the officers mentioned in sub-s. (2) is empowered to act if the satisfaction relates to one or other of the matters mentioned in items (ii) and (iii) above. 1957 Cal 74 (78) [A I R V 44 C 21]: 1957 Cri L Jour 172 (DB).

[2] As S. 3 (2) only authorises particular officers to make the order of detention, an order would not be a good order if made by some other officer. An order, therefore, made by a Deputy Commissioner as such and not as a district Magistrate is without jurisdiction, even if the order states that it was being made under S. 3 (1) (a) (iii) of the Act and the doctrine of presumption of regularity cannot be invoked for presuming that the Deputy Commissioner acted in his capacity as a District Magistrate. 1954 Cal 518 (519) [A I R V 41 C 175]: 1954 Cri L Jour 1496 (DB).

[3] The Commissioner of Police Bombay, has no jurisdiction to make an order under S. 3 (2) against a person who is not resident in Bombay and who is not within his jurisdiction. 1951 Bom 161 (164) [A I R V 38 C 31]: ILR (1950) Bom 736: 52 Cri L Jour 62 (DB).

[4] The State of Bombay cannot, for the purpose of Preventive Detention Act, pass orders for detaining a person found within its territory for his activities in the State of Madras or direct that such a person be interned in the State of Madras. Therefore, when the Commissioner of Police, Bombay arrested and detained a person as he was wanted by the Madras Police for detention, the arrest and detention are illegal. Where such a person is transferred to the State of Madras under S. 2 of the Transfer of Detained Persons Act and after such transfer the Commissioner of Police, Bombay cancels the order of detention he would be entitled to be released and the order of detention cannot be validated by the Madras Government by serving a fresh order of detention without first releasing him. 1951 Mad 583 (588, 589) [AIR V 38 C 163]: 52 Cri L Jour 294 (DB).

[5] Power to pass an order under the Act can be delegated by the Rajpramukh to any of his ministers under the Rules of Business and it is not necessary that Rajpramukh should be personally satisfied as to necessity for passing order of detention. 1951 Pepsu 147 (150) [AIR V 38 C 56]: 52 Cri L Jour 1215.

[6] The mere fact that the detenu's activities extended over places within the area of adjoining district over which he has no jurisdiction does not deprive the District Magistrate of his authority to order his detention when at the time of making the order the detenu was admittedly within his district. 1951 Pat 439 (2) (441) [AIR V 38 C 115]: 1952 Cri L Jour 543 (DB).

[7] Under the scheme of the Act it is a matter entirely for the detaining authority as a representative of the executive Government to decide whether the activities of a particular person are prejudicial to the security of the state, the maintenance of public order etc. It is that authority alone, and not the court who is in the best position to take a decision whether the detention of a particular person is called for on any of the reasons mentioned in S. 3 (1) (a) of the Act. 1953 Bom 59 (61) [AIR V 40 C 17]: ILR (1953) Bom 182: 1953 Cri L Jour 322 (DB).

[8] Unless the reason given for the detention of a person is not within the scope and ambit of the Act it would not be open to the detenu to say that the detaining authority had no jurisdiction to pass an order of detention. 1952 Hyd 186 (187) [AIR V 39]: I L R (1952) Hyd 770: 1952 Cri L Jour 1756 (DB).

[9] Where the detention order is passed by the chief commissioner, Bhopal, the presumption that the authority acted within its jurisdiction and powers clearly arises and implies and indicates the place of the activities unless it is otherwise shown. 1952 Bhopal 6 (10) [AIR V 39]: 1952 Cri L Jour 683.

[10] An order of detention under S. 3 (1) stated in the preamble "whereas the Government of Bombay was satisfied" and its operative part read "Now, therefore the Government of Bombay is pleased to direct that the said Shri.....be detained.

By order of the Governor of Bombay
Sd/- * * *
Secretary to the Government of Bombay
Home Department."

Held, that the order was "expressed" to be made in the name of the Governor as required by Art. 166 (1) of the Constitution because it said, "By order of the Governor". 1952 S C 317 (318) [AIR V 39]: 1952 S C R 674: 1952 Cri L Jour 1269.

[11] Where orders of detention expressly state that the Governor of Punjab was satisfied of their necessity and that they were made by his order, the mere fact that they are signed by the Home Secretary would not make them defective. 1952 S C 350 (352) [AIR V 39]: 1952 SCR 756: 1953 Cri L Jour 146

[*See also* 1952 Raj 33 (34) [AIR V 39]: ILR (1951) 1 Raj 193 : 1952 Cri L Jour 370 (DB).]

21. "Forthwith". — [1] "Forthwith" in section 3 (3) of the Preventive Detention Act cannot mean the same thing as "as soon as may be" in section 7, and the former is more peremptory than the latter. The difference between the two expressions lies in this that while under section 7 the time that is allowed to the authority to send the communication to the detenu is what is reasonably convenient, under section 3 (3) what is allowed is only the period during which he could not, without any fault of his own, send the report. Under section 7 the question is whether the time taken for communicating the grounds is reasonably requisite. Under section 3 (3) it is whether the report has been sent at the earliest point of time possible and when there is an interval of time between the date of the order and the date of the report, what has to be considered is whether the delay in sending

Section 3 — Note 21 *(contd.)*

the report could have been avoided. 1957 S C 28 (31, 32) [(S) A I R V 44 C 6]: 1956 S C R 653 : 1957 Cri L Jour 10.

[But see 1951 Bom 30 (32) [AIR V 38 C 12]: ILR (1951) Bom 190: 52 Cri L Jour 366 (FB).]

22. Report to State. — [1] It is obvious that the communication that has to be served on the detenu under S. 7 of the Act is a formal document setting out the grounds for the order and the particulars in support thereof, subject, of course, to S. 7 (2); whereas the report to the state under S. 3 (3) is a less formal document in the nature of a confidential inter-departmental communication, which is to contain the particulars on which the order was made. It could not have been intended that the contents of the two communications which are so dissimilar in their scope and intendment should be identical. 1957 S C 23 (28) [(S) AIR V 44 C 5]: 1956 S C R 644: 1957 Cri L Jour 5.

[2] The provisions of S. 3 (3) are intended to regulate the course of business between the State Government and the authorities subordinate to it exercising its power under statutory delegation, and their scope is altogether different from that of S. 7. The purpose is so different that it cannot be presumed that the expression "the grounds on which the order has been made" is used in S. 3 (3) in the same sense which it bears in S. 7. 1957 S C 23 (27) [(S) AIR V 44 C 5]: 1956 S C R 644: 1957 Cri L Jour 5.

[3] The failure on the part of the Authority to send along with his report under section 3 (3) the very grounds which he subsequently communicated to the detenu under section 7 is not a breach of the requirements of that sub-section and it was sufficiently complied with when he reported the materials on which he made the order. 1957 S C 23 (28) [(S) AIR V 44 C 5]: 1956 S C R 644: 1957 Cri L Jour 5.

[4] The words "grounds on which the order has been made" occurring in S. 3 (3) when construed in their natural and ordinary sense, would include any information or material on which the order was based. 1957 S C 23 (26) [(S) AIR V 44 C 5]: 1956 S C R 644: 1957 Cri L Jour 5.

23. "Approval".—[1] The approval that the Parliament requires from the State Government under S. 3 (3) is an approval arrived at after considerations of all relevant and material circumstances. It is not a mechanical approval ; it is an approval which requires a certain mental process and that mental process can only be possible provided not only relevant and proper materials are placed before the Government, but also correct facts are placed before the Government. If the Court is satisfied that the State Government gave its approval on incorrect facts placed before it, then the approval is vitiated by extraneous factors and it cannot be an approval required by law. 1956 Bom 490 (492, 493) [AIR V 43 C 189] : ILR (1956) Bom 792 : 1956 Cri L Jour 875 (DB).

[2] An order of detention under S. 3 (2) after 12 days of the making thereof must spend itself under S. 3 (3) unless in the meantime it has been approved by the State Government. Such an approval can only be sought and accorded if the order made by the District Magistrate together with the grounds has been reported to the State Government and not otherwise. If the grounds are not before the State Government it is impossible for it to approve the detention. 1957 Raj 5 (6) [AIR V 44 C 2] : I L R (1956) 6 Raj 720 : 1957 Cri L Jour 100 (DB).

[3] The applicant was actually arrested on 30-1-56. The District Magistrate had ordered detention of the applicant on 7-1-56 but the grounds of detention were drawn up for the first time as late as on 3-2-1956. The State, however, approved the detention of the petitioner although apparently no grounds were submitted to it within 12 days thereof— *Held*, that in the circumstances either the District Magistrate or the State Government had not before them proper material on the basis of which the detention of the petitioner could be ordered or approved. 1957 Raj 5 (6) [A I R V 44 C 2] : I L R (1956) 6 Raj 720 : 1957 Cri L Jour 100 (DB).

24. Grounds for order.—[1] The grounds of detention are required to be prepared soon after the detention if not simultaneously with it or prior thereto and the fact of detention along with the grounds thereof has to be reported by the District Magistrate to the State Government and by the State Government, if it has approved the detention, to the Central Government together with the grounds on which the order has been made. 1957 Raj 5 (6) [AIR V 44 C 2] : ILR (1956) 6 Raj 720 : 1957 Cri L Jour 100 (DB).

[2] Section 3 makes it incumbent upon the Government to communicate to the detenu grounds on which the order has been made. 1951 Bom 252 (253) [A I R V 38 C 48] : I L R (1951) Bom 92 : 52 Cri L Jour 437 (DB).

[3] Whether the grounds are sufficient or not is not within the ambit of the decision of the Court and it is the subjective decision of the Government which is implied. 1957 Punj 235 (237) [AIR V 44 C 88] : ILR (1956) Punj 374 : 1957 Cri L Jour 1168.

[*See also* 1952 Pat 185 (192) [AIR V 39] : 31 Pat 97 : 1952 Cri L Jour 493 (FB).]

[4] The grounds supplied to a detenu must be connected with the order of preventive detention. If it is found that they are not so connected it cannot be said that the requirements of Art. 22 (1) (3) (5) of the Constitution of India had been complied with. Failure to establish a connection between them and the order of detention would make the order invalid. 1950 All 709 (713) [AIR V 37 C 276]: 52 Cri L Jour 732 ✣ 1959 Andh Pra 73 (76) [AIR V 46 C 23] : 1959 Cri L Jour 160 (DB) ✣ 1957 Punj 235 (237) [A I R V 44 C 88] : ILR (1956) Punj 374 : 1957 Cri L Jour 1168.

[5] It may be that the detaining authority may have more materials than the grounds, but the grounds must be the essential basis upon which the detaining authority arrives at its satisfaction and makes the order of detention. 1956 Bom 490 (491) [A I R V 43

Section 3 — Note 24 *(contd.)*

C 189] : I L R (1956) Bom 792 : 1956 Cri L Jour 875 (DB).

[6] The fact that what were essential commodities were laid down in certain statutes e.g. Essential Supplies Act etc. cannot be considered to be a valid ground for nullifying the provisions of S. 3 1954 Cal 591 (594) [A I R V 41 C 202] : 1954 Cri L Jour 1722 (DB).

[7] The question of the correctness of grounds of detention cannot be enquired into by the High Court in an application for a writ of habeas corpus. All that the High Court can see is whether the District Magistrate's satisfaction was bona fide or not. In fact the Act itself provides the forum where the correctness of the grounds of detention is to be examined. 1951 All 456 (457) [A I R V 38 C 96].

[8] Though it is not competent to the Court to inquire into the sufficiency of the materials and reasonableness of the grounds on which the detaining authority was satisfied that it was necessary to make the order under S. 3 (1), the grounds can be scrutinised to see whether the detaining authority had the state of satisfaction necessary to make an order under the section. 1951 Madh B 56 (58) [AIR V 38 C 16] (DB).

[9] Where a careful scrutiny of the grounds show that the District Magistrate had not the state of satisfaction which he professed to have when he made the order of detention, statutory requirement of satisfaction has not been fulfilled and the detention of the applicant is not justified. 1951 Madh B 56 (58) [AIR V 38 C 16] (DB).

[10] The scheme of the Act is not merely to import mechanically the language of cls. (a) and (b) of S. 3 (1) into the grounds given under S. 7 but to give all facts, particulars and details on which the detention is based. 1951 Bom 33 (43) [A I R V 38 C 13]: I L R (1951) Bom 546 : 52 Cri L Jour 418 (DB).

[11] If in addition to setting forth the grounds which he did correctly enough the District Magistrate made a slip in a superfluous portion of the relevant communication it cannot be said that he did not observe the forms and rules of law so as to vitiate his order. 1954 Cal 591 (595) [AIR V 41 C 202] : 1954 Cri L Jour 1722 (DB).

[12] If the later communication contains facts leading to a conclusion which is outside the grounds first supplied the same cannot be looked into as supporting the order of detention and therefore those grounds are new grounds. 1955 Raj 6 (11) [(S) AIR V 42 C 4] : I L R (1954) 4 Raj 51 : 1955 Cri L Jour 95 (DB).

[13] The grounds on which a person is arrested under S. 109, Criminal P.C., can legitimately be utilized for his detention under the P. D. Act if those grounds satisfy the requirements of S. 3 of the Act under which the order is passed. Where after such an order is passed the proceedings pending under S. 109, Criminal P. C. against the person are dropped the order of detention is not illegal nor can it be said to be made mala fide. 1955 N U C (Assam) 28 (41) [AIR V 42].

[14] All the grounds supplied to the petitioner must be clear and specific and even if one of them does not satisfy this condition the right of representation guaranteed to the detenu under Art. 22 (5) of the Constitution is affected and consequently the order of detention is illegal. 1953 Pepsu 207 (208) [AIR V 40 C 83] : I L R (1953) Patiala 423 : 1953 Cri L Jour 1838.

[15] The Government cannot modify the grounds on which the District Magistrate bases his satisfaction. In other words the Government cannot substitute its own satisfaction for the satisfaction of the District Magistrate. 1955 Raj 6 (11) [(S) A I R V 42 C 4] : I L R (1954) 4 Raj 51 : 1955 Cri L Jour 95 (DB).

[16] Grounds of detention being vague and indefinite — Order of detention is bad in law. ('50) 3 Sau L R 151 (154) (DB) ✠ 1952 Pepsu 126 (127) [AIR V 39] : 3 Pepsu L R 77 : 1952 Cri L Jour 1485 (DB). (Ground furnished to detenu stating that he was a believer in the cult of violence — No facts quoted in support of the allegation—Ground is vague and detention illegal.)

[17] It is not necessary for Government when it proceeds to confirm an order of detention and to continue the detention of the person concerned to supply the grounds on which the detention is being continued. 1952 Punj 406 (407) [AIR V 39] : ILR (1952) Punj 481 : 1953 Cri L Jour 26 (DB).

[But see 1951 Punj (Simla) 119 (119) [AIR V 38 C 25I] : 52 Cri L Jour 1451 (DB).]

[18] Maintenance of public tranquillity cannot furnish valid ground for detention. 1955 Raj 6 (9) [(S)AIR V 42 C 4] : ILR (1954) 4 Raj 51 : 1955 Cri L Jour 95 (DB).

[19] When the grounds justified the detention of the petitioner, it cannot be said that it was a case of satisfaction on the part of the detaining authority patently simulated. 1958 Mad 425 (428) [AIR V 45 C 143] : ILR (1958) Mad 692 : 1958 Cri L Jour 1047 (DB).

[20] In determining whether a ground of detention is or is not relevant, the grounds of detention must be regarded as a whole. 1952 S C 324 (328) [AIR V 39] : 1952 S C R 683 : 1952 Cri L Jour 1503 ✠ ('61) 1961 (2) Cri L Jour 547 (552) (Punj) ✠ ('60) 1960 Jab L J 522 (524) (DB) ✠ 1955 Madh B 36 (40) [AIR V 42 C 9] : ILR (1955) Madh B 98 : 1955 Cri L Jour 476 (DB).

[21] Where there are several grounds of detention and one of them is the subject-matter of a criminal prosecution that does not make the order of detention illegal. 1955 Madh B 65 (65) [AIR V 42 C 17] (DB).

[22] When out of the several grounds of detention one or more are beyond the scope of the Act under which an order of detention is made, even if some of the grounds are legal, the entire order of detention is vitiated thereby and in the application of this principle the reason why a particular ground is held to be beyond the scope of the Act is not material at all. 1952 Pepsu 126 (128) [AIR V 39] : 3 Pepsu L R 77 : 1952 Cri L Jour 1485 (DB)✠

Section 3 — Note 24 *(contd.)*
1960 Punj 332 (334) [AIR V 47 C 116] : 1960 Cri L Jour 981 ✣ 1951 Punj (Simla) 157 (166) [AIR V 38 C 27] : 52 Cri L Jour 17 (DB).

[23] The mere fact that the order of detention under S. 3 (1) was passed by one Chief Commissioner, but the grounds were supplied by his successor-in office, does not warrant the inference that these grounds were those which satisfied the then Commissioner who made the order of detention in the matter of the requisite satisfaction before passing the order. 1952 Bhopal 6 (10) [AIR V 39] : 1952 Cri L Jour 683.

25. Power of Court.—[1] A Court of law is not even competent to inquire into the truth or otherwise of the facts which are mentioned as grounds of detention in the communication to the detenu under S. 7 of the Act. 1954 S C 179 (181) [AIR V 41 C 37] : 1954 S C R 418 : 1954 Cri L Jour 456 ✣ 1951 Pat 134 (135) [AIR V 38 C 17] : 30 Pat 716 : 52 Cri L Jour 1175 (FB) ✣ 1955 Madh B 36 (40) [AIR V 42 C 9] : I L R (1955) Madh B 98 : 1955 Cri L Jour 476 (DB) ✣ 1953 Assam 97 (100) [A I R V 40 C 42] : I L R (1953) 5 Assam 66 : 1953 Cri L Jour 770 ✣ 1953 Pat 351 (352) [AIR V 40 C 125] : 1953 Cri L Jour 1734 (DB) ✣ 1951 Trav-Co 217 (219) [AIR V 38 C 87] : ILR (1951) Trav-Co 1 : 52 Cri L Jour 1089 (DB).

[2] It is not open to the Court to go into the question whether on merits the detaining authority had justification to pass the order of detention or to continue the detention. That under the Act is a sphere exclusively of the detaining authority and upon this sphere the Court cannot encroach. 1953 Bom 59 (61) [AIR V 40 C 17] : ILR (1953) Bom 182 : 1953 Cri L Jour 322 (DB).

[3] The reasonableness of the suspicion on which the order of detention is made can never be enquired into by the Court. ('54) ILR (1954) 1 Cal 1 (29) (FB).

[4] The Court can only go into the question whether the grounds supplied to the detenue are irrelevant or vague and can afford a basis for the subjective satisfaction of the detaining authority. 1953 Cal 81 (82) [AIR V 40 C 24] : 1953 Cri L Jour 310 (DB).

[5] It is very essential that a Court of Law should, as far as possible, keep away from the heat and dust of political battle and make an objective and detached appraisal of the record before it. 1956 Bom 490 (491) [A I R V 43 C 189] : ILR (1956) Bom 792 : 1956 Cri L Jour 875 (DB).

[6] The Court should be vigilant to safeguard the liberty of the subject. 1956 Bom 490 (491) [AIR V 43 C 189] : ILR (1956) Bom 792 : 1956 Cri L Jour 875 (DB).

[7] Although it is not open to the Court to scrutinize the correctness or incorrectness of the allegations made by the detaining authority, yet it is entitled to know that the order is bona fide. 1951 Vindh Pra 36 (38) [AIR V 38 C 9] : 52 Cri L Jour 894.

[8] It is not for the High Court to sit in appeal over the decision arrived at by the Government. 1955 NUC (Bom) 5548 [AIR V 42] ✣ ('53) ILR (1953) Madh B 138 (142).

[9] The Court has to consider with a view to determining whether an order of detention under the Preventive Detention Act is legal, whether the detaining authority was satisfied as a matter of fact or he could be satisfied on the material or information that was before him. 1952 Pepsu 126 (127) [AIR V 39] : 3 Pepsu L R 77 : 1952 Cri L Jour 1485 (DB).

[10] The grounds supplied to the detenu can be examined by the High Court to see if the mandatory provisions of clause 5 of Art. 22 of the Constitution have been complied with. 1951 Pat 153 (156) [AIR V 38 C 22] : 30 Pat 653 : 52 Cri L Jour 1231 (DB).

[11] Affidavits filed on behalf of the detenus may generally be divided into three classes (i) those that consist of a mere denial of the grounds or facts alleged; (ii) those that consist of an attempted explanation of the fact alleged, the truth of the explanation depending on credibliity of evidence; and (iii) those that disclose circumstances which render the grounds or the facts on which the grounds are founded completely non-existent, that is inaccurate on the face of them without the necessity, and independent ot the question of any evidence. It is in the last class of cases the High Court can interfere on the ground that the order is not bona fide. The first two classes of cases are those in which the Advisory Board is the proper authority to consider the denial or the explanation. 1951 Pat 153 (156) [AIR V 38 C 22] : 30 Pat 653 : 52 Cri L Jour 1231 (DB).

[12] The High Court cannot undertake an investigation as to the truth or otherwise of the materials on which the satisfaction of the executive authority is grounded. The facts alleged have to be taken to be correct and it will not be a ground for interference if the detenu merely puts forward a counter-version. 1951 Pat 153 (155) [AIR V 38 C 22] : 30 Pat 653 : 52 Cri L Jour 1231 (DB).

[13] In an application by a detenu ordered to be detained by an order under Ss. 3 and 4 of the Preventive Detention Act filed under S. 491, Cr. P. Code, or Art. 226 of the Constitution, the High Court cannot treat detention cases as though they were cases under trial before it and to substitute its own judgment for that of the State Government. 1952 Pat 298 (303) [AIR V 39] : 1952 Cri L Jour 1101 (DB). (Ground communicated not imaginary —Court cannot scrutinise evidence.)

[14] The statement that the High Court cannot question the correctness of the ground means that an investigation into the correctness or otherwise of the grounds, depending as it does on the believability of evidence, cannot be undertaken by the High Court because it is not the satisfaction of the High Court which is a condition precedent to the validity of the order but the satisfaction of the State Government. In such cases, whether there is an affidavit in reply or not the High Court is powerless to interfere. 1951 Pat 153 (156) [AIR V 38 C 22] : 30 Pat 653 : 52 Cri L Jour 1231 (DB).

Section 3 — Note 25 *(contd.)*

[15] In a matter so fundamental and important as the liberty of the subject, which can be deprived of only by strict compliance with the statutory requirements of S. 3, the High Court will not be prepared to uphold the validity of an order of detention by reliance on S. 114, Illustration (e), Evidence Act. 1952 Orissa 200 (201) [AIR V 39] : ILR (1952) Cut 353 : 1952 Cri L Jour 1051 (DB).

[16] The Court is not given the jurisdiction to decide whether the subjective decision of the authority making the order was right or not. 1951 S C 481 (483) [AIR V 38 C 65] : 1952 S C R 18 : ILR (1952) Punj 1 : 1952 Cri L Jour 75.

[17] A writ of habeas corpus is intended for the protection of personal liberty which is a fundamental right under the Constitution, and considering the object for which the power has been conferred, it is conceived that whenever the case of unlawful deprivation of personal liberty is brought to the notice of the Court the Court will not hesitate to issue the writ. 1956 Tripura 1 (1, 2) [AIR V 43 C 1] : 1956 Cri L Jour 118.

[18] There is nothing in the Constitution itself which bars the power of the Supreme Court or the High Courts to examine the facts of each particular case on a Habeas Corpus application and to decide the reasonableness of the suspicion entertained about a person. ('54) ILR (1954) 1 Cal 1 (32) (FB).

[19] A provision whereby a Court is prevented from examining into the validity or propriety of a detention order, by reason of the subjective satisfaction of the executive, amounts, in effect, to a suspension of the power of the Court to issue a writ of Habeas Corpus. ('54) ILR (1954) 1 Cal 1 (33) (FB).

[*See also* ('51) 3 Pepsu L R 238 (247) (DB).]

[20] In proceedings under habeas corpus petition what the Courts have to see is whether the particular detention complained of is lawful or not. If not lawful the Courts would order the release of the petitioner from detention under such a detention order. 1957 All 782 (790) [(S) AIR V 44 C 217] : ILR (1957) 2 All 42 : 1957 Cri L Jour 1361 (DB).

[21] The propriety or reasonableness of the satisfaction of the Central or the State Government upon which an order for detention under S. 3 of the Preventive Detention Act is based, cannot be raised and the Supreme Court cannot be invited to undertake an investigation into sufficiency of the matters upon which such satisfaction purports to be grounded. The Supreme Court can, however, examine the grounds disclosed by the Government to see if they are relevant to the object which the legislation has in view, namely, the prevention of objects prejudicial to the defence of India or to the security of State and maintenance of law and order therein. 1954 S C 276 (277) [AIR V 41 C 64] : 1954 Cri L Jour 735.

[22] The considerations which guide the State in taking action under the process of preventive detention are not necessarily the same as those which guide Courts in punishing persons disobeying the laws of the State. With executive considerations the High Court has no concern. ('50) 1950 All L J 608 (611).

26. Power of Court — Sufficiency of grounds.—[1] The power to issue a detention order under S. 3 depends entirely upon the satisfaction of the appropriate authority specified in that section. The sufficiency of the grounds upon which such satisfaction purports to be based, provided they have a rational probative value and are not extraneous to the scope or purpose of the legislative provision, cannot be challenged in a Court of law except on the ground of mala fides. 1955 Madh B 36 (39, 40) [AIR V 42 C 9] : ILR (1955) Madh B 98 : 1955 Cri L Jour 476 (DB) ✠ 1954 S C 179 (181) [AIR V 41 C 37]: 1954 S C R 418 : 1954 Cri L Jour 456 ✠ 1951 S C 174 (176) [AIR V 38 C 25] : 1951 S C R 212 : 52 Cri L Jour 400 ✠ 1951 S C 157 (160) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 ✠ 1960 Guj 43 (45) [AIR V 47 C 16] : 1960 Cri L Jour 1588 (DB) ✠ 1959 Andh Pra 73 (76) [AIR V 46 C 23] : 1959 Cri L Jour 160 (DB) ✠ 1956 All 589 (593) [AIR V 43 C 196] : 1956 Cri L Jour 1152 (DB) ✠ 1952 Bhopal 1 (5) [AIR V 39] : 1952 Cri L Jour 660 ✠ 1952 Mys 85 (87) [AIR V 39] : ILR (1951) Mys 455 : 1952 Cri L Jour 1526 (DB).

[2] Merely because a ground is vague it cannot be considered that it is no ground at all and therefore not sufficient to satisfy the authorities, and a vague ground does not stand on the same footing as an irrelevant ground, which can have no connection at all with the satisfaction of the Government. 1952 Mys 85 (87) [A I R V 39] : I L R (1951) Mys 455 : 1952 Cri L Jour 1526 (DB).

[3] It is not for the High Court to probe into the sufficiency of the grounds which satisfied the Magistrate. It is not possible to subject the grounds to any objective test of sufficiency. ('53) I L R (1953) Madh B 138 (142).

[4] A detenu is not entitled to urge that High Court should enquire into the sufficiency of the material which was before the District Magistrate or reasonableness of his satisfaction with regard to the detention of the petitioner. 1951 Madh B 51 (55) [AIR V 38 C 15] (DB).

[5] While it is not open to the Court to determine the sufficiency of the reasons which induced the detaining authority to issue the order of detention or to investigate into the evidence upon which the authority was satisfied of the necessity for the detention, the Court in the exercise of its powers will be competent to determine whether such an order could have been made by a person acting reasonably. If it found that the authority did not apply its mind in passing the order, the Court will set it aside. 1952 Bhopal 1 (5) [AIR V 39] : 1952 Cri L Jour 660.

27. State and Central Government. — [1] The word "State" is used distributively and refers to the appropriate State. ('54) ILR (1954) 1 Cal 1 (15) (FB).

[2] In view of the Adaptation of Laws Order, 1950, and the General Clauses Act, the

[a][3A. Execution of detention orders.

A detention order may be executed at any place in India in the manner provided for the execution of warrants of arrest under the [1]Code of Criminal Procedure, 1898.]

[a] *Inserted* by the Preventive Detention (Amendment) Act, 1951 (IV of 1951), S. 5 [22.2-1951].

[a][4. Power to regulate place and conditions of detention.

Every person in respect of whom a detention order has been made shall be liable—

(a) to be detained in such place and under such conditions, including conditions as to maintenance, discipline and punishment for breaches of discipline, as the appropriate Government may, by general or special order, specify; and

(b) to be removed from one place of detention to another place of detention, whether within the same State or in another State, by order of the appropriate Government:

Provided that no order shall be made by a State Government under clause *(b)* for the removal of a person from one State to another State except with the consent of the Government of that other State.]

[a] Sections 4 and 5 were *substituted* for the original sections 4 and 5 by the Preventive Detention (Amendment) Act, 1951 (IV of 1951), S. 6 [22-2-1951].

Section 3 — Note 27 *(contd.)*

use of the words "Central Government" or the words "The State" do not make S. 3 meaningless. ('54) ILR (1954) 1 Cal 1 (14, 15) (FB).

[3] The words 'Central Government' mean in relation to anything done or to be done after the commencement of the Constitution, the President. ('54) ILR (1954) 1 Cal 1 (16, 38) (FB).

Section 3A — Note 1

[1] Section 3A provides for the mode of execution of an order of detention in India. It does not connote the absence of a power to order detention outside India. The execution of an order for detention outside India cannot be provided for in a statutory enactment. 1953 Cal 81 (85) [A I R V 40 C 24] : 1953 Cri L Jour 310 (DB).

[2] Sections 3A, 4 (a) and (b) cannot be read as limiting the scope of S. 5. 1953 Cal 81 (85) [A I R V 40 C 24] : 1953 Cri L Jour 310 (DB).

[3] Non-service of the detention order simultaneously with the arrest does not necessarily render the arrest illegal. It is all a question of substance, whether subsequent service is or is not sufficient compliance with law. 1953 Mad 41 (49) [AIR V 40 C 17] : 1953 Cri L Jour 224.

[4] Detention order not a warrant of arrest —Provisions of S. 80, Criminal P. C., cannot be extended to detention order by virtue of S. 3-A. 1961 All 542 (543, 544) [AIR V 48 C 139] : 1961 (2) Cri L Jour 595 (DB).

Section 4 — Note 1

[1] Merely because an order under S. 4 is invalid and would vitiate the detention in a particular place which is referred to in that order, the order of detention itself, which has been properly passed, will not be invalidated. If the factum of detention in a particular place becomes illegal by reason of an order under S. 4 being bad, it can be subsequently validated by a proper order made under S. 4. In such a case the absence of a valid order directing that the detenu be detained in a particular place would not compel the Court to release the detenu if a valid order directing his detention in a particular place is passed by a proper authority before his release. 1952 Bom 1 (5, 6) [AIR V 39] : I L R (1952) Bom 134 : 1952 Cri L Jour 81 (DB).

[2] Sections 3A, 4 (a) and 4 (b) cannot be read as limiting the scope of S. 5. 1953 Cal 81 (85) [A I R V 40 C 24]: 1953 Cri LJ 310 (DB).

[3] A person who is ordered to be detained by a District Magistrate but whose period of detention is extended by an order of the State Government is entitled to claim that fresh grounds of detention should be supplied to him. 1951 Punj (Simla) 119 (119) [AIR V 38 C 25I]: 52 Cri L Jour 1451 (DB).

[4] Section 4, Preventive Detention Act, which gives power to Government and in exercise of which Orissa Security Prisoners (Condition of Detention) Order was passed has not laid down any mode of publication—Order also not published in Gazette—No question of prosecuting a person affected by order, for contravention of its provisions can arise until he has been communicated of its provisions. 1953 Orissa 336 (337) [AIR V 40 C 98]: I L R (1953) Cut 514 : 1953 Cri L Jour 1840 (DB).

[5] The Punjab Communist Detenus Rules, 1950, constitute a self-contained code regulating the place and conditions of detention of the detenus. Hence Ss. 45, 46 and 52 of the Prisons Act do not apply to their case. 1953 S C 325 (332) [A I R V 40 C 77] : 1953 S C R 730 : 1953 Cri L Jour 1432.

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[a][5. Detention orders not to be invalid or inoperative on certain grounds.
No detention order shall be invalid or inoperative merely by reason—
(a) that the person to be detained thereunder is outside the limits of the territorial jurisdiction of the Government or officer making the order, or
(b) that the place of detention of such person is outside the said limits.]

[a] Sections 4 and 5 were *substituted* for the original sections 4 and 5 by the Preventive Detention (Amendment) Act, 1951 (IV of 1951) S. 6 [22-2-1951].

6. Powers in relation to absconding persons.
[a][*(1)*] If the Central Government or the State Government or an officer specified in sub-section *(2)* of section 3, as the case may be, has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government or officer may—

(a) make a report in writing of the fact to a Presidency Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 87, 88 and 89 of the Code of Criminal Procedure, 1898, shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate ;

(b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

[a][*(2)* Notwithstanding anything contained in the Code of Criminal Procedure, 1898, every offence under clause *(b)* of sub-section *(1)* shall be cognizable.]

[a] Section 6 was *renumbered* as sub-section (1) of that section and sub-s. (2) was *inserted* by the Preventive Detention (Second Amendment) Act, 1952 (LXI of 1952), S. 5 [30-9-1952].

7. Grounds of order of detention to be disclosed to persons affected by the order.
(1) When a person is detained in pursuance of a detention order, the authority making the order shall, [a][as soon as may be, but not later than five days from the date of detention], communicate to him the grounds on which the

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Section 5 — Note 1

[1] Section 5 plainly provides for passing an order of detention of the would-be detenue even though he is outside the territorial limits of the jurisdiction of the Government, which may mean either the Central or the State Government. This connotes the exercise of the power of detention of a "person to be detained." i. e., the would-be detenue even when he is in a foreign country. The section does not draw any distinction between deliberate and unintentional exercise of extra-territorial powers. The use of the words 'merely' is not intended to restrict the exercise of extra-territorial powers. Sections 3A, 4 (a) and 4 (b) cannot be read as limiting the scope of section 5. The context does not therefore, narrow down to plain meaning of section 5. Section 5 is not limited to cases of unintentional exercise, by the detaining authority, of extra-territorial powers. 1953 Cal 81 (84, 85) [AIR V 40 C 24] : 1953 Cri L Jour 310 (DB).

SECTION 7 — SYNOPSIS

1. Scope and applicability.
2. Communication of grounds.
3. "Authority making the order."
4. "As soon as may be."
5. "Grounds on which the order has been made."
6. Vagueness of grounds.
7. Particulars whether should be given.
8. Sufficiency of grounds.
9. Powers of High Court.
10. Notice.
11. Burden of proof.
12. Earliest opportunity.

order has been made, and shall afford him the earliest opportunity of making a representation [b][against the order to the appropriate Government].

(2) Nothing in sub-section *(1)* shall require the authority to disclose facts which it considers to be against the public interest to disclose.

[a] *Substituted* for "as soon as may be" by the Preventive Detention (Second Amendment) Act, 1952 (LXI of 1952), S. 6 [30-9-1952]. [b] *Substituted* for the words "against the order, in a case where such order has been made by the Central Government, to that Government and in a case where it has been made by a State Government or an officer subordinate thereto to the State Government" by the Preventive Detention (Amendment) Act, 1951 (IV of 1951), S. 7 [22-2-1951].

Section 7 — Synopsis *(contd.)*

13. Representation by detenu.

14. Disclosure of facts — Sub-s. (2).

1. Scope and applicability. — [1] Section 7 of the Preventive Detention Act which compels the detaining authority to supply persons deprived of their liberty without a trial and to afford them an opportunity of making a representation for the purpose of clarifying their position and repudiating the grounds urged against them, are meant to be considered as substituted for trial. This minimum of liberty should not be further whittled down. 1951 Orissa 20 (21) [AIR V 38 C 8] : ILR (1950) Cut 540 : 52 Cri L Jour 104 (DB).

[2] No doubt S. 7 gives a very valuable right to the detenu and should the Government fail to conform with the provisions of that section the detenu can claim to be released, but this fact does not extend its provisions to the orders to which it does not relate. It merely comes into play when an order of detention is made and it has no applicability whatsoever to the order confirming the order of detention or extending the period fixed by that order. 1952 Pepsu 100 (101) [AIR V 39] : ILR (1952) Patiala 192: 1952 Cri L Jour 1093.

[3] An order passed under S. 3 of Jammu and Kashmir Public Security Act cannot be said to be invalid because the detenu is not supplied with the grounds of detention. The provisions of S. 7 of the P. D. Act cannot apply to such a case and the provisions of the Public Security Act do not provide for supplying such grounds to the detenu. 1952 J & K 4 (6) [AIR V 39] : 10 J & K L R 38.

[4] Section 11 of the P. D. Act does not empower the Government expressly or by implication to override the provisions of S. 7. 1951 Punj 119 (119) [AIR V 38 C 25 I] : 52 Cri L Jour 1451 (DB).

[5] The provisions of S. 7 are mandatory. 1952 Pepsu 100 (101) [AIR V 39] : ILR (1952) Patiala 192 : 1952 Cri L Jour 1093.

2. Communication of grounds.— [1] Under S. 7 grounds of detention must be communicated as soon as may be, so that the detenu may have the earliest opportunity of representing against the order. Non-compliance with the provisions of S. 7 makes the detention improper. 1952 Hyd 24 (24) [AIR V 39] (DB)✣ 1950 S C 27 (67) [AIR V 37 C 6]: 1950 S C R 88: 51 Cri L Jour 1383✣ 1952 Cal 26 (29) [AIR V 39] : ILR (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB)✣ 1951 Pat 389 (394, 395) [AIR V 38 C 99] : 29 Pat 992 : 52 Cri L Jour 282 (DB)✣ 1950 Hyd 68 (69) [AIR V 37 C 21] : ILR (1951) Hyd 183 (DB).

[2] The grounds should communicate to the detenu the substance of information that is available against him. If this is not done, there is danger of his right of representation being defeated. 1951 Assam 29 (33) [AIR V 38 C 12] : ILR (1950) 2 Assam 453 : 52 Cri L Jour 1186 (DB).

[3] It is only those grounds on which the order has been made that have to be communicated to the detenu. 1951 Pat 389 (395) [AIR V 38 C 99] : 29 Pat 992 : 52 Cri L Jour 282 (DB).

[4] Section 7 does not require that the communication of the grounds should be made directly by the authority making the order. The communication may be through recognised channels prescribed by the administrative rules of business. 1952 S C 350 (352) [AIR V. 39] : 1952 S C R 756 : 1953 Cri L Jour 146.

[5] Section 7 requires the detaining authority to communicate to the detenu the grounds of detention, but it does not require him to set forth over again the specific provisions of the P. D. Act under which the detention order was made. 1954 Cal 591 (595) [AIR V 41 C 202] : 1954 Cri L Jour 1722 (DB).

[6] Where, in addition to setting forth the grounds which he did correctly the District Magistrate made a slip in a superfluous portion of the relevant communication it could not be said that he did not observe the forms and the rules of law so as to vitiate his order 1954 Cal 591 (595) [AIR V 41 C 202] : 1954 Cri L Jour 1722 (DB).

[7] A description of the contents of the second communication of the grounds for detention as "supplementary grounds" does not necessarily make them additional or new grounds One has to look at the contents to find out whether they are new grounds. When they only furnish details of the grounds furnished to the detenu previously, they cannot be treated as new grounds. Further the fact that the details were communicated later does not necessarily show that they were not within the knowledge of the authorities when they sent the first communication of grounds. 1951 S C 174 (176) [AIR V 38 C 25]: 1951 S C R 212 : 52 Cri L Jour 400.

[8] Where a communication sent to the petitioners was to the effect that they held a secret meeting of Adivasis and incited and instigated them to have recourse to intimidation, violence and arson in order to prevent the labourers from outside villages hired by landlords from working for landlords and as a result of such incitement and instigation there were several cases of intimidation, vio-

Section 7 — Note 2 *(contd.)*

lence and arson and the particulars which followed gave the dates on which the several incidents took place and the communication further stated that it was not in public interests to disclose further facts, it was held that the communication as a whole was not vague and was sufficiently definite to apprise the petitioners of what they were charged with and to enable them to give their explanation therefor. 1957 S C 23 (25) [(S) AIR V 44 C 5]: 1956 S C R 644 : 1957 Cri L Jour 5.

[9] There is no obligation to communicate to the detenu the decision not to disclose the facts as well as the ambit of the non-disclosure at the time when the grounds are furnished. The necessity for such a communication would arise only if the detenu, feeling the grounds to be vague, asks for particulars. An obligation to communicate the decision not to disclose facts considered prejudicial to public interest may well be implied in such a situation. But in the absence of any such request by the detenu, the non-communication of the decision cannot be held to have hampered his constitutional right of representation and an obligation to communicate cannot be implied in those circumstances. 1956 S C 531 (535, 536) [(S) A I R V 43 C 91] : 1956 S C R 382 : 1956 Cri L Jour 935.

[10] Section 7 of the Preventive Detention Act only requires the authorities to 'communicate' to the detenu the grounds on which the order has been made. Accordingly, if a copy of the grounds was not furnished but he was only informed of the grounds, that by itself would not make the detention illegal. 1951 Raj 69 (71) [AIR V 38 C 29] : 1952 Cri L Jour 425 (DB).

3. "Authority making the order." — [1] Article 22 (5) of the Constitution contemplates that the grounds are to be furnished after the detention; therefore the words 'the authority making the order', do not mean the individual who made it. What is meant by the words "the authority making the order" is, if the order is made by the District Magistrate, the District Magistrate, if the order is made by the Government of a State, the State Government, if the order is made by the Central Government, then necessarily the Central Government. Thus, there is nothing wrong if an order of detention is passed by one District Magistrate and after his transfer the grounds are supplied by another District Magistrate. 1951 Bom 33 (41, 42) [AIR V 38 C 13] : I L R (1951) Bom 546 : 52 Cri L Jour 418 (DB).

[2] If the appropriate Government proceeds to confirm an order of detention under S. 11 and to specify the period for which the detention should continue it does not become "the authority making the order" which is required by S. 7 to supply the grounds of detention. 1952 Punj 406 (407) [AIR V 39] : I L R (1952) Punj 481 : 1953 Cri L Jour 26 (DB).

4. "As soon as may be." — [1] In the following cases decided with reference to the section as it stood before the amendment of 1951, it was held that the Act does not fix the time within which the grounds should be furnished to the person detained. It merely states that the communication must be "as soon as may be." This means reasonable despatch and what is reasonable must depend on the facts of each case. No arbitrary time-limit can be set down. 1952 S C 350 (352) [AIR V 39] : 1952 S C R 756 : 1953 Cri L Jour 146 ✣ 1951 S C 174 (176) [AIR V 38 C 25] : 1951 S C R 212 : 52 Cri L Jour 400 ✣ 1951 Bom 30 (31) [AIR V 38 C 12] : I L R (1951) Bom 190 : 52 Cri L Jour 366 (FB) ✣ 1951 Hyd 128 (132) [AIR V 38 C 53] : I L R (1951) Hyd 654 : 52 Cri L Jour 1402 (FB) ✣ 1953 Hyd 277 (279) [AIR V 40 C 142] : I L R (1953) Hyd 459 : 1953 Cri L Jour 1845 (DB) ✣ 1952 Hyd 112 (116) [AIR V 39] : I L R (1952) Hyd 122 : 1952 Cri L Jour 1076 (DB) ✣ 1952 Pepsu 61 (61) [AIR V 39] : 2 Pepsu L R 471 : 1952 Cri L Jour 591 ✣ 1951 Assam 29 (32) [AIR V 38 C 12] : I L R (1950) 2 Assam 453 : 52 Cri L Jour 1186 (DB) ✣ 1951 Hyd 43 (43, 44) [AIR V 38 C 7] (DB) ✣ 1951 Pat 389 (393) [AIR V 38 C 99] : 29 Pat 992 : 52 Cri L Jour 282 (DB).

[2] Under S. 7 the grounds of detention have to be communicated to the detenu as soon as may be. 1951 Bom 30 (31) [AIR V 38 C 12] : I L R (1951) Bom 190 : 52 Cri L Jour 366 (FB) ✣ 1951 Pepsu 84 (85) [AIR V 38 C 33]: 2 Pepsu L R 394 ✣ 1951 Punj 157 (159) [AIR V 38 C 27] : 52 Cri L Jour 17 (DB).

[3] The period of five days provided in S. 7 is an absolute one and is independent of the period which is permissible under the expression "as soon as may be" which must by its very nature be indefinite depending on the facts and circumstances of the case. 1957 S C 28 (33) [(S) AIR V 44 C 6] : 1956 S C R 653: 1957 Cri L Jour 10.

[4] The word "forthwith" in S. 3 (3) cannot mean the same thing as "as soon as may be" in S. 7. The former is more peremptory than the latter. 1957 S C 28 (32) [(S) AIR V 44 C 6] : 1956 S C R 653 : 1957 Cri L Jour 10.

[5] The rights to have the ground and to make representation against it are secured by the Constitution and the obligation of "as soon as may be" and "earliest opportunity" in each case are cast on the authority concerned. Enquiry about the time limitations is, therefore, an important judicial function. 1951 Hyd 128 (129) [AIR V 38 C 53] : I L R (1951) Hyd 654 : 52 Cri L Jour 1402 (FB).

[6] The words "as soon as may be" in S. 7 are not equivalent to "as and when the detaining authority thinks proper" but they require that the order should be conveyed to the person affected as early as in the circumstances of the case could reasonably be expected to be done. 1951 Pepsu 84 (85) [AIR V 38 C 33] : 2 Pepsu L R 394.

[7] The words "as soon as may be" and earliest opportunity of making a representation under S. 7 are correlative and stress upon the detaining authority the necessity of providing the detenu as soon as may reasonably be practicable with the grounds on which his detention has been ordered, so that

Section 7 — Note 4 *(contd.)*

he may avail of the earliest opportunity to apply to the Government for revocation or withdrawal of the order if it is unjustified, improper or illegal. 1951 Pepsu 84 (85) [AIR V 38 C 33] : 2 Pepsu L R 394.

[8] Where a contention is based on the question of delay it is for the Government to explain why the grounds were not furnished sooner than they were. 1951 Raj 69 (71) [AIR V 38 C 29] : 1952 Cri L Jour 425 (DB).

[9] Inordinate delay in communicating the grounds of his detention to the detenu vitiates the order and renders his detention improper and illegal. 1951 Pepsu 84 (85) [AIR V 38 C 33] : 2 Pepsu L R 394.

[10] Unreasonable delay in communication of the grounds or communication of inadequate or vague and indefinite grounds would make further detention of the deteuu illegal. 1951 Orissa 251 (253) [AIR V 38 C 59] : I L R (1951) Cut 387 : 52 Cri L Jour 679 (DB).

[11] It is a question of fact in each case whether there has been any delay in furnishing the grounds of detention to the detenu. 1951 Hyd 162 (163) [AIR V 38 C 58] : 52 Cri L Jour 1527 (FB) ✣ 1951 Raj 69 (71) [AIR V 38 C 29] : 1952 Cri L Jour 425 (DB).

[12] The detenus were detained in February 1950 and did not receive the particulars of the grounds served in the middle of March until towards the end of July 1950. The so-called supplementary grounds or particulars did not state any new grounds for the orders of detention. They were in the nature of particulars of the rather general grounds given earlier. They merely amplified those grounds giving specific instances to support the general statements made earlier — *Held* that the detenus had been given the grounds of detention "as soon as may be" and had been given "the earliest opportunity of making representations. 1953 Cal 129 (133) [AIR V 40 C 42] : 1953 Cri L Jour 361 (DB).

[13] Delay in supplying the grounds of detention to the detenu and in affording him an opportunity to make representation is justiciable in Indian law. 1951 Hyd 128 (129) [AIR V 38 C 53] : I L R (1951) Hyd 654 : 52 Cri L Jour 1402 (FB).

5. "Grounds on which the order has been made." — [1] The words "grounds on which the order has been made" are to be considered in the context of the Constitution and the Preventive Detention Act. 1951 Bom 83 (42) [AIR V 38 C 13] : ILR (1951) Bom 546 : 52 Cri L Jour 418 (DB).

[2] If the grounds which are furnished under S. 3 (3) could contain matters which need not be communicated to the detenu under S. 7, the expression "grounds on which the order has been made" cannot bear the same meaning in both the sections. 1957 S C 23 (27) [(S) AIR V 44 C 5] : 1956 S C R 644 : 1957 Cri L Jour 5.

[3] The object of supplying grounds of detention to a person ordered to be detained is to enable him to make an effective representation. 1951 Pepsu 134 (135) [A I R V 38 C 52] : 52 Cri L Jour 1100 ✣ 1956 All 589 (589) [AIR V 43 C 196] : 1956 Cri L Jour 1152 (DB).

[4] Where it is seen that the grounds have no relation to one of the objects, it cannot be explained by saying that it refers to another. That only proves that the mind of the authority was not applied at all. 1952 Raj 171 (175) [AIR V 39] : I L R (1952) 2 Raj 569 : 1953 Cri L Jour 34.

[5] The scope of the provisions of S. 3 (3) is entirely different from that of S. 7 which deals with the right of the detenu as against the State Government and its subordinate authorities. S. 3 (3) requires the authority to co mmunicate the grounds of its order to the State Government, so that the latter might satisfy itself whether detention should be approved. Section 7 requires the statement of grounds to be sent to the detenu so that he might make a representation against the order. The purpose of the sections is so different that it cannot be presumed that the expression "the grounds on which the order has been made" is used in S. 3 (3) in the same sense which it bears in S. 7. 1957 S C 23 (27) [(S) AIR V 44 C 5] : 1956 S C R 644 : 1957 Cri L Jour 5.

[6] There is clear difference between grounds and facts. The grounds are the bases of the allegations, the facts really are the evidence upon which the bases of the allegations are to be established. 1951 Cal 194 (197) [A I R V 38 C 32] : 51 Cri L Jour 1569 (DB) ✣ 1951 Pat 389 (395) [AIR V 38 C 99] : 29 Pat 992 : 52 Cri L Jour 282 (DB).

[7] 'Grounds' are mainly if not solely the reasons of detention, i. e., inferential deductions in terms of the social orders sought to be maintained in the interest of the general public. Further the acts that bear out the offensive conduct of the person accused and bear the next proximate relation to it are also to be given out as part of the grounds. The 'facts', on the other hand, are the incidents, events and circumstances, informations, suspicions, conjectures, and the like including the sources of informations and the agencies set up in that behalf; they may constitute the back-ground which determines the nature and character of the acts manifesting the grounds that eventuate the necessity for detention. They may amount to proofs and are zealously guarded against disclosure. All the relevant facts need not be disclosed. The ambit of the grounds as distinguished from the ambit of the facts has to be determined on the particular case. The rules in this connection are bound to be flexible rather than hard and fast. 1951 Orissa 251 (253) [AIR V 38 C 59] : ILR (1951) Cut 387 : 52 Cri L Jour 679 (DB).

[8] The grounds are conclusions of fact and not recitals of facts. If the grounds furnished are definite, clear and precise and are sufficient to serve the purpose for which they are communicated, the detenu cannot complain of anything further. 1959 Andh Pra 73 (79) [A I R V 46 C 23] : 1959 Cri L Jour 160 ✣ 1959 S C 1335 (1340) [AIR V 46 C 188] : 1960-1 S C R 411 : 1959 Cri L Jour 1501 ✣

Section 7 — Note 5 *(contd.)*
1952 Raj 171 (175) [AIR V 39] : ILR (1952) 2 Raj 569 : 1953 Cri L Jour 34.

[9] When the grounds justify the detention of a petitioner it cannot be said that it was a case of satisfaction on the part of the detaining authority patently simulated. 1958 Mad 425 (428) [AIR V 45 C 143] : ILR (1958) Mad 692 : 1958 Cri L Jour 1047 (DB). (AIR 1953 S C 451, *Foll.*)

[10] The words "grounds of the order of detention" in S. 7 mean the same thing as the "grounds on which the order has been made" which find place in Art. 22 (5) of the Constitution. 1951 Pat 389 (395) [AIR V 38 C 99] : 29 Pat 992 : 52 Cri L Jour 282 (DB).

[11] A duty has been cast upon the detaining authority by S. 7 of the Preventive Detention Act to supply to the detenu the grounds of his detention. If he fails in that duty, the detenu can come up to the Court direct and ask for his release on the ground that a mandatory provision of the Act has not been complied with. He is not bound to complain to the authority. Even if he complains to the authority in ignorance of his rights, the Court can take cognizance of it and consider whether the duty has been discharged properly. 1951 Sau 13 (15) [AIR V 38 C 7] (DB).

[12] The grounds furnished must be clear, precise and must disclose facts except those which the detaining authority considers to be against the public interest to disclose. 1951 Madh B 51 (55) [AIR V 38 C 15] (DB) ✣ 1951 Orissa 20 (21) [AIR V 38 C 8] : I L R (1950) Cut 540 : 52 Cri L Jour 104 (DB) ✣ 1951 Sau 13 (14) [AIR V 38 C 7] (DB).

[13] When out of several grounds of detention one or more are beyond the scope of the Preventive Detention Act under which an order of detention is made, even if some of the grounds are illegal, the entire order of detention is vitiated thereby. 1952 Pepsu 126 (128) [A I R V 39] : 3 Pepsu L R 77 : 1952 Cri L Jour 1485 (DB) ✣ 1955 J & K 35 (36) [(S) AIR V 42 C 20] : 1955 Cri L Jour 1597 (FB) ✣ 1953 Madh B 153 (153) [AIR V 40 C 54] : 1953 Cri L Jour 982 ✣ ('52) I L R (1952) 2 Cal 78 (80) (DB).

[**See however** 1951 Pat 389 (395) [AIR V 38 C 99] : 29 Pat 992 : 52 Cri L Jour 282 (DB)].

[14] Section 7 merely mentions the grounds on which the order has been made and does not prescribe any form of the grounds. From this it is legitimate to infer that all that is necessary is that the grounds should be such as should enable the detenu to make a representation to the proper authority and this condition should be regarded as amply satisfied when the grounds contain the particulars of the detenu's activities, on account of which the detaining authority formed his satisfaction that it was necessary to order his detention and it is also stated therein what the nature of the conclusion arrived at by the detaining authority was. ('51) 3 Pepsu L R 238 (245, 246).

[15] In determining whether a ground of detention is or is not relevant to the detention, the grounds of detention must be regarded as a whole. 1955 Madh B 36 (40) [AIR V 42 C 9] : ILR (1955) Madh B 98 : 1955 Cri L Jour 476 (DB).

[16] In a petition made by the detenu to the High Court for his release it is not within the scope of such a petition to enquire into the truth or falsehood of the grounds supplied to the detenu. 1953 Pepsu 190 (191, 192) [AIR V 40 C 77] : ILR (1953) Patiala 1 : 1953 Cri L Jour 1710.

[17] Where in petitions under S. 226, Constitution of India, the position taken up by the detenus is that there did not exist any ground whatsoever for thinking that the activities of the detenus were prejudicial either to the security of State or to the maintenance of public order and when it is mentioned in the grounds that the detenus had been ordered to be detained with a view to preventing them from acting prejudicially to the maintenance of public order, it does not lie in the petitioners' mouth to say that there existed any other grounds which justified the belief that the detenus had been acting prejudicially to the security of the State as well and that the said grounds had been withheld from them. ('51) 3 Pepsu L R 238 (243, 244).

[18] The obligation of the Government to furnish grounds which are not vague cannot be taken to mean that they must furnish every meticulous detail. 1955 S C 631 (632) [(S) AIR V 42 C 99] : 1955 Cri L Jour 1408.

[19] The complaint that a detenu under the Act is deprived of the opportunity of proving before the Court that the statements contained in the grounds for detention were incorrect is untenable since it is open to him to prove the allegation before the Advisory Board. 1956 All 589 (592) [AIR V 43 C 196] : 1956 Cri L Jour 1152 (DB).

[20] The detenu has a right to be informed of the grounds on which he is being detained with reasonable promptitude so far as the circumstances of the particular case admit. The grounds must have some details mentioned in them in a clear manner giving him exact information as to what he is supposed to have done which justified his detention. 1951 Punj (Simla) 157 (165) [AIR V 38 C 27] : 52 Cri L Jour 17 (DB) ✣ 1952 Pat 374 (375) [AIR V 39] : 1952 Cri L Jour 1382 (DB).

[21] The ground that a particular act on the face of it is legal or innocent is not by itself sufficient to exonerate the individual for the purpose of preventive detention. His activities have to be weighed in the light of all the surrounding circumstances wherein he has voluntarily placed himself. 1952 Pat 374 (376) [AIR V 39] : 1952 Cri L Jour 1382 (DB).

[22] The fact that no fresh grounds were supplied to the detenu after the order of detention has been confirmed and extended by the Government does not make his detention illegal. 1952 Pepsu 100 (101) [AIR V 39] : I L R (1952) Patiala 192 : 1952 Cri L Jour 1093 ✣ 1952 Bom 1 (9, 10) [AIR V 39] : I L R (1952) Bom 134 : 1952 Cri L Jour 81 (DB).

[**But see** 1951 Punj 119 (119) [AIR V 38 C 25 I] : 52 Cri L Jour 1451 (DB).]

[23] Before the Government can pass an order of preventive detention under the Act

Section 7 — Note 5 *(contd.)*

it must be satisfied with respect to the individual person that his activities are directed against one or other of the objects mentioned in the Act and that it was necessary to prevent him from acting in such a manner. If the ground by itself is not so convincingly irrelevant and incapable of bringing about satisfaction in any rational person the question whether such ground can give rise to the satisfaction required for making the order is outside the scope of the inquiry of the Court. 1952 Pat 374 (376) [AIR V 39] : 1952 Cri L Jour 1382 (DB).

[24] Spreading of disaffection against a party Government cannot be said to be a ground for inferring that the public order would not be maintained. It is the right of every citizen in a democratic Government to spread disaffection against a particular party Government. That right is, of course, subject to the condition that the disaffection should not be so spread as to result in violence and there should be really no incitement to use violence. 1956 All 589 (593) [AIR V 43 C 196] : 1956 Cri L Jour 1152 (DB) ✠ 1957 All 782 (795) [(S) AIR V 44 C 217] : I L R (1957) 2 All 42 : 1957 Cri L Jour 1361 (DB).

[25] The grounds supplied to the detenu must be connected with the order of preventive detention. 1950 All 709 (713) [AIR V 37 C 276] : I L R (1951) 2 All 493 : 52 Cri L Jour 732.

[26] The adjective "supplementary" in the words "supplementary grounds" is capable of covering cases of adding new grounds to the original grounds, as also giving particulars of the facts which are already mentioned in the ground to lead to the conclusion of fact contained in the ground originally furnished. 1951 S C 157 (164) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373. (A I R 1951 Bom 266, *Reversed* on a different point.)

[27] It is not possible to lay down any hard and fast rule as to what the grounds should contain in order that the detenu may be able to make an effective representation. 1951 Assam 29 (33) [AIR V 38 C 12] : I L R (1950) 2 Assam 453 : 52 Cri L Jour 1186 (DB).

[28] It is obvious that the grounds for making the order are the grounds on which the detaining authority was satisfied that it was necessary to make the order. These grounds, therefore, must be in existence when the order is made. The question whether such ground can give rise to the satisfaction required for making the order is outside the scope of the inquiry of the Court. But the question whether the vagueness of indefinite nature of the statement furnished to the detained person is such as to give him the earliest opportunity to make a representation is a matter within the jurisdiction of the Court's inquiry and subject to its decision. 1951 S C 157 (163) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373. (A I R 1951 Bom 266, *Reversed* on a different point.)

[29] A layman who is not experienced in the interpretation of documents can hardly be expected without legal aid, which is denied to him, to interpret the grounds in the proper sense. It is up to the detaining authority to make his meaning clear beyond doubt, without leaving the person detained to his own resource for interpreting them otherwise such grounds would be regarded as vague so as to render it difficult, if not impossible, for the petitioner to make an adequate representation. 1953 S C 318 (320) [AIR V 40 C 74] : 1953 S C R 708 : 1953 Cri L Jour 1241.

[30] The provisions of S. 7 are mandatory and if no grounds of detention are supplied to the detenu or they are not supplied within a reasonable time, the detention becomes illegal. According to the section the grounds have to be supplied when a person is ordered to be detained and the authority who is to supply them is the one making the order of detention. 1952 Pepsu 100 (101) [AIR V 39] : ILR (1952) Patiala 192 : 1952 Cri L Jour 1093.

[31] The grounds and particulars by the subordinate authority should be furnished to the State Government before the grounds are furnished to the detenu. 1951 Bom 30 (33) [AIR V 38 C 12] : I L R (1951) Bom 190 : 52 Cri L Jour 366 (FB).

[32] The detention grounds are liable to be examined not with a view to ascertain their existence as a fact, but with a view to examine the state of the mind of the detaining authority. 1952 Bhopal 6 (13) [AIR V 39] : 1952 Cri L Jour 683.

[33] A detenu is entitled, as a matter of right, to know the grounds on which the order of detention has been made against him. No question of waiver can arise in such circumstances. 1951 Pat 389 (394) [AIR V 38 C 99] : 29 Pat 992 : 52 Cri L Jour 282 (DB).

[34] The orders of detention are not invalid because of the statement in the grounds that the organisation to which the detenus belong has been declared an illegal organisation and therefore is an illegal organisation. 1953 Cal 129 (133, 134) [A I R V 40 C 42] : 1953 Cri L Jour 361 (DB).

[35] A ground of detention containing a statement of facts showing the association of the detenu with notorious and proclaimed dacoits is a relevant ground. 1955 Madh B 36 (40) [AIR V 42 C 9] : I L R (1955) Madh-B 98 : 1955 Cri L Jour 476 (DB).

[36] That the detenu had eloped with a girl and married her would not endanger public peace—Ground is outside scope of Act. 1953 Madh-B 153 (153) [AIR V 40 C 54] : 1953 Cri L Jour 982.

[37] A person was detained for doing smuggling business in rice and paddy from the cordoned area. The District Magistrate in the grounds supplied to the person referred to the case, as one of the grounds alleged to have been sub-judice in May 1951, to bring out that, according to his information the person was an incorrigible smuggler, as his smuggling activities continued even in June and July 1951. Held that the order did not rest on this ground alone and that the detention, therefore, could not be held to be illegal even if there was any case pending against the person arising out of any one transaction. 1953

Section 7 — Note 5 (*contd.*)
Assam 63 (64) [A I R V 40 C 26] : 1953 Cri L Jour 507.

[38] Where the information obtained by the District Magistrate is that acting in his capacity as licensed whole-sale dealer in food-grains, the detenu sold such grains in the black market, such conduct will certainly be prejudicial to the maintenance of supplies essential to the community. The order of detention made by the District Magistrate in these circumstances cannot be characterised as arbitrary and is warranted by the provisions of the Act. The information supplied to the detenu under S. 7 in such a case cannot be said to be too vague to be acted upon or to be answered effectively by the detenu. 1951 Trav-Co 217 (219, 221) [AIR V 38 C 87] : ILR (1951) Trav-Co 1 : 52 Cri L Jour 1089 (DB).

[39] Any slight inaccuracy in details of the grounds stated cannot be held to invalidate an order of detention. The inaccuracy has to be considered in the light of and against the background of, all the grounds which have been communicated to the detenu. 1951 Pat 68 (72) [A I R V 38 C 9] : 52 Cri L Jour 603 (DB).

6. Vagueness of grounds. — [1] Where the grounds supplied are vague and indefinite the section is not complied with. 1951 Punj 157 (159) [AIR V 38 C 27] : 52 Cri L Jour 17 (DB).

[2] It is well settled that whenever the grounds of detention are found to be vague, the detenu is entitled to an order of release from the Court. 1951 Orissa 27 (29) [AIR V 38 C 10] : 52 Cri L Jour 110 (DB) ✣ 1952 S C 350 (353) [AIR V 39] : 1952 S C R 756 : 1953 Cri L Jour 146 ✣ 1956 Pat 1 (4) [(S) A I R V 43 C 1] : 1956 Cri L Jour 86 (DB) ✣ 1951 Punj (Simla) 8 (11) [A I R V 38 C 2]. (The Court instead of ordering the immediate release of the detenu, should not direct fresh grounds of detention containing fuller particulars to be supplied to him to enable him to submit an effective representation to the Government.)

[3] What constitutes vagueness has to be determined by keeping in view the purpose for which the grounds are supplied. They are supplied in order to enable the detenu to make a representation to the detaining authority refuting the correctness of the involved facts and inferences founding the grounds. They can be held to be vague if the minimum of information which will enable the detenu to present a case in his expected representation is not available on the face of it. Vagueness also consists in that the reasons of apprehension of the detaining authority are too remote, being mere possibility upon possibility or contingency upon contingency. 1951 Orissa 27 (29) [A I R V 38 C 10] : 52 Cri L Jour 110 (DB). (That detenu is of desparate character and his political creed is Communism held too vague.) ✣ 1951 Hyd 162 (162, 163) [AIR V 38 C 58] : 52 Cri L Jour 1527 (FB) ✣ 1953 Hyd 277 (279) [A I R V 40 C 142] : I L R (1953) Hyd 459 : 1953 Cri L Jour 1845 (DB) ✣ 1952 Cal 26 (28) [AIR V 39] : I L R (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB).

[4] "Vague" can be considered as an antonym of "definite." If the ground which is supplied is incapable of being understood or defined with sufficient certainty, it can be called vague. 1951 S C 157 (164) [A I R V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373. (AIR 1951 Bom 266 *reversed* on a different point.) ✣ 1951 Hyd 128 (132) [AIR V 38 C 53] : ILR (1951) Hyd 654 : 52 Cri L Jour 1402 (FB). (Where the detenu after intelligently understanding the ground, has procured the certificates to contradict its statements, the ground cannot be said to be vague.)

[5] Vagueness is a relative term. Its meaning must vary with the facts and circumstances of each case. What may be said to be vague in one case, may not be so in another, and it could not be asserted as a general rule that a ground is necessarily vague if the only answer of the detained person can be to deny it. If the statement of facts is capable of being clearly understood and is sufficiently definite to enable the detained person to make his representation, it cannot be said that it is vague. Further particulars of what has taken place, can be more definitely stated than those of events which are yet in the offing. In the very nature of things, the main object of the Act is to prevent persons from doing something which comes within the purview of any one of the sub-clauses of cl. (a) of S. 3 (1) of the Act. 1959 S C 1335 (1341) [A I R V 46 C 188] : 1960-1 S C R 411 : 1959 Cri L Jour 1501.

[6] The word "sketchy" does not mean the same thing as "vague." "Sketchy" means incomplete and lacking detail while "vague" means not clear and involves an element of ambiguity. 1951 Punj 157 (160) [AIR V 38 C 27] : 52 Cri L Jour 17 (DB).

[7] It cannot be held as a general rule that without specification of time of the activities the ground would always be considered to be vague and indefinite. 1951 Pepsu 134 (135) [AIR V 38 C 52] : 52 Cri L Jour 1100.

[8] Where the grounds furnished to the detenu contain fairly detailed references to his activities and the detenu had absolutely no doubt of misgiving in his mind regarding them they cannot be held to be vague or indefinite merely because the dates of the activities imputed to the detenu at various places were not mentioned. 1951 Raj 69 (72) [AIR V 38 C 29] : 1952 Cri L Jour 425 (DB).

[9] The Court can only go into the question whether the grounds supplied to the detenu are irrelevant or vague and can afford a basis for the subjective satisfaction of the detaining authority. 1953 Cal 81 (82) [AIR V 40 C 24] : 1953 Cri L Jour 310 (DB).

[10] Mere vagueness of grounds standing by itself and without leading to inference of *mala fides* or lack of good faith is not justifiable issue in a Court of law for the necessity of quashing the order, inasmuch as the ground or grounds on which the order of detention was made is a matter for the subjective satisfaction of the Government or of the detaining authority. 1952 S C 350 (353) [A I R V 39] : 1952 S C R 756 : 1953 Cri L Jour 146 ✣ 1953 Pat 351 (353) [A I R V 40 C 125] : 153 Cri L Jour 1734 (DB).

Section 7 — Note 6 *(contd.)*

[11] If the grounds are such that they are incapable of being understood by the detenu to enable him to make a proper representation then alone would the grounds be regarded as vague. 1952 Hyd 186 (186) [AIR V 39] : ILR (1952) Hyd 770 : 1952 Cri L Jour 1756 (DB)✣ 1951 S C 174 (177) [A I R V 38 C 25] : 1951 S C R 212 : 52 Cri L Jour 400.

[12] Where the ground supplied to each of the detenus is incapable of being intelligently understood and sufficiently definite to enable the detained persons to make representations against the order of detention, there is a breach of the provisions contained in Art. 22 (5) of the Constitution and the order of detention becomes illegal. 1955 N U C (Punj) 5712 [AIR V 42].

[13] Ground furnished to detenu stating that he was a believer in the cult of violence— No facts quoted in support of the allegation— Ground is vague and detention illegal. 1952 Pepsu 126 (127) [AIR V 39] : 3 Pepsu L R 77: 1952 Cri L Jour 1485 (DB).

[14] The grounds supplied to A which were exactly similar to those supplied to other four detenus, alleged that A was an avowed member of Communist party which described the present agitation as "Civil War" and that A was attempting to collect weapons etc. and was likely to go underground. No further details were given on the ground that their disclosure was against public interest. In an application by A under S. 491, Criminal P.C. *Held* that the grounds were too vague. 1951 Orissa 20 (21) [A I R V 38 C 8] : I L R (1950) Cut 540 : 52 Cri L Jour 104 (DB).

[See however 1952 Pat 177 (184) [A I R V 39] : 31 Pat 1 : 1952 Cri L Jour 484 (DB).]

[15] In none of the grounds had any date or time been mentioned. In one of the grounds in which it was alleged that the petitioner organised two illegal strikes not only was there no mention of the date but no particulars were given as to the place or places where the alleged strikes were said to have occurred nor of the persons against whom they were alleged to have been .directed. *Held*, that these grounds were in terms which were too vague to enable the petitioner to make an adequate representation. 1954 All 315 (316, 317) [AIR V 41 C 149] : ILR (1954) 2 All 230 : 1954 Crl L Jour 685 (DB). (A I R 1953 S C 318, *Foll.)*

[16] Where the grounds supplied to several detenus under S. 7 (1) were that they "were engaged in smuggling cloth and other supplies, maintenance of which is essential to the community and in furtherance of object indulged in activities prejudicial to the security of the State and the maintenance of public order." *Held*, that the grounds were vague and indefinite as they did not mention particulars of date, or kind of smuggling or of the country to which supplies were smuggled and hence the detention was invalid. 1951 Punj (Simila) 157 (159) [AIR V 38 C 27] : 52 Cri L Jour 17 (DB).

[17] The ground supplied to the detenu that he with another person tried to chalk out a programme for the breach of the peace has no causal or direct connection with the maintenance of public order and is far too vague and indefinite. So also to help person to go "underground' cannot be a ground for detaining a person unless such rendering of help is connected with the maintenance of public order. 1950 All 709 (711) [A I R V 37 C 276] : I L R (1951) 2 All 493 : 52 Cri L Jour 732.

[18] One of the grounds supplied to the petitioner for his detention was that he associated himself with the fast undertaken by *A* and that the petitioner criticised the Congress Government and accused the Indian Prime Minister in his speeches saying that the Prime Minister was solely responsible for the partition of India and cow-slaughter. It was also alleged that he incited the public against cow-slaughter and threatened the Government with bad consequences if *A* expired. *Held*, that both the expressions "incited the public against cow-slaughter" and "threatened the Government with bad consequences" were so vague as not to lead to the conclusion that any kind of violence was to be practised by the people in case *A* expired. 1956 Pat 1 (2, 3) [(S) AIR V 43 C 1] : 1956 Cri L Jour 86 (DB).

[19] The question as to whether the grounds furnished are vague or not is ultimately a question that has to be determined on a consideration of the circumstances in each case. 1951 S C 157 (164) [A I R V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373 (A I R 1951 Bom 266. *Reversed* on a different point.) ✣ 1956 S C 531 (534) [(S) AIR V 43 C 91] : 1956 S C R 382 · 1956 Cri L Jour 935 ✣1951 Pepsu 164 (166) [A I R V 38 C 60] : 52 Cri L Jour 1438 (DB).

[20] Where one out of the several grounds supplied to the detenu is vague but the others are in order the legality of the detention order is not affected thereby. 1953 Pepsu 190 (192) [AIR V 40 C 77] : ILR (1953) Patiala 1 : 1953 Cri L Jour 1710 ✣ 1956 Pat 1 (6) [(S) A I R V 43 C 1] : 1956 Cri L Jour 86 (DB) ✣ ('54) Madh B L J 1954 H C R 1195 (1200) (DB) ✣ ('54) ILR (1954) Patiala 31 (40).

[But see 1952 Cal 26 (29) [AIR V 39] : ILR (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB) ✣ 1951 Pepsu 164 (167) [A I R V 38 C 60] : 52 Cri L Jour 1438 (DB).]

[21] Although grounds and particulars communicated to the detenu must not be vague, indefinite or incomplete and must convey sufficient information to the detenu to enable him to make a representation that the detaining authority was wrong in its belief that his detention was necessary in the interest of public safety etc.. if the detenu knew what incidents were being referred to and was therefore not prejudiced by any defect in the grounds themselves, there is a substantial compliance with the provisions of S. 7. 1951 All 18 (19, 20) [A I R V 38 C 5] : 1952 Cri L Jour 422 (DB).

[22] In order to challenge the order of detention on the ground that the grounds furnished to the detained person are vague or indefinite it would be necessary for the detenu to show that the vagueness or indefiniteness of the grounds either embarrassed him or affected his right of making an effective re-

Section 7 — Note 6 *(contd.)*

presentation to the authority concerned. 1960 Guj 43 (46) [A I R V 47 C 16] : 1960 Cri L Jour 1588 (DB).

[23] The fact that the detenu did not apply to the detaining authoriry to be supplied with particulars of the grounds furnished to him is a circumstance against the allegation of vagueness of grounds. ('60) 1960 Jab L J 522 (524) (DB).

[24] Even if there is a challenge on the ground of vagueness owing to the absence of certain particulars and the facts which according to the Government could not be disclosed on the ground of public interest the order of detention will still be valid in certain circumstances. ('60) 62 Pun L R 257 (260, 261).

7. Particulars whether should be given. —[1] The omission of the word "particulars" in the Act is not accidental but deliberate and decidedly it has widened the scope of the detaining authority's discretion. He is not now required to supply the detenu with the particulars of his activities. But the elimination of the necessity of mentioning particulars does not take away from the detaining authority the responsibility of not having the grounds and indefinite. They must also be such as to enable the detenu to make an effective representation to him. 1952 Bhopal 1 (6) [AIR V 39] : 1952 Cri L Jour 660.

[*See also* 1953 Raj 177 (178) [A I R V 40 C 62] : ILR (1953) 3 Raj 63 : 1953 Cri L Jour 1424 (DB). (Section 7 mentions the word "grounds" and does not mention the word "particulars".)]

[2] A petitioner has the right, under Art. 22 (5) of the Constitution to be furnished with particulars of the grounds of detention sufficient to enable him to make a representation which on being considered may give relief to him. This constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained subject o course to a claim of privilege under Art. 22 (6) of the Constitution. Where it has not been done in regard to one of the grounds mentioned in the statement of grounds the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21 of the Constitution and he is, therefore, entitled to be released. 1953 S C 318 (320) [AIR V 40 C 74] : 1953 S C R 708 : 1953 Cri L Jour 1241 ✠ 1955 J & K 38 (40) [(S) A I R V 42 C 22] : 1955 Cri L Jour 1598 (FB).

[3] A Court can order the release of a detained person if the grounds of detention served on that person are vague and indefinite and do not afford sufficient particulars to enable him to make an effective representation. 1951 Cal 194 (196) [AIR V 38 C 32] : 51 Cri L Jour 1569 (DB).

[4] Where one of the grounds of detention supplied to a detenu refers to the detenu's holding of secret meetings and inciting students and villagers of a place to resort to unconstitutional activities in order to bring about the disruption of the present order by violent means, this ground, by itself, is not insufficient to warrant an order of detention. It contains sufficient particulars to justify an order of detention. 1951 Assam 29 (31) [A I R V 38 C 12]: ILR (1950) 2 Assam 453 : 52 Cri L Jour 1186 (DB).

[5] Supply of particulars given in the affidavit by the Government in an application under S. 491, Cr. P. C. before the High Court to the detenu for the purpose of enabling him to make representation under S. 8 of the P. D. Act is no compliance with the provisions of S. 7 (1). The detention is rendered invalid by non-compliance with S. 7 (1) in the first instance and it cannot be validated by further supply of particulars at this stage. 1951 Punj (Simla) 157 (159, 160) [AIR V 38 C 27]: 52 Cr L Jour 17 (DB).

[6] The right of the detenu to be furnished with particulars is subject to the limitation whereby disclosure of facts considered to be against public interest cannot be required. 1956 S C 531 (535) [(S) AIR V 43 C 91]: 1956 SCR 382: 1956 Cri L Jour 935.

[7] A court is entitled to consider whether the grounds served upon a detenu do afford sufficient particulars to enable a detenu to make an effective representation. 1951 Cal 194 (196) [AIR V 38 C 32]: 51 Cri L Jour 1569 (DB).

[8] Both the obligation to furnish particulars and the duty to consider whether the disclosure of any facts involved therein is against public interest are vested in the detaining authority, not in any other. 1956 SC 531 (535) [(S) AIR V 43 C 91]: 1956 SCR 382: 1956 Cri L Jour 935.

[9] The summary rejection by court of the later communication solely on the ground that all materials in all circumstances must be furnished to the detenu when the grounds are first communicated is not sound. 1951 SC 157 (165) [AIR V 38 C 24]: 1951 SCR 167: 52 Cri L Jour 373. (A I R 1951 Bom 266, *Reversed.*)

[10] The grounds to be supplied to the detenu must give some particulars of the act ascribed to him as well as the conclusions drawn from those acts, but it is not necessary they should meticulously reproduce the relevant words of S. 7 itself. ('51) 3 Pepsu L R 238 (245) (DB).

[11] If the grounds furnished are vague, the detenu can ask for particulars sufficient to enable him to do so but the authority is not bound to give all and sundry details but may give reasonable particulars. 1952 Raj 171 (175) [AIR V 39]: ILR (1952) 2 Raj 569: 1953 Cri L Jour 34.

[12] The sufficiency of the particulars conveyed to a detenu in accordance with the provisions embodied in Art. 22 (5) of the Constitution is a justiciable issue. ('54) Madh B L J 1954 H C R 1195 (1201) (DB).

[13] If the grounds do not contemplate all the particulars necessary for enabling the detenu to make his representation against the order of his detention he may ask for further particulars of the facts and the authority which passed the order of detention is expected to furnish all that information subject, of course,

Section 7 — Note 7 *(contd.)*

to the provisions of S. 7 (2). 1959 S C 1335 (1340, 1341) [AIR V 46 C 188]: 1960-1 S C R 411: 1959 Cri L Jour 1501.

[14] Merely stating that detenu belonged to Communist party which is illegal and carried on subversive activities without giving any particulars of the nature of activities indulged in by detenu, is vague and is not enough — Nature of activities to enable detenu to make effective representation should be given. 1953 Madh B 153 (154) [A I R V 40 C 54] : 1953 Cri L Jour 982.

[15] It is not necessary that any particulars should be given by the detaining authority in the grounds furnished to the petitioners. S. 7 uses the word "grounds" only and does not speak of the furnishing of any particulars to the detenu. 1952 Raj 171 (175) [A I R V 39]: ILR (1952) 2 Raj 569 : 1953 Cri L Jour 34.

8. Sufficiency of grounds. — [1] The sufficiency of the grounds is not a matter for examination by the court. The sufficiency of the grounds to give the detained person the earliest opportunity to make a representation can be examined by the court but only from that point of view. 1951 S C 174 (177) [AIR V 38 C 25]: 1951 S C R 212: 52 Cri L Jour 400 ✠ 1953 Hyd 277 (280) [AIR V 40 C 142]: ILR (1953) Hyd 459: 1953 Cri L Jour 1845 (DB).

[2] Merely stating in the grounds for detention that the detenu was responsible for strikes amongst the labourers without mentioning whether they were legal or illegal is not a ground of such precision or adequacy as to enable the detenu to make a representation against the order of detention. 1952 Bhopal 6 (12) [AIR V 39]: 1952 Cri L Jour 683.

[3] Membership of Communist party is not enough for action under Act. 1952 Hyd 112 (118) [AIR V 39]: ILR (1952) Hyd 122: 1952 Cri L Jour 1076 (DB) ✠ ('52) ILR (1952) 2 Cal 78 (80) (DB).

[4] The fact that the petitioner would suffer no hardship or prejudice by reason of sufficient particulars not having been already furnished to him is immaterial. The question is not whether the petitioner will in fact be prejudicially affected in the matter of securing his release by his representation but whether his constitutional safeguard has been infringed. 1954 All 315 (317) [A I R V 41 C 149]: ILR (1954) 2 All 230: 1954 Cri L Jour 685 (DB).

[5] As the organisations known as Bharatiya Jan Sangh, R. S. S. S. and Gohatya Nirodh Samiti are not illegal organisations, mere membership of these organisations cannot bring the detenu within the mischief of the Preventive Detention Act. 1956 Pat 1 (2) [(S) AIR V 43 C 1]: 1956 Cri L Jour 86 (DB).

[6] Grounds making wide and sweeping allegations against detenu without disclosing bases of those allegations are not sufficient. 1951 Cal 194 (196) [AIR V 38 C 32]: 51 Cri L Jour 1569 (DB).

[7] Where the grounds stated that the detenu (a wholesale licensed dealer in foodgrains) was engaging himself in the activity of hoarding considerable quantity of foodgrains from out of their normal circulation so vitally necessary for the life of the community and thereby offended against the provision of S. 3 (1) (a) (iii) and also disclosed that the object of such hoarding was to profiteer by selling the hoarded stock in the black-market, *Held*, that the grounds disclosed were not insufficient for enabling the dentenu to make a representation, although all the sources of information which led the authorities to the conclusion that detention was essential to prevent the detenu from selling in black-market, were not disclosed. 1951 Orissa 251 (255) [AIR V 38 C 59]: ILR (1951) Cut 387: 52 Cri L Jour 679 (DB).

[8] Where the sentence in the grounds supplied to the detenu only alleged his association with a gang headed by a certain named person wanted by the police in 15 cases of murder and dacoity, but in the same paragraph the grounds continued with the words 'amongst the many acts of your association and assistance, a few specific acts are mentioned below' which were followed by details of three recent occasions on which the detenu had been seen in the company of that leader of the gang the ground cannot be said to be vague, though the first sentence taken by itself may possibly be regarded as somewhat vague. 1954 Punj 154 (156, 157) [AIR V 41 C 79] : 1954 Cri L Jour 1068.

[9] It is necessary that the grounds of detention supplied in S. 7 of the Preventive Detention Act must be quite definite as well as precise. So merely stating that the detenu had given shelter to the gang of a dacoits sometime prior to his being taken into detention is not enough as it is vague and a proper representation cannot be made on such grounds. 1951 Sau 13 (14) [A I R V 38 C 7] (DB).

[10] Insufficiency of the grounds supplied to a detenu would not render the detention order invalid ab initio. 1951 Orissa 251 (253) [AIR V 38 C 59]: ILR (1951) Cut 387: 52 Cri L Jour 679 (DB).

9. Powers of High Court.—[1] The mere fact that the grounds on which the detaining authority made an order of detention were not true is not a matter for the High Court to go into in a petition under Art. 226 of the Constitution. 1953 Pepsu 145 (146) [AIR V 40 C 63] : I L R (1952) Patiala 445 : 1953 Cri L Jour 1519.

[2] What the High Court has to see when an order of detention is challenged by detenu is whether the order is sufficiently full and clear so as to give the detenu an opportunity to make an effective representation against the order. 1955 N U C (Bom) 5556 [AIR V 42].

[3] High Court cannot enter into the question whether the statements of fact made in the grounds supplied to the petitioner are true or not. It is a matter for the consideration of the Advisory Board. 1953 Assam 63 (64) [AIR V 40 C 26] : 1953 Cri L Jour 507 ✠ ('54) Madh B L J 1954 H C R 1195 (1197) (DB) ✠ 1953 Assam 97 (100) [AIR V 40 C 42] : ILR (1953) 5 Assam 66 : 1953 Cri L Jour 770. (If the

Section 7 — Note 9 *(contd.)*

facts stated in the grounds of detention are disputed, the remedy that the law allows to the petitioner is by a representation to the Government.) ✣1953 Cal 129 (134) [A I R V 40 C 42] : 1953 Cri L Jour 361 (DB). (The High Court cannot sit as a Court of appeal and hold that the facts alleged are not true or have not been established.) ✣ 1952 Raj 171 (175) [A I R V 39] : I L R (1952) 2 Raj 569 : 1953 Cri L Jour 34.

[4] All that the High Court is authorised to see is whether the grounds bear any relevancy to the objects mentioned in the detention orders. 1952 Raj 171 (175) [AIR V 39] : I L R (1952) 2 Raj 569 : 1953 Cri L Jour 34.

[5] The Courts must look at the grounds disclosed to the detenu under S. 7 (1) from two points of view. In the first place to consider whether they came within the ambit of this Act and the second, which is equally important, is whether they furnish an opportunity, and a reasonable opportunity, to the detenu of making a representation which he has a right to make under the section. 1956 Bom 490 (491) [AIR V 43 C 189] : ILR (1956) Bom 792 : 1956 Cri L Jour 875 (DB).

[6] If a reasonable connection can be said to exist between the grounds of detention and the information upon which they are based, the High Court will not be justified in saying that the grounds are vague or insufficient. If on the other hand, no reasonable connection can be said to exist between the grounds of detention and the information upon which they are based, it would not be difficult for the High Court to say that the grounds are insufficient. 1951 Assam 29 (30) [A I R V 38 C 12] : I L R (1950) 2 Assam 453 : 52 Cri L Jour 1186 (DB).

[7] The grounds that are to be furnished to the detenu being grounds on which the order has been made, they may be looked at by the Courts for the purpose of satisfying themselves whether the Government or the officer concerned arrived at the satisfaction which is necessary under S. 3 before a valid order could be made. 1956 Bom 490 (491) [AIR V 43 C 189] : ILR (1956) Bom 792 : 1956 Cri L Jour 875 (DB) ✣ 1952 Raj 171 (175) [A I R V 39] : I L R (1952) 2 Raj 569 : 1953 Cri L Jour 34.

[8] The subjective satisfaction as regards the sufficiency of grounds for passing a detention order is the satisfaction exclusively of the authority which has to pass such order and it is not for the High Court to enter into the merits of that order. That being so, it is not open to the High Court to examine the said materials with a view to determining whether the aforesaid subjective satisfaction of the executive authority concerned had been arrived at correctly or not. 1956 All 589 (593) [A I R V 43 C 196] : 1956 Cri L Jour 1152 (DB).

[9] The Court can scrutinise the grounds to see whether they are sufficiently explicit to enable the detenu to make a representation or not. 1956 Pat 1 (4) [(S) A I R V 43 C 1] : 1956 Cri L Jour 86 (DB).

[10] When the grounds are so vague that the detenu cannot make an effective representation and he has a right to approach the Court and complain that there has been an infringement of his fundamental right and even if the infringement of the second part of the right under Art. 22 (5) of the Constitution is established, he is bound to be released by the Court. 1953 Raj 177 (178) [AIR V 40 C 62]: ILR (1953) 3 Raj 63: (1953) Cri L Jour 1424 (DB).

[11] The question whether the vagueness or indefiniteness of the statement furnished to the detained person is such as to deprive him of the earliest opportunity to make a representation to the authority is a matter within the jurisdiction of the High Court and subject to the decision of the High Court. 1960 Guj 43 (46) [AIR V 47 C 16] : 1960 Cri L Jour 1588 (DB).

[12] Where a person who has been detained under the P. D Act applies to the High Court under S. 491, Criminal P. C., all that can be seen in the proceeding is whether the grounds communicated are connected with the order of detention and whether the order made by the District Magistrate is made bona fide or mala fide. 1960 Guj 43 (45) [AIR V 47 C 16] : 1960 Cri L Jour 1588 (DB).

[13] It is open to the Court to look into the grounds, supplied to the detenu to see whether they are precise and definite. Thus although it is not open to the Court to question the reasonableness or otherwise of the satisfaction of the detaining authority yet it is certainly competent to the Court to satisfy itself that on the materials supplied to the detenu, the detaining authority could be honestly satisfied as to the correctness of the order passed by it. 1950 All 709 (710) [A I R V 37 C 276] : I L R (1951) 2 All 493 : 52 Cri L Jour 732.

[14] Where a person arrested in respect of certain offence is released from jail on a writ of habeas corpus but is immediately arrested under S. 7, Preventive Detention Act on ground which had been held to be illegal that very day, the Court can look into the grounds of detention with a view to see whether the order of detention is mala fide or bona fide. 1956 Manipur 44 (47) [(S) A I R V 43 C 17] : 1956 Cri L Jour 1411.

10. Notice.—[1] When on perusal of the notice under S. 7 it is clear that the grounds and reasons for the detention are contained in the first paragraph of the said notice and that other paragraphs are only a compendium of the facts and particulars on which the subjective satisfaction of the statutory authority was based for coming to the conclusions mentioned in the first paragraph any vagueness, irrelevancy or the like in the facts and particulars supplied in the other paragraphs would not affect the validity of the detention order so long as the grounds furnished do not suffer from any of those defects. 1957 All 782 (793) [(S) AIR V 44 C 217] : I L R (1957) 2 All 42 : 1957 Cri L Jour 1361 (DB).

[2] Where in a notice under S. 7 the reasons or the grounds for the detention order are stated to be : (1) that the petitioner had created disaffection and discontent among the Muslims towards the Government and (2) that

Section 7 — Note 10 *(contd.)*

he persisted in activities calculated to disturb public peace and tranquillity. *Held* that one of the grounds given in the notice thus suffered from relevancy and as it was not possible to say to what extent the satisfaction of the detaining authority was based upon this consideration, the notice was bad as a whole and the detention order based on it must be quashed. 1957 All 782 (795) [(S) AIR V 44 C 217]; ILR (1957) 2 All 42 : 1957 Cri L Jour 1361 (DB).

11. Burden of proof.—[1] The burden to prove that the reasons for detention supplied to the detenu were of such a nature that it was possible for the detenu to base thereon his representation to the Government lies upon the State. Where the Government verbally communicates the reasons for detention and there is no evidence to show what those reasons were the order of detention must be held to be illegal. 1952 Pepsu 61 (62) [AIR V 39] : 2 Pepsu L R 471 : 1952 Cri L Jour 591.

12. Earliest opportunity. — [1] Under Art. 22 of the Constitution and S. 7, P. D. Act, a detenu is entitled at the earliest possible opportunity to know the grounds of his detention. If there is any detention without furnishing of grounds to the person concerned, such detention is not lawful. Those who are responsible for ordering detention in order to justify such detention have to comply with the letter as well as with the spirit of the Constitution and the Act. 1951 Hyd 79 (79) [AIR V 38 C 30] : ILR (1951) Hyd 187 : 52 Cri L Jour 502 (DB).

13. Representation by detenu.—[1] The purpose of the section clearly is that the grounds which are to be furnished to the detenu should be sufficient to enable him to make an effective representation to the Government in the matter of his detention. 1951 Bom 33 (43) [A I R V 38 C 13] : I L R (1951) Bom 546 : 52 Cri L Jour 418 (DB) ✣ 1956 All 589 (593) [AIR V 43 C 196] : 1956 Cri L Jour 1152 (DB)✣('54) I L R (1954) Patiala 31 (39)✣ 1952 Bhopal 1 (6) [A I R V 39] : 1952 Cri L Jour 660. (If a detenu is precluded from making an effective representation to the detaining authority the whole purpose of S. 7 is frustrated.) ✣ 1952 Cal 26 (28) [A I R V 39] : I L R (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB)✣1951 Assam 29 (32) [A I R V 38 C 12] : ILR (1950) 2 Assam 453 : 52 Cri L Jour 1186 (DB).

[2] If the representation to be made by detenu has to be intelligible to meet the charges contained in the grounds, the information conveyed to the detained person must be sufficient to attain that object. Without getting information sufficient to make a representation against the order of detention it is not possible for a man to make a representation. The right to receive the grounds is independent but it is intentionally bound up and connected with the right to make the representation. 1951 S C 157 (161, 162) [AIR V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373. (AIR 1951 Bom, 266, *Reversed* on another point.)

[3] Where the grounds furnished to a detenu were : "That you along with your associates have been collecting and are likely to collect arms and ammunitions illegally for illegal purposes and illegal activities : *Held* that the grounds were not such as to enable the detenu to make a proper representation. 1951 Bom 252 (255) [AIR V 38 C 48] : ILR (1951) Bom 92 : 52 Cri L Jour 437 (DB).

[4] The conferment of the right to make a representation necessarily carries with it the obligation on the part of the detaining authority to furnish the grounds, i. e. materials on which the detention was made. Thus, while there is a connection on the part of the detaining authority to furnish grounds and the right given to the detained person to have an earliest opportunity to make the representation the test to be supplied in respect of the contents of the grounds for the two purposes is quite different. For the first, the test is whether it is sufficient to satisfy the authority. For the second the test is whether it is sufficient to enable the detained person to make the representation at the earliest opportunity. 1951 S C 157 (163) [A I R V 38 C 24] : 1951 S C R 167 : 52 Cri L Jour 373. (A I R 1951 Bom 266, *Reversed* on a different point.)

[5] Unless the facts and particulars on the basis of which the detention is ordered are furnished to the detenu in the grounds which are given to him so soon as may be after detention, he cannot possibly make an effective representation to Govt. against his detention. 1951 Bom 33 (43) [A I R V 38 C 13] : I L R (1951) Bom 546 : 52 Cri L Jour 418 (DB).

[6] Where grounds supplied to a detenu are vague and indefinite and he is, as a consequence of that fact deprived of the opportunity of making a representation, the result would practically be the same as if no grounds have been supplied to him. Giving of vague and indefinite grounds would not be a strict compliance with the requirements of S. 7. 1951 Assam 29 (32) [A I R V 38 C 12] : ILR (1950) 2 Assam 453 : 52 Cri L Jour 1186 (DB).

[7] If the grounds are too vague making representation ineffective or impossible, in any real sense of the term, then such vagueness will be defeating the constitutional right of representation. 1952 Cal 26 (29) [A I R V 39] : ILR (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB).

[8] Where it is clear from the representation made by the detenu that he had the grounds before him, the non-furnishing of the copy of the grounds will not affect the order as the detenu is not prejudiced. 1951 Raj 69 (71) [A I R V 38 C 29] : 1952 Cri L Jour 425 (DB).

[9] Representation made by detenu should be forwarded to Government with utmost promptitude. 1951 Punj (Simla) 119 (120) [AIR V 38 C 25I] : 52 Cri L Jour 1451 (DB).

14. Disclosure of facts — Sub-section (2).—[1] Sub-section (2) of S. 7 does not prohibit the disclosure of facts. All that it does is to give to the detaining authority a

Section 7 — Note 14 *(contd.)*

discretion to withhold certain facts in public interest. The discretion is not to be exercised capriciously and if no facts are given or if they are given in such a way as to make it impossible for the detenu to make a representation against the order then there is a failure to comply with mandatory provision of the section. 1951 Madh B 51 (55, 56) [AIR V 38 C 15] (DB).

[2] The only facts which the detaining authority is not bound to disclose are those the disclosure of which it considers to be against the public interest. 1951 Assam 29 (32) [A I R V 38 C 12] : I L R (1950) 2 Assam 453 : 52 Cri L Jour 1186.

[3] The law gives the detaining authority the power to withhold information, the disclosure of which it considers prejudicial to the public interest. Where the detaining authority considers the exercise of this privilege necessary, it should indicate that other available information not included in the grounds of detention has been withheld in public interest. If this is not done, and the grounds supplied are vague and indefinite, the Court would be justified in holding that the further detention of the detenu is illegal. 1951 Assam 29 (33) [AIR V 38 C 12] : ILR (1950) 2 Assam 453 : 52 Cri L Jour 1186 (DB).

[4] Per *Vyas J.*—"I must point out that we have noticed a general, but definite, tendency amongst the detaining authorities to say in their affidavits in a vague way that whatever is stated in the grounds of detention is the only material which could be furnished to the detenu and that any further disclosure is against public interest. I must express disapproval of the omnibus manner in which recourse is taken to Art. 22 (6) of the Constitution for claiming privilege. In my opinion, such general, indefinite and omnibus expression as is employed in the detaining authority's affidavit is open to a real danger that it may be used sometimes to shut out some possible contentions which a detenu may take in order to challenge his detention. That surely could never have been the intention of the Constituent Assembly in enacting Art. 22 (6)." 1951 Bom 33 (43) [A I R V 38 C 13] : I L R (1951) Bom 546 : 52 Cri L Jour 418 (DB).

[5] When giving the grounds for detention, the authority may and indeed usually should embody in the grounds the conclusions which are reached by him. But under the Constitution itself he is not required to disclose such facts as it is not in the public interest to disclose. It is obvious, therefore, that, in the first instance, at any rate, the authority which detains has to determine whether it is in the public interest to disclose a particular fact or not. Its decision can be challenged consequently only on the ground that it is a *mala fide* decision. 1952 Bom 1 (10, 11) [AIR V 39] : I L R (1952) Bom 134 : 1952 Cri L Jour 81 (DB).

[6] The main object of giving the grounds to the detenu is to enable him to know upon what conclusions of fact action was taken against him. Every fact ought to be disclosed to him which is not protected by Art. 22 (6) of the Constitution. 1951 Bom 33 (38) [AIR V 38 C 13] : I L R (1951) Bom 546 : 52 Cri L Jour 418 (DB).

[7] The only privilege a detaining authority can claim against disclosure of facts is on grounds of public interest. If no facts at all leading to the detention of a detenu are to be mentioned in the grounds which are to be furnished to him, then obviously the intention underlying the enactment of Art. 22 (6) is frustrated. 1951 Bom 33 (42, 43) [AIR V 38 C 13] : I L R (1951) Bom 546 : 52 Cri L Jour 418 (DB).

[8] It is open to authority not to disclose to the detenu facts if it considers that it would be against public interests so to do. 1957 S C 23 (27) [(S) AIR V 44 C 5] : 1956 S C R 644 : 1957 Cri L Jour 5.

[9] The detaining authority cannot refuse to disclose the grounds in the public interest. All that it can refuse to disclose are facts which would be harmful to public interest if they were disclosed. 1951 Cal 194 (197) [AIR V 38 C 32] : 51 Cri L Jour 1569 (DB).

[10] Though if the grounds of detention are very vague and indefinite so as to render the object of furnishing the grounds nugatory the order may be set aside, the detaining authority is under no obligation to disclose to the detenu the basis of the allegation, i.e., the particulars of the allegations on which the detention is made. It is not correct to say that what Cl. 6 of Art. 22 of the Constitution entitles the detaining authority is only to refrain from disclosing to the detenu the evidence of the allegations. Grounds of detention cannot be said to be vague and indefinite for the reason that they do not contain the basis of those grounds. 1951 Mad 182 (184, 185) [AIR V 38 C 17] : 52 Cri L Jour 688 (DB).

[11] It is open to a detenu to require the detaining authority, when or before making a representation, to state whether the grounds of his detention are based upon any information in its possession which it is not prepared to disclose in public interest, and if the answer of the detaining authority is in the affirmative the High Court would not be in a position to say whether the grounds stated by the detaining authority are insufficient. It is only when the grounds are based upon information which can be disclosed to the detenu that the High Court will be in a position to pronounce them as sufficient or otherwise. 1951 Assam 29 (30) [A I R V 38 C 12] : I L R (1950) 2 Assam 453 : 52 Cri L Jour 1186 (DB).

[12] Under S. 7 (1) and (2), Preventive Detention Act, which is similar to Art. 22 (5) and (6), Constitution of India, the Court has first to consider whether the ground or grounds disclosed by the detaining authority contain facts or materials sufficient in its opinion to enable the detenu to make a representation. Then it has to consider whether any of the facts which it thinks are necessary have been rightly withheld by the detaining authority on the ground that a disclosure of such facts would be against public interest If no such facts have been withheld on the ground of public interest and they have not been dis-

8. Constitution of Advisory Boards.

(1) The Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards for the purposes of this Act.

(2) Every such Board shall consist of [a][three] persons who are, or have been, or are qualified to be appointed as, Judges of a High Court, and such persons shall be appointed by the Central Government or the State Government, as the case may be.

[b][* * * * *]

[c][*(3)* The appropriate Government shall appoint one of the members of the Advisory Board who is or has been a Judge of a High Court to be its Chairman, and in the case of a [d][Union territory] the appointment to the Advisory Board, of any person who is a Judge of the High Court of a [e][State] shall be with the previous approval of the State Government concerned :

Provided that nothing in this sub-section shall affect the power of any Advisory Board constituted before the commencement[f] of the Preventive Detention (Second Amendment) Act, 1952, to dispose of any reference under section 9 pending before it at such commencement.]

[a] *Substituted* for "two" by the Preventive Detention (Amendment) Act, 1951 (IV of 1951), S. 8 [22-2-1951]. [b] Proviso to sub-s. (2) inserted *ibid* was omitted by the Preventive Detention (Second Amendment) Act, 1952 (LXI of 1952), S. 7 [30-9-1952]. [c] *Inserted, ibid.* [d] *Substituted* for "Part C State" by 3 A. L. O., 1956 [1-11-1956]. [e] *Substituted* for "Part A State or a Part B State", *ibid.* [f] That is, 30th September, 1952.

Section 7 — Note 14 *(contd.)*

closed, then the Court must come to the conclusion that the provisions of S. 7 (1) and (2) not having been complied with the detention is not valid and the detenu must be set free. 1951 Bom 252 (255) [AIR V 38 C 48] : I L R (1951) Bom 92 : 52 Cri L Jour 437 (DB).

Section 8 — Note 1

[1] Neither S. 8 nor Cl. 4 (a) of Art. 22 of the Constitution constitutes the Advisory Board a Court of law or imposes on it the duty of determining whether a person's detention is legal. 1954 All 315 (316) [AIR V 41 C 149] : I L R (1954) 2 All 230 : 1954 Cri L Jour 685 (DB).

[2] The fact that the Constitution has provided an Advisory Board for advising on cases of preventive detention does not mean that the right of the High Court to grant a writ of habeas corpus in cases where the initial arrest was illegal or improper has been taken away. 1954 All 315 (316, 317) [AIR V 41 C 149] : I L R (1954) 2 All 230 : 1954 Cri L Jour 685 (DB).

[3] The Advisory Board is not a judicial body, it does not follow strict judicial procedure, it is in fact in the nature of a body charged with the responsibility of advising the executive Government in regard to cases of preventive detention where it is intended that such detention shall last for more than three months. 1954 All 315 (316) [A I R V 41 C 149] : I L R (1954) 2 All 230 : 1954 Cri L Jour 685 (DB).

[4] All that S. 8 does is to constitute a body, which, as its name implies, is a purely advisory body whose duty it is to advise the Government whether in its opinion there is sufficient cause for the continued detention of a particular person or persons. Its opinion cannot, therefore, operate to oust the jurisdiction of the High Court to determine whether the grounds upon which the petitioner was detained satisfied the requirements of the law. 1954 All 315 (316) [A I R V 41 C 149] : I L R (1954) 2 All 230 : 1954 Cri L Jour 685 (DB).

[5] Having regard to the proviso added to S. 8 (2) and to sub-s. 2-A inserted after S. 10 (2) of the Preventive Detention Act by the Amending Act IV of 1951, there cannot be any doubt that references made in respect of orders of detention passed on or after 22nd February, 1951, when the Amending Act came into force, must be considered by all the three members of the Advisory Board. Where such a reference was not considered by all the three members of the Advisory Board but only by a majority of them, the fundamental right of the detenu as guaranteed by Art. 21 of the Constitution has been infringed and the detenu is entitled to be released forthwith. 1951 Assam 169 (173, 174) [A I R V 38 C 77] : ILR (1951) 3 Assam 494 : 52 Cri L Jour 1453 (DB).

[6] Where the Notification constituting an Advisory Board under S. 8 was issued after the Act had been amended, and the notification took cognizance of the amendment, it must be assumed that the Board was constituted under the Act of 1950 as amended. The omission to state that the Notification was being issued under S. 8 of the Act of 1950 as amended does not detract from the validity of the Notification. 1953 Assam 22 (23) [AIR V 40 C 7] : ILR (1952) 4 Assam 295 : 1953 Cri L Jour 220.

[7] Chairman of Advisory Board not duly appointed — Reference made beyond 30 days of date of detention—Provisions of Ss. 8 (3) and 9 held violated. 1954 Pat 57 (59) [A I R V 41 C 23] : 32 Pat 55 : 1954 Cri L Jour 91 (DB).

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[a][**9.** Reference to Advisory Boards.

In every case where a detention order has been made under this Act, the appropriate Government shall, within thirty days from the date of detention under the order, place before the Advisory Board constituted by it under section 8 the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer, also the report by such officer under sub-section *(3)* of section 3.]

[a] *Substituted* for the original section 9 by the Preventive Detention (Second Amendment) Act, 1952 (LXI of 1952), S. 8 [30-9-1952].

Section 9 — Note 1

[1] The intention of the Legislature in enacting Ss. 9, 10 and 11 of the Preventive Detention Act, is that no detention is to be regarded to be lawful beyond three months unless within that period the Government on a report from the Advisory Board justifying detention decides to confirm the detention order and to continue the detention for a period that in its view may appear to be necessary. 1952 Pepsu 134 (135) [AIR V 39] : 3 Pepsu L R 595 : 1952 Cri L Jour 1452 (DB).

[2] The import of the words "under S. 8" in S. 9 is unmistakable and it would offend against all well recognised canons of construction to read in S. 9 the words "sub-section (2) of section 8" in place of "section 8". 1954 Pat 57 (58) [AIR V 41 C 23] : 32 Pat 55 : 1954 Cri L Jour 91 (DB).

[3] It appears clear from the marginal note to S. 9 that the section intends that the matter of detention should be handed over to the Board within a certain time for consideration and not that the Board should begin applying its mind to the case of the detenu within that time. 1955 Madh B 36 (39) [AIR 42 C 9] : ILR (1955) Madh B 98 : 1955 Cri L Jour 476 (DB).

[4] In every case, where a person is ordered to be detained under the P. D Act, it is imperative for the Government within six weeks (now thirty days) of the detention to place before the Advisory Board the grounds on which the order has been made and the representation, if any, made by the person affected by the order. 1952 Pepsu 134 (135) [AIR V 39] : 3 Pepsu L R 595 : 1952 Cri L Jour 1452 (DB).

[5] The plain meaning of the expression "place the material before the Advisory Board" is simply this, that the material should be made available to the Board or placed in their hands. It cannot be said that the material can be said to be placed before the Board only if the Board at a formal meeting is made aware of the material and the Board at that meeting applies its mind to the detenu's case. Section 9 is sufficiently complied with if the material referred to therein is handed over in the office of the Board within thiry days from the date of detention. 1955 Madh B 36 (39) [AIR V 42 C 9] : ILR (1955) Madh B 98 : 1955 Cri L Jour 476 (DB).

[6] The thirty days' period prescribed by S. 9 is governed by S 10, General Clauses Act, so that if the period expires on a holiday, the material can be placed before the Board on the next day on which the office of the Board is open. The placing of the requisite material before the Board is an act or proceeding within the meaning of S. 10, General Clauses Act. 1955 Madh B 36 (38) [AIR V 42 C 9] : ILR (1955) Madh B 98 : 1955 Cri L Jour 476 (DB).

[7] Chairman of Advisory Board not duly appointed — Reference made beyond 30 days of date of detention — Provisions of Ss. 8 (3) and 9 held violated — Detention held illegal. 1954 Pat 57 (59) [AIR V 41 C 23] : 32 Pat 55 : 1955 Cri L Jour 91 (DB).

[8] Where the grounds of detention are supplied to the detenu along with the order of detention in order to enable him to make a representation without delay, the Government can place the case before the Advisory Board at any time within the period allowed under S. 9. The mere fact that the Government had made an undue haste in obtaining the decision of the Advisory Board for purposes of confirming the order of detention cannot lead to the inference of mala fide on the part of the Government especially when there is no allegation of any violation of any provision of the Act. 1953 Assam 97 (101) [AIR V 40 C 42] : ILR (1953) 5 Assam 66 : 1953 Cri L Jour 770.

[9] Where a detenu's case is considered only by two members and not by all the three members of the Advisory Board, the fundamental right of the detenu as guaranteed by Art. 21 of the Constitution is infringed and he is entitled to be released forthwith. 1951 Assam 169 (170) [AIR V 38 C 77] : ILR (1951) 3 Assam 494 : 52 Cri L Jour 1453 (SB).

[10] Where the short point for consideration is whether a detenu is entitled to be released forthwith when his case has not been considered within the period prescribed by all the three members of the Advisory Board, it is not a fit case for appeal to the Supreme Court. 1951 Assam 169 (172) [AIR V 38 C 77] : ILR (1951) 3 Assam 494 : 52 Cri L Jour 1453 (SB).

[11] It is plain from the language of S. 9 of the Preventive Detention Act that the necessity for a reference to an Advisory Board is the subsistence of an order of detention and that it matters not that the detenu has been temporarily released in pursuance of S. 14 of the Act. 1951 Assam 169 (171) [AIR V 38 C 77] : ILR (1951) 3 Assam 494 : 52 Cri L Jour 1453 (DB).

[12] It is clear that the Act as amended in 1951 requires that every case of detention should be placed before an Advisory Board constituted under the Act. 1952 S C 27 (28)

10. Procedure of Advisory Boards.

[a][(1) The Advisory Board shall after considering the materials placed before it and, after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if in any particular case it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report to the appropriate Government within ten weeks from the date of detention.]

Section 9 — Note 1 *(contd.)*

[AIR V 39] : 1952 SCR 368 : 1952 Cri L Jour 321.

[13] There is nothing in the Act to suggest that the power of revocation conferred on the State Government cannot be exercised unless the procedure prescribed by Ss 9 and 10 has been followed. 1952 All 180 (181) [AIR V 39]: 1952 Cri L Jour 372.

[14] It is not open to the petitioner to challenge in habeas corpus proceedings before the High Court the factual correctness of a ground as set out in the grounds of detention, when the petitioner had an opportunity to challenge the correctness of that allegation in the proceedings before the Advisory Board in which he fully participated. 1958 Mad 425 (427) [AIR V 45 C 143] : ILR (1958) Mad 692 : 1958 Cri L Jour 1047 (DB).

[15] A detenu has the legal and constitutional right to approach the High Court under S. 491, Cr. P. C. or Art. 226, of the Constitution before making any representation or before there is any reference to the Advisory Board and before the time for such reference has expired. 1952 Cal 26 (32) [AIR V 39] : ILR (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB).

[16] The merits or demerits of the cause of detention are not within the purview of the Courts but of the Advisory Board. 1952 Cal 26 (32) [AIR V 39] : ILR (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB).

[17] Though Government is technically correct in not accepting the representation sent by the detenu after the period prescribed under S. 9 yet it would be far better if the technicalities are waived and the representation is placed before the Advisory Board. 1953 Cal 129 (135) [AIR V 40 C 42] : 1953 Cri L Jour 361 (DB).

[18] It is clear that whatever the number of representations which the detenu might have made to the Government before his case is sent to the Advisory Board, the Government is bound to forward them to the Board for consideration and examination. 1952 Bom 1 (15) [AIR V 39] : ILR (1952) Bom 134 : 1952 Cri L Jour 81 (DB).

[19] The disposal of a petition under section 491 of the Code of Criminal Procedure or even Art. 226 of the Constitution cannot at all affect the applicant's cause before the Advisory Board. 1952 Cal 26 (31) [AIR V 39] : ILR (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB).

[20] See also the following cases decided with reference to 1951 amendment. 1951 S C 301 (304) [AIR V 38 C 51] : 1951 S C R 621 : 52 Cri L Jour 1103. (The combined effect of Ss. 9 (2) (a) and 1 (i of the Amending Act of 1951 is to provide, where detention orders were in force at the commencement of the new Act, that the persons concerned could be detained for a period longer than three months if an Advisory Board reports that there are sufficient grounds for detention within ten weeks from the commencement of the new Act.) ✣ 1952 Orissa 208 (210) [AIR V 39] : ILR (1951) Cut 529 : 1952 Cri L Jour 1113 (DB). (Though S. 9 (2) (a) in terms applies to all classes of detentions under the Act which continued to be in force from the date of the commencement of the amending Act by virtue of section 12 (a), the scope of that clause should however be limited to those classes of detentions where orders did not expire within six weeks from 22-2-51.)

SECTION 10 — SYNOPSIS

1. Scope and object.
2. "Desires to be heard".
3. Report by Advisory Board.
4. Maintainability of writ petition.

1. Scope and object. — [1] The intention of the legislature in enacting Ss. 9, 10 and 11 of the Act is that no detention is to be regarded as lawful beyond three months unless within that period the Government on a report from the Advisory Board justifying detention, decides to confirm the detention order and to continue the detention for a period that in its view may appear to be necessary. 1952 Pepsu 134 (135) [AIR V 39] : 3 Pepsu L R 595 : 1952 Cri L Jour 1452 (DB).

[2] Section 10, Preventive Detention Act, imposes a statutory obligation on the Advisory Board to submit a report to Government within a period of 10 weeks from the date of the detention under S. 11 (1). 1952 Punj 349 (349) [AIR V 39].: ILR (1952) Punj 129 : 1952 Cri L Jour 1493 (DB).

[3] There is nothing in the Act to suggest that the power of revocation conferred on the State Government by S. 13 cannot be exercised unless the procedure prescribed by Ss. 9 and 10 has been followed. The Government can revoke the District Magistrate's order at any time and at any stage of the proceedings. 1952 All 180 (181) [AIR V 39] : 1952 Cri L Jour 372.

[4] There is no contradiction between Article 22 (4) of the Constitution of India and Ss. 10 and 11 of the Act. ('54) ILR (1954) 1 Cal 1 (16) (FB).

[5] Having regard to the proviso added to sub-section (2) of S. 8 and to sub-section 2A inserted after sub-section (2) of S. 10 by the Amending Act of 1951, there is no doubt that that references made in respect of orders of

(2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.

[b][*(2A)* When there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.]

(3) Nothing in this section shall entitle any person against whom a detention order has been made [c][* * *] to appear by any [d][legal practitioner] in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

[a] *Substituted* for the original sub-section (1) by the Preventive Detention (Second Amendment) Act, 1952 (LXI of 1952), S. 9 [30-9-1952]. [b] *Inserted* by the Preventive Detention (Amendment) Act, 1951 (IV of 1951), S. 10 [22-2-1951]. [c] The words "to attend in person or" were *omitted* by Act LXI of 1952, S. 9. [d] *Substituted* for "legal representative", *ibid.*

Section 10 — Note 1 *(contd.)*

detention passed on or after 22-2-1951 must be considered by all the three members of the Advisory Board. 1951 Assam 169 (170) [AIR V 38 C 77] : ILR (1951) 3 Assam 494 : 52 Cri L Jour 1453 (SB).

2. "Desires to be heard." — [1] Reading sub-sections (1) and (3) of S. 10 together there is no doubt that the intention behind the use of the words "if the person concerned desires to be heard" appearing in sub-s. (1) was that the detenu, if so desired to be heard personally, would be entitled to be heard by the Board. To say that these words mean a desire to be heard either in person or through counsel would be to overlook sub-s. (3) on account of which a detenu can never claim to be heard through Counsel. 1955 Raj 185 (185) [AIR V 42 C 58] : ILR (1955) 5 Raj 761 : 1955 Cri L Jour 1517 (DB).

[2] Section 10 (as amended by Act 61 of 1952) — Opportunity not given to detenu of being personally heard—Effect of is to render recommendation of Advisory Board of no avail — If more than 3 months pass detenu is entitled to release. ('55) ILR (1955) 5 Raj 443 (445) (DB).

3. Report by Advisory Board.—[1] The provisions of S. 10 of the Preventive Detention Act appear to be mandatory. If the Advisory Board fails to submit its report within the period prescribed by S. 10 and consequently the Government does not pass orders under S. 11 the detention of the detenu after the expiry of the period provided will in any case become illegal, and the accused is entitled to be set at liberty. 1953 Sau 63 (64) [AIR V 40 C 26] : 1953 Cri L Jour 586 (DB)✠ 1951 Assam 169 (170) [AIR V 38 C 77] : ILR (1951) 3 Assam 494: 52 Cri L Jour 1455 (SB)✠ 1953 Sau 51 (51, 52) [AIR V 40 C 22] : 1953 Cri L Jour 503 (DB).

[2] Where the Advisory Board submits its report to the Government within ten weeks of the order of detention as required by S. 10 (1) and the Government takes action thereon within three months of the order of detention by confirming the order of detention under S. 11 (1), the further detention of the detenu is perfectly valid. 1953 Sau 138 (139) [AIR V 40 C 69] : 1953 Cri L Jour 1247 (DB).

[3] Where a detenu's case is considered only by two members and not by all the three members of the Advisory Board, it follows that the fundamental right of the detenu as guaranteed by Art. 21 has been infringed and that he is entitled to be released forthwith. 1951 Assam 169 (170) [AIR V 38 C 77] : ILR (1951) 3 Assam 494 : 52 Cri L Jour 1453 (SB).

[4] The report referred to in sub-ss. (1), (2) and (3) of S. 10 cannot be equated to a judgment of a judicial or quasi-judicial tribunal where the reasons on which the opinion of the Advisory Board was based were set out. The language of S. 10 of the Act does not warrant the imposition of such a statutory obligation on the Advisory Board that its opinion should be backed or be based on a report containing the reasons for its opinion. 1958 Mad 425 (429) [AIR V 45 C 143] : I L R (1958) Mad 692 : 1958 Cri L Jour 1047 (DB).

[5] The real statutory obligation laid on the Advisory Board is to report its opinion to the Government. There is no further statutory obligation to report to the Government the reasons for that opinion. The Advisory Board is not bound by law to discuss in any report the merits of the case referred to it, for example, the evidence for and against each of the grounds for the detention as specified by the detaining authority, before the Advisory Board reports its opinion to the Government. 1958 Mad 425 (430) [AIR V 45 C 143] : I L R (1958) Mad 692 : 1958 Cri L Jour 1047 (DB).

[6] Under S. 10 the Board has no power to make any order to continue or discontinue the detention, but is only under a duty to submit its report to the State Government. When the petitioner says in his petition for habeas corpus, that the Board has not passed any order in the context, he means that the Board has not submitted its report. 1958 S C 152 (153) [AIR V 45 C 26] : 1958 S C R 996 : 1958 Cri L Jour 282.

[7] The report of the Advisory Board under S. 10 of the Act is not equivalent to a judgment or order of a judicial or quasi-judicial tribunal. It is no doubt true that S. 10 (2)

Section 10 — Note 3 *(contd.)*

draws a distinction between the report of an Advisory Board and its opinion. But the question does not prescribe as to what the report should contain. Having regard to the provisions of S. 10 (3) which makes the report of the Advisory Committee confidential what is really required is the unambiguous opinion of the Advisory Board and the factual existence of a report setting out the reasons for the opinion is not a condition precedent for the exercise of power by the Government under S. 11 of the Act. The non-existence of a report setting out the reasons of the Advisory Board for its opinion will not affect the validity of the order of Government under S. 11 of the Act. 1958 Mad 425 (430) [AIR V 45 C 143] : ILR (1958) Mad 692 : 1958 Cri L Jour 1047 (DB).

[8] Whether or not the Court can ascertain whether there was factually a report apart from the opinion of the Advisory Board the Court is not entitled to examine the contents of the report for any purpose. 1958 Mad 425 (430) [AIR V 45 C 143]: ILR (1958) Mad 692: 1958 Cri L Jour 1047 (DB).

[9] Section 10 (2) provides for the same report as contemplated in Art. 22 (4) of the Constitution. ('54) I L R (1954) 1 Cal 1 (16) (FB).

[10] The making of the report by the Advisory Board under S. 10 within the time prescribed by law (10 weeks) is of the utmost importance to the detenu and the failure to make the report in time may quite conceivably have the effect of unlawfully prolonging the detention and, therefore, after the expiry of the ten weeks the detenu may well complain that he has been deprived of his personal liberty otherwise than in accordance with procedure established by law. Where the ten weeks' time within which the report of the Advisory Board was to be filed expired on October 27, 1957 and the Habeas Corpus petition was filed on November 8, 1957, the detenu may well complain that on and from October 28, 1957, his detention has become illegal and bad. 1958 S C 152 (153) [AIR V 45 C 26] : 1958 S C R 996 : 1958 Cri L Jour 282.

[11] It is clear from S. 10 (1) that the Advisory Board, after considering the materials placed before it under S. 9, can call for further information from the appropriate Government, and that thereafter if in any particular case it considers it essential so to do or if the detenu desires to be heard, after hearing him, submit its report to the appropriate Government. In such a situation the Advisory Board must of necessity obtain further information from the appropriate Government before it hears the detenu. There is nothing in this procedure which offends against the principles of natural justice. 1960 S C 625 (629) [AIR V 47 C 98] : 1960 Cri L Jour 764.

[12] The Act does not provide anywhere for the communication of the Advisory Board's report to the detenu. Under S. 10 the report has to be submitted by the Board only to the appropriate Government within 10 weeks from the date of detention. That being so, no question of supplying the detenu with a copy of the Advisory Board's report arises, for it would be of no use to the detenu. Hence, the fact that the decision of the Board was communicated to the detenu more than three months after his arrest will not make the detention illegal. 1956 All 589 (592) [AIR V 43 C 196] : 1956 Cri L Jour 1152 (DB).

4. Maintainability of writ petition.—[1] There is no competition or conflict between the Advisory Board and the Courts under the scheme of the Constitution as well as under the P. D. Act. The Court's order of dismissal is an adverse adjudication on the merits of the cause for detention in this context. The merits or demerits of the cause for detention are not within the purview of the Courts but of the Advisory Board. 1952 Cal 26 (32) [AIR V 39] : ILR (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB).

[2] Detention under Preventive Detention Act—Case examined by Advisory Board and report submitted—Petition under Art. 226 is not maintainable. 1957 Tripura 25 (26) [AIR V 44 C 10] : 1957 Cri L Jour 480.

[3] A detenu has the legal and constitutional right to approach the High Court under S. 491, Cri. P. C. or Art. 226 of the Constitution before he has made any representation or before there is any reference to the Advisory Board and before the time for such reference or report by the Board has expired. 1952 Cal 26 (32) [AIR V 39] : ILR (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB). (The disposal of a petition under S. 491, Cr. P. C. or Art. 226 of Constitution cannot affect applicant's cause before Advisory Board.)

[4] A detenu has the fullest opportunity of having his allegation of non-existence of grounds judicially determined by the Board. A petition for a writ of habeas corpus is not the only judicial proceeding where finality is given to a finding of fact before it reaches the High Court. 1956 All 589 (592) [AIR V 43 C 196] : 1956 Cri L Jour 1152 (DB).

[5] Where a statement of fact contained in the affidavit filed in Court by the detaining authority is disputed the matter has to be considered by the Advisory Board. The question of the truth of that statement is not within the jurisdiction of the Court to decide. 1951 S C 481 (484) [AIR V 38 C 65] : 1952 S C R 18 : ILR (1952) Punj 1 : 1952 Cri L Jour 75.

[6] Detention under Act—Advisory Board examining case of detenu and deciding not to order release — Petition by detenu under Art. 226 not barred. 1960 Punj 332 (335) [AIR V 47 C 116].

[7] Where the petitioners were detained under the Act before its amendment and after the amendment the Government passed fresh orders of detention wherein previous orders were expressly referred to and it was stated that in partial modification of those orders the Government were pleased to detain the petitioners and the grounds for detention communicated to the petitioners were identical with those for the detention under the unamended Act— *Held* that since the time

[a][**11. Action upon the report of Advisory Board.**

(1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.

(2) In any case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.]

[a] *Substituted* for the original section 11 by the Preventive Detention (Amendment) Act, 1951 (IV of 1951), S. 11 [22-2-1951].

OBJECTS AND REASONS

"Section 11 of the principal Act has been revised to make clear what is now implicit, namely, where the Advisory Board reports that there is no sufficient cause for detention, the person concerned must be released."
—S. O. R., Gaz. Ind., 1951, Pt. II-S. 2, p. 6.

Section 10 — Note 4 *(contd.)*

limits fixed in Ss. 9 (1) and 10 (1) were not complied with it could not be held that the detention was in accordance with the procedure established by law. There was a clear violation of the fundamental right guaranteed under Art. 21 of the Constitution which invalidated the subsequent detention even if it be held that the detention orders were valid in their inception. 1952 Orissa 208 (211) [AIR V 39] : ILR (1951) Cut 529 : 1952 Cri L Jour 1113 (DB).

SECTION 11 — SYNOPSIS

1. Scope and object.
2. Report to Government.
3. "May confirm the detention order and continue the detention".
4. Fixing of period of detention.

1. Scope and object.—[1] Sub-section (1) of S. 11 does not contravene any of the provisions of Art. 22 of the Constitution and is accordingly valid. 1958 S C 163 (170) [AIR V 45 C 29] : 1958 SCR 460 : ILR (1958) Punj 46 : 1958 Cri L Jour 283.

[2] Under S. 11 it is not an essential prerequisite to the validity of the detention order that it should be communicated to the petitioner. 1953 Assam 63 (64) [AIR V 46 C 26] : 1953 Cri L Jour 507.

[3] A detenu has the legal and constitutional right to approach the High Court under S 491, Cr. P. C. or Art. 226 of the Constitution before he has made any representation or before there is any reference to the Advisory Board and before the time for such reference or report by the Board has expired. The disposal of a petition under S. 491 of the Cr P. C. or even Art 226 of the Constitution cannot at all affect the applicant's cause before the Advisory Board. 1952 Cal 26 (31, 32) [AIR V 39] : ILR (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB).

[4] There is no conflict or competition between the Advisory Board and the Courts under the scheme of the Constitution as well as under the Preventive Detention Act. The Court's order of dismissal is not an adverse adjudication on the merits of the "cause for detention" in this context. The merits or demerits of the cause for detention are not within the purview of the Courts but of the Advisory Board. 1952 Cal 26 (32) [AIL V 39]: I L R (1953) 1 Cal 89 : 1952 Cri L Jour 204 (DB).

[5] The intention of the legislature in enacting Ss. 9, 10 and 11 is that no detention is to be regarded as lawful beyond three months unless within that period, the Government, on a report from the Advisory Board justifying detention decides to confirm the detention for a period that in its view may appear necessary. 1952 Pepsu 134 (135) [AIR V 39] : 3 Pepsu L R 595 : 1952 Cri L Jour 1452 (DB).

2. Report to Government.—[1] The real statutory obligation laid on the Advisory Board is to report its opinion to the Government. There is no further statutory obligation to report to the Government the reasons for that opinion. 1958 Mad 425 (430) [AIR V 45 C 143]: ILR (1958) Mad 692 : 1958 Cri L Jour 1047 (DB).

[2] The report referred to in S. 11(1) cannot be equated to a judgment of a judicial or quasi-judicial tribunal where the reasons on which the opinion of the Advisory Board was based were set out. 1958 Mad 425 (429) [AIR V 45 C 143] : ILR (1958) Mad 692 : 1958 Cri L Jour 1047 (DB).

[3] Whether or not the Court can ascertain whether there was factually a report apart from the opinion of the Advisory Board, the Court is not entitled to examine the contents of the report for any purpose. 1958 Mad 425 (430) [AIR V 45 C 143] : ILR (1958) Mad 692: 1956 Cri L Jour 1047 (DB).

[4] Before exercising the statutory power under S. 11 (1) of the Act at its discretion, the Government is not bound to take into account both the report and the opinion of the Advisory Board. Both sub ss (1) and (2) of S. 11 require of the Government that it should consider the opinion of the Advisory Board reported to it by that Board. It certainly cannot be urged that where factually there was no report apart from the opinion reported to the Government, but the Advisory Board reported that in its opinion there was no sufficient cause for the detention, the Government could ignore the opinion and treat it as *non est* in law. It is the opinion of the

Section 11 — Note 2 *(contd.)*
Advisory Board that is relevant both under sub-ss. (1) and (2 of S 11, the opinion of the Advisory Board reported by that board to the Government. The language of S. 11 (1) gives no indication of what the "report" referred to in Ss 10 (2) and 10 (3) of the Act should contain. 1958 Mad 425 (430) [A I R V 45 C 143] : ILR (1958) Mad 692 : 1958 Cri L Jour 1047 (DB).

[5] The report is confidential even from the Court. The Court is not entitled to examine the report even to verify whether it satisfies what S 10 requires. There is nothing in S. 10 or in S. 11 that requires the Advisory Board to submit to the Government the reasons for the opinion which S. 10 (2) requires the Board to report to the Government. 1958 Mad 425 (430) [AIR V 45 C 143]: ILR (1958) Mad 692: 1958 Cri L Jour 1047 (DB).

3. "May confirm the detention order and continue the detention". — [1] Grammatically S. 11(1) confers two powers namely (1) the appropriate Government may confirm the detention order and (2) the appropriate Government may continue the detention for such period as it thinks fit. The confirmation of the detention order certainly contemplates the taking of an executive decision, but the detenu being already in custody and the detention order being confirmed his detention continues automatically and, therefore, no further executive decision is called for to continue the detention. It follows that it is not necessary to include a direction for the confirmation of the detention in the decision confirming the detention order 1952 S C 181 (183) [AIR V 39] : 1952 S C R 612 : 1952 Cri L Jour 955.

[2] While the Act requires an executive decision for the confirmation of an order of detention under S. 11 (1) the Act does not itself prescribe any particular form of expression of that executive decision. All that the procedure established by law requires is that the appropriate Government must take a decision as to whether the detention order should be confirmed or not under S. 11 (1). Where such decision has been taken by the appropriate Government, there is no breach of the procedure established by law and the detention cannot be called in question. 1952 S C 181 (185, 188) [AIR V 39] : 1952 S C R 612 : 1952 Cri L Jour 955.

[3] Where after receiving the report of the Advisory Committee the State Government confirms the order of detention, there is nothing in S. 11 which would compel the State Government to communicate its decision to the detenu. 1952 Bom 1 (10) [AIR V 39] : ILR (1952) Bom 134: 1952 Cri L Jour 81 (DB) ✣1953 Sau 138 (139) [AIR V 40 C 69] : 1953 Cri L Jour 1247 (DB).

[4] Having regard to the different provisions of the Preventive Detention Act, the order of confirmation which the Government is required to make under S. 11 of the Act has to be made within a period of three months from the date of detention. 1959 Mys 7 (9, 10) A I R V 46 C 2] : ILR (1957) Mys 374 : 1959 Cri L Jour 63 (DB).

[5] The absence of an order terminating the detention would not by itself mean that the Government has decided to continue the detention for the period originally fixed by the District Magistrate; unless the Government makes a clear order to that effect, it cannot be taken to have considered the advisability of confirming the detention order and continuing the detention of the person confirmed. 1952 Pepsu 134 (135, 136) [AIR V 39] : 3 Pepsu LR 595 : 1952 Cri L Jour 1452 (DB).

[6] What S. 11 provides is that the Government "may confirm and continue the detention" of the person concerned. The words "may confirm" and "and continue detention" have their own significance and they obviously mean that if the Government decides to continue the detention, it must confirm the order of detention, and that the non-confirmation of the order would result in its revocation and termination of the detention. The verb "may" only indicates that it is not obligatory on the Government to confirm the detention order even though the Advisory Board has reported in favour of the necessity of continuing the detention. The phrase read in its context undoubtedly signifies that the Government, if it decides to continue the detention, must confirm the detention order. 1952 Pepsu 134 (136) [AIR V 39] : 3 Pepsu L R 595 : 1952 Cri L Jour 1452 (DB).

[7] Section 11 does not specify the period during which the order of detention should be confirmed by the appropriate Government, but there can be little doubt that it should be confirmed within a reasonable period, i. e., within a period which a man of ordinary prudence would consider reasonable in the circumstances of the case. 1952 Punj 349 (350) [AIR V 39] : I L R (1952) Punj 129 : 1952 Cri L Jour 1493 (DB).

[8] It is not necessary for Government, when it proceeds to confirm an order of detention and to continue the detention of the person concerned, to supply the grounds on which the detention is being continued. 1952 Punj 406 (407) [AIR V 39] : ILR (1952) Punj 481 : 1953 Cri L Jour 26 (DB) ✣ 1952 Pepsu 100 (101. 102) [AIR V 39] : ILR (1952) Patiala 192 : 1952 Cri L Jour 1093.

[But see 1951 Punj 119 (119) [AIR V 38 C 251] : 52 Cri L Jour 1451 (DB).]

[9] Clause (5) and cl. (6) of Art. 22 of the Constitution read together make it obligatory on the part of the Government to disclose all the grounds on which the order has been made though not all the facts constituting such grounds. In other words although the Government may not in the public interests disclose the full particulars of the grounds supplied, the Government is bound to disclose all the grounds on which the order of detention is based. 1959 Mys 7 (11) [AIR V 46 C 2] : I L R (1957) Mys 374 : 1959 Cri L Jour 63 (DB).

[10] An order of detention for an indeterminate period at the time of confirmation is not what is contemplated under S. 11. 1953 Assam 73 (74) [AIR V 40 C 30] : 1953 Cri L

[11A. Maximum period of detention.

(1) The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under section 11 shall be twelve months from the date of detention.

(2) Notwithstanding anything contained in sub-section *(1)*, every detention order which has been confirmed under section 11 before the commencement[b] of the Preventive Detention (Second Amendment) Act, 1952, shall unless a shorter period is specified in the order, continue to remain in force until the 1st day of April, 1953, or until the expiration of twelve months from the date of detention, whichever period of detention expires later.

Section 11 — Note 3 *(contd.)*

Jour 654 ✠ 1952 Assam 187 (189) [AIR V 39]: I L R (1952) 4 Assam 134 : 1952 Cri L Jour 1706.

[11] On a proper construction of S. 11 (1), a specification of the period of continuation of the detention is not necessary, however desirable one may consider it to be. Non-specification of such period at the time of confirming the detention order will not therefore make detention a nullity. 1952 S C 181 (186) [A I R V 39] : 1952 S C R 612 : 1952 Cri L Jour 955 ✠ 1953 Bom 59 (60) [AIR V 40 C 17] : I L R (1953) Bom 182 : 1953 Cri L Jour 322 (DB) ✠ 1952 Punj 406 (407) [AIR V 39] : I L R (1952) Punj 481 : 1953 Cri L Jour 26 (DB).

[12] Where the original order for detention was under sub-cls. (ii) and (iii) of S. 3 (1) (a) and the Government in exercise of its power under S. 11 confirmed the detention under sub-cl. (ii) but revoked the detention under sub-cl. (iii), on the ground that the Advisory Board did not uphold the detention under that sub-clause—*Held*, that the order was not in conformity with S. 11 under which Government could either confirm the order of detention made under S. 3 or revoke it completely and that there was nothing in law which prevented the Government from making a fresh order of detention if it so chose. 1954 S C 179 (181) [AIR V 41 C 37] : 1954 S C R 418 : 1954 Cri L Jour 456.

[13] The omission to convey the order made under S. 11 does not make detention illegal or result in infringement of the petitioner's fundamental right. 1957 S C 173 (175) [(S) A I R V 44 C 22] : 1957 S C R 63 : 1957 Cri L Jour 320.

[14] An order for the extension of detention made under the purported exercise of the powers conferred by any of the provisions of the Act is not an order with respect to the time when or the manner in which anything is to be done under the Act. Such an order could only be made under the Act and after the Act had come into force and in anticipation of its coming into force. 1953 S C 49 (50) [AIR V 40 C 13] : 1953 S C R 905 : 1953 Cri L Jour 501.

[15] Once the appropriate Government in making the order under S. 11 (1) specifies the period during which the detention of the person concerned is to continue, it does not become functus officio and is not incapable of extending the detention for a further period at a subsequent time if it considers necessary. 1952 S C 181 (186) [AIR V 39] : 1952 S C R 612 : 1952 Cri L Jour 955.

4. Fixing of period of detention.—[1] It is only after the Advisory Board, to which the case has been referred, reports that the detention is justified, the Government should determine what the period of detention should be and not before. The fixing of the period of detention in the initial order itself is, therefore, contrary to the scheme of the Act and cannot be supported. 1952 S C 27 (28) [AIR V 39] : 1952 S C R 368 : 1952 Cri L Jour 321 ✠ 1958 S C 163 (170) [AIR V 45 C 29] : 1958 S C R 460 : ILR (1958) Punj 46 : 1958 Cri L Jour 283.

[2] The Government no doubt has got the power to determine for what period a person is to be detained if the Advisory Board has reported that there is sufficient cause for his detention. If it wants to fix it, it would be after the receipt of the report. But it is a very different thing to say that it is obligatory on it to fix the period and that if it does not, there is necessarily a non-compliance with the requirement of S. 11 (1). 1953 Assam 22 (24) [AIR V 40 C 7] : I L R (1952) 4 Assam 295 : 1953 Cri L Jour 220.

Section 11A — Note 1

[1] Section 11A cannot be construed to mean that the period of detention may go beyond the life of the Act. What the section means is that during the life time of the Act the maximum period of any detention may be 12 months from the date of detention. 1955 Cal 374 (376) [(S) AIR V 42 C 110] : 1955 Cri L Jour 1055 (DB) ✠ 1956 Bom 127 (127, 128) [AIR V 43 C 37] : 1956 Cri L Jour 379 (DB). (What is rendered invalid by S. 11A is continued detention for more than one year.)

[2] Preventive Detention (Second Amendment) Act (61 of 1952) extended the life of the Principal Act 4 of 1950, till 31-12-1954. Therefore in the absence of S. 11A all the old detentions would have been extended till that date. But S. 11A modified that period and put 1-4-1953 as the latest date for them. Section 11A therefore conferred a benefit and is not unreasonable. But it is inevitable that the length of detention will vary in each individual case, for, it is the discretion of the Government to fix the period of detention. Classification of detentions into those before and after 30-9-1952 is therefore not discriminatory within the meaning of Arts. 22 (7) (b) and 14 of the Constitution and S. 11A is not ultra vires. 1953 S C 52 (53) [AIR V 40 C 14] : 1953 S C R 210 : 1953 Cri L Jour 508.

[3] Words "unless shorter period is specified in the order" have reference to periods

(3) The provisions of sub-section *(2)* shall have effect notwithstanding anything to the contrary contained in section 3 of the Preventive Detention (Amendment) Act, 1952,[c] but nothing contained in this section shall affect the power of the appropriate Government to revoke or modify the detention order at any earlier time.]

[a] *Inserted* by the Preventive Detention (Second Amendment) Act, 1952 (LXI of 1952), S. 10 [30-9-1952]. [b] That is, 30th September 1952. [c] Section 3 of the Preventive Detention (Amendment) Act, 1952 (XXXIV of 1954) was as follows :

"3. *Validity and duration of detention in certain cases.* — Every detention order confirmed under section 11 of the principal Act and in force immediately before the commencement of this Act [that is, 14th March, 1952] shall have effect as if it had been confirmed under the provisions of the principal Act as amended by this Act ; and accordingly, where the period of detention is either not specified in such detention order or specified (by whatever form of words) to be for the duration or until the expiry of the principal Act or until the 31st day of March, 1952, such detention order shall continue to remain in force for so long as the principal Act is in force, but without prejudice to the power of the appropriate Government to revoke or modify it at any time."

[a][**12. Validity and duration of detention in certain cases.**

For the avoidance of doubt it is hereby declared that—

(a) every detention order in force at the commencement[b] of the Preventive Detention (Amendment) Act, 1951, shall continue in force and shall have effect as if it had been made under this Act as amended by the Preventive Detention (Amendment) Act, 1951 ; and

(b) nothing contained in sub-section *(3)* of section 1 or sub-section *(1)* of section 12 of this Act as originally enacted shall be deemed to affect the validity or duration of any such order.]

[a] *Substituted* for the original section 12 by the Preventive Detention (Amendment) Act, 1951 (IV of 1951), S. 11 [22-2-1951]. [b] That is, 22nd February, 1951.

Section 11A — Note 1 *(contd.)*

mentioned immediately thereafter and not to the date of expiry of the amending Act 34 of 1952. 1953 S C 49 (51) [AIR V 40 C 13] : 1953 S C R 905 : 1953 Cri L Jour 501.

[4] The words "the order" in S. 11A (2) refer, not to the initial order of detention, but to the order of detention as eventually confirmed under S. 11 (1). 1953 S C 49 (51) [AIR V 40 C 13] : 1953 S C R 905 : 1953 Cri L Jour 501.

[5] Where an order extending detention till 30-9-52 is passed, the detention cannot continue after that date by force of the provisions of S. 11A (2) merely because that date by accident or coincidence happens to be identical with the date on which the amending Act of 1952 was to expire. 1953 S C 49 (51) [AIR V 40 C 13] : 1953 S C R 905 : 1953 Cri L Jour 501.

[6] The "order" referred to in S. 11A (2) is the order to be passed by the Government under S. 11 after the receipt of the report of the Advisory Board. It does not refer to an order passed by a subordinate authority under S. 3 of the Act. Therefore, the fixation of the period of detention by the District Magistrate is not permitted by any of the provisions of the Act and such a direction would tend to prejudice a fair consideration of the detenu's case when it is placed before an Advisory Board. 1955 Raj 6 (10, 11) [(S) A I R V 42 C 4] : I L R (1954) 4 Raj 51 : 1955 Cri L Jour 95 (DB).

[7] Section 11A is clear and unless a shorter period is specified in the order of detention, S. 11A (2), applies. The Court cannot add the words "or must be deemed to have been specified by reason of the expiry of the earlier Act" into the section. 1953 S C 52 (52) [AIR V 40 C 14] : 1953 S C R 210 : 1953 Cri L Jour 508.

Section 12 — Note 1

[1] Though the Legislature by enacting S. 12 of the Preventive Detention Act, as amended by Act IV of 1951, has continued for a further period, which was to be regulated by certain procedure mentioned in the amended Act, the detention of persons who had already been detained by a valid order of detention in force at the date of the coming into force of the Amending Act, that does not render the Act invalid and S. 12 of the Amended Act, is not *ultra vires* on the ground, that the Legislature has taken upon itself to do an executive act. There is no question of any encroachment by the Legislature upon the powers of the executive. 1952 Bom 1 (3) [AIR V 39]: ILR (1952) Bom 134 : 1952 Cri L Jour 81 (DB).

[2] Where an order of detention is continued under the provisions of S. 12, the case of the detenu must be refered to an Advisory Board. But there is nothing whatever which requires the appropriate Government to give an opportunity to make a representation. The detention is continued by the new Act pending the examination of the question by an Advisory Committee, but it cannot be regarded as a new detention in the sense that the detenu is to be given another opportunity to make a representation. 1952 Bom 1 (9, 10)

13. Revocation of detention orders.

(1) Without prejudice to the provisions of section 21 of the General Clauses Act, 1897, a detention order may at any time be revoked or modified—

(a) notwithstanding that the order has been made by an officer mentioned in sub-section *(2)* of section 3, by the State Government to which that officer is subordinate or by the Central Government;

(b) notwithstanding that the order has been made by a State Government, by the Central Government.

[a][*(2)* The revocation or expiry of a detention order shall not bar the making of a fresh detention order under section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Central Government or a State Government or an officer, as the case may be, is satisfied that such an order should be made.]

[a] *Substituted* for the former sub-section *(2)* by the Preventive Detention (Second Amendment) Act, 1952 (LXI of 1952), S. 11 [30-9-1952].

OBJECTS AND REASONS

Sub-section (2) — "The Joint Committee have completely recast sub section *(2)* of section 13 so as to make it clear that a fresh detention order can be passed against a person only on the basis of fresh facts arising after the date of the revocation or expiry of the last detention order."—J. C. R., Gaz. Ind., 1952, Pt. II-Sec. 2, page 360.

Section 12 — Note 1 *contd.)*

[AIR V 39]: ILR (1952) Bom 134: 1952 Cri L Jour 81 (DB).

[3] It is open to a detenu to show that the order of detention was a fraudulent exercise of the power vested in the Government. The burden of showing that is on him and he can sustain the burden only if he successfully rebuts the presumption of bona fide on the part of the Government. 1953 Mad 41 (49) [AIR V 40 C 17]: 1953 Cri L Jour 224 (DB).

[4] Section 12 has no application to any order of detention which was not in force at the commencement of the Preventive Detention (Amendment) Act, 1951, *i.e.*, on 22nd February, 1951. The words "such order" in sub-s. (*b*) clearly mean an order referred to in sub-s. (*a*) *i.e.*, an order in force on 22nd February, 1951. 1955 Cal 374 (381) [(S) AIR 42 C 110]: 1955 Cri L Jour 1055 (DB).

[5] Where the petitioners were detained under the Act before its amendment and after the amendment the Government passed fresh orders of detention wherein previous orders were expressly referred to and it was stated that in partial modification of those orders the Government were pleased to detain the petitioners and the grounds for detention communicated to the petitioners were identical with those for the detention under the unamended Act and the reference to the Advisory Board was made after the expiry of the period of six weeks from 22-2-51 and similarly the report of the Board was submitted to the Government after the expiry of ten weeks from that date: *Held*, that the detention was not in accordance with the procedure established by law. There was a clear violation of the fundamental right guaranteed under Art. 21 of the Constitution which invalidated the subsequent detention even if it be held that the detention orders were valid in their inception 1952 Orissa 208 (211) [AIR V 39]: I L R (1951) Cut 529: 1952 Cri L Jour 1113 (DB).

[6] The question as to whether the detenu should be detained for the full period mentioned in the order passed by the detaining authority or whether before the termination of that period he may be released is a matter that is to be considered by the Government of the State. 1951 Trav-Co 217 (221) [AIR V 38 C 87]: ILR (1951) Trav-Co 1: 52 Cri L Jour 1089 (DB).

Section 13 — Note 1

[1] Section 13 gives very wide powers to the detaining authority in the matter of extending the detention order and it can revoke or modify a detention order at any time it chooses and the power of modification would certainly include a power of extension of the period of detention; provided such power is exercised before the period originally fixed has expired and provided the extended period does not exceed the over-all limit which is co-extensive with the life or duration of the Act itself. 1952 S C 181 (186) [AIR V 39] : 1952 SCR 612 : 1952 Cri L Jour 955.

[2] The power of revocation conferred on the State Government by S. 13 of the Preventive Detention Act is untrammelled by any restrictions. There is nothing in the Act to suggest that this power of revocation cannot be exercised unless the procedure prescribed by Ss. 9 and 10 of the Act has been followed. It follows that when the State Government passes its own order of detention after revoking the order of detention passed by the District Magistrate, it cannot be attacked as *ultra vires* because the procedure prescribed by Ss. 9 and 10 was not followed. 1952 All 180 181) [AIR V 39]: 1952 Cri L Jour 372.

[3] Where an order of detention passed by the District Magistrate was revoked it is open to the State Government to issue a fresh order of detention against the same person. 1951 Pat 68 (71) [AIR V 38 C 9]: 52 Cri L Jour 603 (DB).

***[14. Temporary release of persons detained.**

(1) The appropriate Government may at any time direct that any person detained in pursuance of a detention order may be released for any specified period either without conditions or upon such conditions specified in the direction as that person accepts, and may at any time cancel his release.

(2) In directing the release of any person under sub-section *(1)*, the appropriate Government may require him to enter into a bond with or without sureties for the due observance of the conditions specified in the direction.

(3) Any person released under sub-section *(1)* shall surrender himself at the time and place, and to the authority, specified in the order directing his release or cancelling his release, as the case may be.

(4) If any person fails without sufficient cause to surrender himself in the

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Section 13 — Note 1 *(contd.)*

[4] As in habeas corpus proceedings the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of the proceeding, the detaining authority can, in the absence of proof of bad faith, supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complies with the requirements of the law in that behalf. 1952 SC 106 (108) [AIR V 39]: 1952 SCR 395: 1952 Cri L Jour 656.

[5] When the law gives the State Government the power to issue a fresh order of detention after the revocation of the order of the District Magistrate, the exercise of that power cannot be held to be mala fide merely because the State Government passed the orders of detention at a time when a habeas corpus application was pending in the High Court. 1951 Pat 68 (71) [AIR V 38 C 9]: 52 Cri L Jour 603 (DB).

[6] Modification means maintenance of the order with slight change. This would not include an attempt at validation of the order which was illegal at its inception. 1955 Raj 6 (11) [(S) AIR V 42 C 4]: ILR (1954) 4 Raj 51: 1955 Cri L Jour 95 (DB).

[7] Where the District Magistrate considered it essential to detain a person to prevent him from acting in a manner prejudicial to the maintenance of public order and tranquillity "but the Government considered that to prevent the person from acting in a manner prejudicial to the maintenance of "public order" was sufficient and modified the District Magistrate's order accordingly: *Held* that such modification was not contemplated by S. 13. 1955 Raj 6 (9) [(S) AIR V 42 C 4]: ILR (1954) 4 Raj 51: 1955 Cri L Jour 95 (DB).

[8] When an authority has a power to make an order he has also inherent power to revoke the order once made, unless there is an express provision of law to the contrary. Thus when a Deputy Commissioner passes an order under S. 3, Preventive Detention Act, he is competent to revoke the same. Moreover, in view of the fact the grounds of detention had not been supplied to the detenu in respect of the first order, that order was inoperative and illegal and for practical purposes it did not exist at all. The only order that would be effective is the later order. 1953 Pepsu 145 (146) [AIR V 40 C 63] I L R (1952) Patia a 445: 1953 Cri L Jour 1519.

[9] Where the earlier order of detention is held invalid on more or less formal grounds, there is nothing in law, to prevent a proper order of detention being passed on the same grounds and the mere fact that the subsequent detention order has been passed on the grounds as were mentioned in the previous order cannot lead the court to hold that the detaining authorities acted mala fide. 1953 Pat 334 (336) [AIR V 40 C 116]: 32 Pat 480: 1953 Cri L Jour 1690 (DB).

[10] When fresh grounds based on fresh facts have been incorporated in the same, it is not at all necessary, under the provisions of S. 13 (2) of the Act, for the detaining authority to say expressly that its satisfaction about the necessity of passing a fresh order of detention was based on fresh facts. 1953 Pat 351 (353) [AIR V 40 C 125]: 1953 Cri L Jour 1734 (DB).

[11] The word 'expiry' must necessarily have reference to time. If an order or an Act is held illegal, it becomes invalid as if it never existed. If an order or an Act is said to expire, it must convey the idea that the order or the Act has run out its full course with reference to time. Accordingly a declaration by the High Court that the detention of the detenu was illegal does not amount to expiry of the order of detention. 1953 Pat 334 (335, 336) [AIR V 40 C 116]: 32 Pat 480: 1953 Cri L Jour 1690 (DB).

Section 14 — Note 1

[1] It is plain from the language of S. 9 that the necessity for a reference to an Advisory Board is the subsistence of an order of detention and that it matters not that the detenu has been temporarily released in pursuance of S. 14 of the Act. 1951 Assam 169 (171) [AIR V 38 C 77]: ILR (1951) 3 Assam 494: 52 Cri L Jour 1453 (SB).

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manner specified in sub-section *(3)*, he shall be punishable with imprisonment for a term which may extend to two years or with fine or with both.

(5) If any person released under sub-section *(1)* fails to fulfil any of the conditions imposed upon him under the said sub-section or in the bond entered into by him, the bond shall be declared to be forfeited and any person bound thereby shall be liable to the penalty thereof.]

[a] *Inserted* by the Preventive Detention (Amendment) Act, 1951 (IV of 1951), S. 12 [22-2-1951]. The original section 14, which was declared *ultra vires* by the Supreme Court in A.I.R. 1950 S. C. 27, was *omitted* by the Preventive Detention (Amendment) Act, 1950 (L of 1950), S. 3.

OBJECTS AND REASONS

"Difficulties were being experienced in releasing detained persons on parole on humanitarian or other grounds because there was no express provision in the principal Act in this behalf as is to be found in certain State Acts relating to maintenance of public order. This omission is now sought to be rectified."
—S.O.R., Gaz. Ind., 1951, Pt. II-Sec. 2, p. 6.

15. Protection of action taken under the Act.

No suit, prosecution or other legal proceeding shall lie against any person for anything in good faith done or intended to be done in pursuance of this Act.

16. Repeal.

The Preventive Detention (Extension of Duration) Order, 1950, is hereby repealed.

[THE] PRISONERS ACT, 1900

(ACT III of 1900)

[The Act printed here is as on 15-2-1961].

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THE SECOND SCHEDULE. — *[Repealed.]*

THE THIRD SCHEDULE. — *[Repealed.]*

STATEMENT OF OBJECTS AND REASONS

"The object of this Bill is merely to consolidate the several Acts relating to prisoners confined by order of a Court which are now to be found in different parts of the Statute-book, and so to replace a number of separate enactments by a single Act, expressed more simply and intelligibly. . . . ."

—Gaz. of Ind., 1899, Pt. V, p. 101.

SELECT COMMITTEE REPORT

* * * * *

"We have adopted the suggestion of the Government of Bombay that sections 19 and 20 of the Prisoners Act, 1871 (V of 1871), should be entirely repealed and that all cases in which persons sentenced in Native States are to be imprisoned in British India should be dealt with under section 16 of the Act, as reproduced in clause 15 of the Bill. We agree with the Local Government that, owing to the amendments made in section 16 of the Act of 1871 by the Prisoners Act (1871) Amendment Act, 1894 (VII of 1894), section 18 of the former Act has been in great measure superseded, and we think that, if power is conferred on the Local Government, as well as the Governor-General in Council, to sanction, under section 16 (clause 15 of the Bill), the reception of persons sentenced by the Courts of Native States in British Indian Jails, and if provision is made for the reception in such jails of persons sentenced by such Courts without obtaining a special sanction in each case when at least one Judge of the Court is a British officer, the law will be simplified without being materially altered. We have therefore omitted clauses 18 and 19 of the Bill as introduced, and recast the second part of sub-clause (1) of clause 15 so as to give effect to our proposals. These changes have necessitated certain consequential changes in sub-clause (3) of clause 20 of the Bill as introduced (now sub-clause (3) of clause 18).

We have, on suggestion of the Government of Bengal, supplied what appears to us to be an obvious omission in the existing law by expanding the provisions of clause 39 of the Bill as introduced (now clause 37) so as to enable a Criminal Court inferior to that of a first class Magistrate to require, through the medium of the District Magistrate, the attendance of prisoners to give evidence or answer charges before it.

The same Local Government has pointed out that sub-clause (2) of clause 41 of the Bill as introduced (now clause 39) does not properly provide for the case of a prisoner confined within a Presidency-town whose removal for the purpose of giving evidence elsewhere is required. We have accordingly enlarged the sub clause by providing that in such cases the orders for removal shall be sent to the Commissioner of Police

Mr. Justice Knox of the Allahabad High Court has noticed that the Bill appears to be defective in that it makes no provision whereby a Criminal Court can require attendance of a prisoner confined in a prison situate beyond the local limits of the jurisdiction of the High Court to which such Criminal Court is subordinate for the purpose of answering a charge of an offence in that Court. Clause 39 of the Bill as introduced (now clause 37) is limited to cases in which the prisoner so charged is confined in some place within the limits of the jurisdiction of the High Court to which the Criminal Court is subordinate, while clause 42 only provides for the case of prisoners required to give evidence. To cure this defect we have inserted words in the latter clause (now clause 40) which will make it cover prisoners charged with offences.

It has been suggested that it would be desirable to make it clear how the custody of prisoners sent to a Court either to give evidence or to answer a charge is to be provided for pending their return to their original prison. We have therefore added a power to make rules on this point to sub-clause (1) (a) of clause 53 of the Bill as introduced (now clause 51)."

* * * * *

—Gaz. of Ind., 1900, Pt. V, p. 23.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937; A. C. A O., 1948; A. L O., 1950; 2 A. L. O., 1956; Mad. (Ad. Ter.) A. L. O., 1961.

—Amended by Acts IV of 1908; XVII of 1923; XXIX of 1950.

—Amended by Ordinance No. XV of 1942.

—Amended it its application to—
- Andhra Pradesh by An. P. Act XXIII of 1958.
- Bihar by Bih Act XXIII of 1956.
- Madhya Pradesh by C. P & Berar Act IV of 1939; M P. Act XXIII of 1958.
- Madras by Mad Acts XXI of 1949; XIV of 1951; XI of 1958.
- Maharashtra by Bom. Acts XVII of 1946; VII of 1949; XXIII of 1951; XV of 1959.
- West Bengal by W. B. Act XIII of 1955.

—Extended by Acts LIX of 1949; XXX of 1950.

—Extended in its application to N. E. F. Agency by Reg. III of 1960.

—Extended in its application to the States merged in or transferred to the State of —
- Bombay by Bom. Acts IV of 1950; XV of 1959.
- Madhya Pradesh by M. P. Act XII of 1950; XXIII of 1958.
- Madras by Mad. Acts XXXV of 1949; XXII of 1957.
- Punjab by Punj. Act V of 1957.

—Repealed in part and amended by Act I of 1903.

—Repealed in part by Acts XXXVIII of 1920; XVII of 1949; XXXII of 1955.

—Repealed in Rajasthan by Raj. Act XXXIX of 1960.

COGNATE ACTS AND PROVISIONS

1. IDENTIFICATION OF PRISONERS ACT, XXXIII OF 1920.
2. PRISONERS (ATTENDANCE IN COURTS) ACT, XXXII OF 1952.
3. PRISONS ACT, IX of 1894.
4. REFORMATORY SCHOOLS ACT, VIII of 1897.

[THE] PRISONERS ACT, 1900 (ACT III of 1900)[a]

[2nd February, 1900.]

An Act to consolidate the law relating to Prisoners confined by order of a Court.

WHEREAS it is expedient to consolidate the law relating to prisoners confined by order of a Court ; It is hereby enacted as follows :—

[a] For S O. R., *see* Gazette of India, 1899, Pt. V, p. 101 ; for Report of the Select Committee, *see ibid*, 1900, p. 23 ; for Proceedings in Council, *see ibid.*, 1899, Pt. VI, pp. 102 and 242 ; *ibid.*, 1900, p. 21.

The Act has been *declared* to be in force in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 [IV] of 1936), S. 3 and Sch.; and in the Angul District by the Angul Laws Regulation, 1936 (5 [V] of 1936), S. 3 and Sch.

This Act has been extended to the new provinces and merged States by the Merged States (Laws) Act, 1949 (LIX of 1949), S. 3 [1-1-1950] and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950, S. 3. [16-4-1950].

This Act has been applied to the States merged in the State of Bombay by Bom. Act IV of 1950 and the old Madhya Pradesh by M. P. Act XII of 1950.

This Act, as was in force in the pre-reorganised State of Bombay (excluding the transferred territories), is extended to the Hyderabad and Saurashtra areas of the State of Bombay by Bom. Act XV of 1959, S. 2 and Part VI inserted by C. P. and Berar Act IV of 1939 is repealed in its application to the Vidarbha region of the State by Bom. Act XXIII of 1959, S. 2.

The Act as was in force in the Mahakoshal region has been extended to all the other regions of the State of Madhya Pradesh by M. P. Act XXIII of 1958, S. 3 (1).

The Act, as extends to the State of Madras, is extended to the merged States of Pudukottai, Banganapalle and Sandur by Madras Act XXXV of 1949, S. 3 [w. e. f. 1-1-1950]; and to the Kanyakumari district and the Shencottah taluk of the Tirunelveli district by Madras Act XXII of 1957, S. 3 [18-12-1957].

This Act as amended from time to time and in force in Punjab is extended to the territories which were comprised in the State of Pepsu by Punj. Act V of 1957, S. 4 (1) [3-4-1957].

This Act is extended to the North East Frontier Agency by Reg. III of 1960, S. 3.

In its application to the State of Rajasthan this Act has been repealed by the Rajasthan Prisoners Act, 1960 (Raj. XXXIX of 1960), S. 14 [7-11-1960].

PART I

PRELIMINARY

1. Short title and extent.

(1) This Act may be called THE PRISONERS ACT, 1900;

[a][*(2)* It extends to the whole of India except [b][the territories which, immediately before the 1st November, 1956, were comprised in Part B States.]] [c][*]

[c][*(3)* * * * * * *]

[a] *Substituted* for sub-section (2) by A. L. O., 1950 [26-1-1950]. [b] *Substituted* for "Part B States" by 2 A. L. O., 1956 [1-11-1956]. Immediately before 1-11-1956 the following were Part B States, namely, Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore Cochin. [c] The word 'and' and sub-section (3) were *repealed* by the Repealing and Amending Act, 1914 (X of 1914), S. 3 & Sch. II.

STATE AMENDMENTS

ANDHRA PRADESH

In sub-section (2) of section 1, after the expression "except the territories which immediately before 1st November 1956 were comprised in Part B States" add the expression "other than the territories specified in sub-section (1) of section 3 of the States Reorganisation Act, 1956."—An. P. Act XXIII of 1958, S. 3 [w. e. f. 1-2-1960].

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MADHYA PRADESH

In sub-section (2) of section 1 after "Part B States" add the words "other than the Madhya Bharat and Sironj regions of the State of Madhya Pradesh."—M. P. Act XXIII of 1958, S. 3 & Sch.

MADRAS

In its application to the added territories in the State of Madras omit the amendment made in sub-section (2) by An. P. Act XXIII of 1958.—Mad. (Added Territories) A. L. O., 1961 [w. r. e. f. 1-4-1960].

MAHARASHTRA

In its application to the State of Bombay in sub-section (2) of section 1, after the words and letter "comprised in Part B States" add the words "other than the Hyderabad and Saurashtra areas of the State of Bombay."—Bom. Act XV of 1959, S. 4.

2. Definitions.

In this Act, unless there is anything repugnant in the subject or context,—

(a) "Court" includes a Coroner and any officer lawfully exercising civil, criminal or revenue jurisdiction; and

(b) "prison" includes any place which has been declared by the State Government, by general or special order, to be a subsidiary jail.

[a][*(c)* "States" means the territories to which this Act extends.]

[a] *Substituted* for the former cl. (c) by 2 A. L. O., 1956 [1-11-1956].

PART II
GENERAL

3. Officers in charge of prisons to detain persons duly committed to their custody.

The officer in charge of a prison shall receive and detain all persons duly committed to his custody, under this Act or otherwise, by any Court, according to the exigency of any writ, warrant or order by which such person has been committed, or until such person is discharged or removed in due course of law.

4. Officers in charge of prisons to return writs, etc., after execution or discharge.

The officer in charge of a prison shall forthwith, after the execution of every such writ, order or warrant as aforesaid other than a warrant of commitment for trial, or after the discharge of the person committed thereby, return such writ, order or warrant to the Court by which the same was issued or made, together with a certificate, endorsed thereon and signed by him, showing how the same has been executed, or why the person committed thereby has been discharged from custody before the execution thereof.

PART III
PRISONERS IN THE PRESIDENCY-TOWNS

5. Warrants, etc., to be directed to Police-officers.

Every writ or warrant for the arrest of any person issued by the High Court in the exercise of its ordinary, extraordinary or other criminal jurisdiction shall be directed to and executed by a Police-officer within the local limits of such jurisdiction.

STATE AMENDMENTS

MADRAS

In its application to the whole of the State of Madras, S. 5 shall be renumbered as sub-s. (1) of that section and after sub-s. (1) as so renumbered add the following sub-section, namely,—

"(2) Every warrant for the arrest of any person issued by a Court of Session shall be directed to, and executed by, a police officer within the local limits of its jurisdiction,"

—Mad. Act XI of 1958, S. 2 [4-9-1958].

Section 3 — Note 1

[1] Court has jurisdiction to enquire into treatment of under-trial prisoners and give directions to jail authority. 1931 Lah 562 (563, 564) [A I R V 18] : 32 Cri L Jour 988 (DB).

[See however 1932 Lah 390 (392) [AIR V 19] : 14 Lah 182 : 33 Cri L Jour 531 (DB).]

[2] Detention of persons convicted under S. 302, I. P. C., in Lahore Central Jail pending their appeals and reference for confirmation of death sentences before the Lahore High Court did not become illegal by reason of subsequent transfer of the province, in which the accused were tried by the Sessions Court, into the Indian Dominion. The warrant issued by the Sessions Judge under S. 3, Prisoners Act, did not lapse because the province did not remain part of Pakistan. 1949 Lah 53 (63) [A I R V 36 C 11] : Pak L R (1948) Lah 19 : 50 Cri L Jour 348 (DB).

[3] When once a person is convicted and sent to jail for undergoing sentence, he is to be governed by the Prisons Act and the Prisoners Act. The effect of the provisions of these Acts is that the convicted person shall continue to remain in the custody of jail official till the expiry of his sentence. Sections 60, 61 and 167, Criminal P. C., are inapplicable to the case of a convicted person and the provisions of the above two Acts do not empower a Magistrate to transfer a convicted criminal prisoner from the custody of the prison to that of the police for purposes of investigation. 1956 Madh B 130 (132) [(S) AIR V 43 C 59] : 1956 Cri L Jour 619.

Section 5 — Note 1

[1] High Court passing sentence on reference under S. 307, Criminal P. C.—Prisoner applying for committal to Presidency jail; High Court issuing warrant of commitment to Superintendent, Alipore jail—Subsequent removal of prisoner from Alipore jail to Presidency jail — Prisoner applying under S. 491, Criminal P. C., for release—*Held*, that S. 5 had no application to this case and the commitment was legal as it was not obligatory on the High Court to commit the prisoner to the Presidency jail. ('02) 29 Cal 286 (297) (FB).

MAHARASHTRA

In its application to the State of Bombay—

(a) in the heading to Part III for the words "the Presidency-towns" *substitute* the words "Greater Bombay";

(b) in section 5—

(i) after the words "criminal jurisdiction" *insert* the words "or by the Court of Session for Greater Bombay";

(ii) after the words "such jurisdiction" *add* the words "or within the limits of Greater Bombay, as the case may be".

—Bom. Acts VII of 1949, Ss. 2 and 3 [11-4-1949] read with XV of 1959, Ss. 2 and 3.

6. Power for State Governments to appoint Superintendents of Presidency prisons.

The State Government may appoint officers who shall have authority to receive and detain prisoners committed to their custody under this part.

Explanation. — Any officer so appointed, by whatever designation he may be styled, is hereinafter referred to as "the Superintendent".

7. Delivery of persons sentenced to imprisonment or death by High Court.

Where any person is sentenced by the High Court in the exercise of its original criminal jurisdiction to imprisonment or to death, the Court shall cause him to be delivered to the Superintendent together with its warrant, and such warrant shall be executed by the Superintendent and returned by him to the High Court when executed.

STATE AMENDMENTS

MADRAS

In its application to the State of Madras, for section 7 *substitute* the following section, namely,—

"7. *Delivery of persons sentenced to imprisonment or death by High Court or Court of Session.*—Where any person is sentenced by the High Court or by a Court of Session to imprisonment for life or to imprisonment or to death, the Court shall cause him to be delivered to the Superintendent, together with its warrant, and such warrant shall be executed by the Superintendent, and returned by him to the High Court or Court of Session, as the case may be, when executed."—Mad. Act XI of 1958, S. 3 [4-6-1958].

MAHARASHTRA

In its application to the State of Bombay, in section 7—

(a) for the words "criminal jurisdiction" *substitute* the words "or appellate criminal jurisdiction or by the Court of Session for Greater Bombay";

(b) for "the Court" *substitute* the words "the High Court or the Sessions Court as the case may be,";

(c) for the words "returned by him to the High Court when executed" *substitute* the words "when executed returned by him to the High Court or the Sessions Court, as the case may be,";

(d) in the marginal note, after the words "High Court" *add* the words "or Sessions Court".—Bom. Acts VII of 1949, S. 4 [11-4-1949] read with XV of 1959, Ss. 2 & 3.

8. Delivery of persons sentenced to transportation by High Court.

Where any person is sentenced by the High Court in the exercise of its original criminal jurisdiction to transportation[a] [b][* *] the Court shall cause him to be delivered for intermediate custody to the Superintendent, and the transportation[a] [b][* *] of such person shall be deemed to commence from such delivery.

[a] For the interpretation of the expression "transportation" *see* S. 53A of the Penal Code. [b] The words "or penal servitude" were *omitted* by the Criminal Law (Removal of Racial Discrimination) Act, 1949 (XVII of 1949), S. 4 [6-4-1949].

STATE AMENDMENTS

MADRAS

In its application to the State of Madras, *omit* section 8.

— Mad. Act XI of 1958, S. 4 [4-6-1958].

Section 8 — Note 1

[1] Sections 7 and 8 apply only to cases where the prisoner is sentenced by the High Court in the exercise of its original criminal jurisdiction. ('02) 29 Cal 286 (297) (FB).

MAHARASHTRA

In its application to the State of Bombay, in section 8—

(a) for the words "criminal jurisdiction" *substitute* the words "or appellate criminal jurisdiction or by the Court of Session for Greater Bombay";

(b) for "the Court" *substitute* the words "the High Court or the Sessions Court, as the case may be,";

(c) in the marginal note, after the words "High Court" *add* the words "or the Sessions Court".—Bom. Acts VII of 1949, S. 5 [11-4-1949] read with XV of 1959, Ss. 2 & 3.

9. Delivery of persons committed by High Court in execution of a decree or for contempt.

Where any person is committed by the High Court, whether in execution of a decree or for contempt of Court or for any other cause, the Court shall cause him to be delivered to the Superintendent, together with its warrant of commitment.

STATE AMENDMENT

MAHARASHTRA

In its application to the State of Bombay, in section 9—

(a) after the words "High Court" *insert* the words "the Bombay City Civil Court or the Court of Session for Greater Bombay";

(b) for the words "the Court" *substitute* the words "the High Court, the City Court or the Sessions Court, as the case may be";

(c) in the marginal note, after the words "High Court" *insert* the words, "City Court or Sessions Court".

—Bom. Acts VII of 1949, S. 6 [11-4-1949] read with XV of 1959, Ss. 2 & 3.

10. Delivery of persons sentenced by Presidency Magistrates.

Where any person is sentenced by a Presidency Magistrate to imprisonment, or is committed to prison for failure to find security to keep the peace or to be of good behaviour, the Magistrate shall cause him to be delivered to the Superintendent, together with his warrant.

STATE AMENDMENT

MADRAS

In its application to the State of Madras, for section 10 *substitute* the following section, namely,—

"10. *Delivery of persons sentenced by Presidency Magistrates or by any Court constituted under lawful authority.*—Where any person is sentenced by a Presidency Magistrate or by any Court constituted under lawful authority to imprisonment, or is committed to prison for failure to find security to keep the peace or to be of good behaviour, the Magistrate or the Court shall cause him to be delivered to the Superintendent, together with his or its warrant."—Mad. Act XI of 1958, S. 5 [4-6-1958].

11. Delivery of persons committed for trial by High Court.

Every person committed by a Magistrate, [a][or Justice of the Peace] for trial by the High Court in the exercise of its original criminal jurisdiction shall be delivered to the Superintendent, together with a warrant of commitment, directing the Superintendent to produce such person before the Court for trial; and the Superintendent shall, as soon as practicable, cause such person to be taken before the Court at a criminal session thereof, together with the warrant of commitment, in order that he may be dealt with according to law.

[a] *Substituted* for the words "Justice of the Peace or Coroner" by the Coroners (Amendment) Act, 1908 (IV of 1908), S. 11.

Section 9 — Note 1

[1] Section 9 has no application where the Prisoner is sentenced and not committed. ('02) 29 Cal 286 (298) (FB).

Section 11 — Note 1

[1] The Superintendent of jail in which the prisoner is, is required to produce the prisoner before the Court to which he is committed and not before any other Court. ('04) 1 Cri L Jour 13 (20) : 31 Cal 1 (DB).

STATE AMENDMENTS

MADRAS

In its application to the State of Madras, for section 11 *substitute* the following section, namely,—

"11. *Delivery of persons committed for trial by a Court of Session.*—Every person committed by a Magistrate or Justice of the peace for trial by a Court of Session, shall be delivered to the Superintendent, together with a warrant of commitment, directing the Superintendent to produce such person before the Court for trial, and the Superintendent shall, as soon as practicable, cause such person to be taken before the Court whenever required together with the warrant of commitment, in order that he may be dealt with according to law."—Mad. Act XI of 1958, S. 6 [4-6-1958].

MAHARASHTRA

In its application to the State of Bombay, in section 11 —

(a) after the words "criminal jurisdiction" *insert* the words "or by the Court of Session for Greater Bombay";

(b) for the words "the Court" *substitute*, at both the places where they occur, the words "the High Court or the Sessions Court, as the case may be";

(c) in the marginal note, after the words "High Court" *add* the words "or Sessions Court".

— Bom. Acts VII of 1949, S. 7 [11-4-1949] read with XV of 1959, Ss. 2 & 3.

12. Custody pending hearing by High Court under section 350 of the Code of Civil Procedure of application for insolvency.

The High Court may, pending the hearing, under section 350 of the Code of Civil Procedure,[a] of any application for a declaration of insolvency, cause the judgment-debtor concerned to be delivered to the Superintendent, subject to the provisions as to release on security of section 349 of the said Code, and the Superintendent shall detain the said judgment-debtor in safe custody until he is re-delivered to an officer of the High Court for the purpose of being taken before it in pursuance of its order, or until he is released in due course of law.

[a] Act XIV of 1882. This reference should be construed as applying to the Provincial Insolvency Act, 1920 (V of 1920), *see* S. 83 (2) of that Act.

13. Delivery of persons arrested in pursuance of warrant of High Court or Civil Court in Presidency-town.

(1) Every person arrested in pursuance of a writ, warrant or order of the High Court in the exercise of its original civil jurisdiction, or in pursuance of a warrant of any Civil Court established in a Presidency-town under any law or enactment for the time being in force, or in pursuance of a warrant issued under section 5, shall be brought without delay before the Court by which, or by a Judge of which, the writ, warrant or order was issued, awarded or made, or before a Judge thereof, if the said Court, or a Judge thereof, is then sitting for the exercise of original jurisdiction.

(2) If the said Court, or a Judge thereof, is not then sitting for the exercise of original jurisdiction, such person arrested as aforesaid shall, unless a Judge of the said Court otherwise directs, be delivered to the Superintendent for intermediate custody, and shall be brought before the said Court, or a Judge thereof, at the next sitting of the said Court, or of a Judge thereof, for the exercise of original jurisdiction in order that such person may be dealt with according to law; and the said Court or Judge shall have power to make or award all necessary orders or warrants for that purpose.

STATE AMENDMENT

MAHARASHTRA

In its application to the State of Bombay, in section 13—

(a) in sub-section (1) for the words "a Presidency-town" *substitute* the words "Greater Bombay";

(b) in the marginal note to the said section, for the word "Presidency-town" *substitute* the words "Greater Bombay."

—Bom. Acts VII of 1949, S. 8 [11-4-1949] read with XV of 1959, Ss. 2 & 3.

PART IV

PRISONERS OUTSIDE THE PRESIDENCY-TOWNS

14. References in this Part to prisons, etc., to be construed as referring also to Reformatory Schools.

In this Part all references to prisons or to imprisonment or confinement shall be construed as referring also to Reformatory Schools or to detention therein.

STATE AMENDMENT

MAHARASHTRA

In its application to the State of Bombay, in the heading to Part IV for the words "the Presidency-towns" *substitute* the words "Greater Bombay".

—Bom. Acts VII of 1949, S. 9 [11-4-1949] read with XV of 1959, Ss. 2 & 3.

[a]**[15.** Power for officers in charge of prisons to give effect to sentences of certain Courts.

(1) Officers in charge of prisons outside the Presidency-towns may give effect to any sentence or order or warrant for the detention of any person passed or issued—

(a) by any Court or tribunal acting, whether within or without the States under the general or special authority of the Central Government, or of any State Government, or of the Government of Burma, or by any Court or tribunal, which was before the commencement[b] of the Constitution acting under the general or special authority of His Majesty, or of the Crown Representative; or

(b) before the 26th January, 1950, by any Court or tribunal in any Indian State—

(i) if the presiding Judge, or if the Court or tribunal consisted of two or more Judges, at least one of the Judges, was an officer of the Crown authorised to sit as such Judge by the State or the Ruler thereof or by the Central Government or the Crown Representative ; and

(ii) if the reception, detention or imprisonment in any Province of India of persons sentenced by any such Court or tribunal had been authorised by general or special order by the State Goverment : [c][*]

[c][*(c)* * * * * * * *].

Provided that effect shall not be given to any sentence or order or warrant for detention passed or issued by any Court or tribunal in Burma without the previous sanction of the State Government concerned.

(2) Where a Court or tribunal of such an Indian State as aforesaid had passed a sentence which could not have been executed without the concurrence of an officer of the Crown, and such sentence had been considered on the merits and confirmed by any such officer specially authorised in that behalf, such sentence, and any order or warrant issued in pursuance thereof, shall be deemed to be the sentence, order or warrant of a Court or tribunal acting under he authority of the Central Government or the Crown Representative.]

[a] *Substituted* by A. L. O., 1950 [26-1-1950]. [b] That is, 26th January, 1950. [c] The word 'or' and cl. (c) were *omitted* by 2 A. L. O., 1956 [1-11-1956].

STATE AMENDMENT

MAHARASHTRA

In its application to the State of Bombay, in section 15, in sub-s. (1) for the words "the Presidency-towns" *substitute* the words "Greater Bombay".

—Bom. Acts VII of 1949, S. 10 [11-4-1949] read with XV of 1959, Ss. 2 & 3

16. Warrant of officer of such Court to be sufficient authority.

A warrant under the official signature of an officer of such Court or tribunal as is referred to in section 15 shall be sufficient authority for holding any

person in confinement, or for sending any person for transportation,[a] in pursuance of the sentence passed upon him.

[a] For the interpretation of the expression 'transportation', *see* S. 53A of the Penal Code.

STATE AMENDMENT

MADRAS

In its application to the State of Madras, in section 16 for the words "for transportation" *substitute* the words "for imprisonment for life". — Mad. Act XI of 1958, S. 7 [4-6-1958].

17. Procedure where officer in charge of prison doubts the legality of warrant sent to him for execution under this Part.

(1) Where an officer in charge of a prison doubts the legality of a warrant or order sent to him for execution under this Part, or the competency of the person whose official seal or signature is affixed thereto to pass the sentence and issue the warrant or order, he shall refer the matter to the State Government, by whose order on the case he and all other public officers shall be guided as to the future disposal of the prisoner.

(2) Pending a reference made under sub-section *(1)*, the prisoner shall be detained in such manner and with such restrictions or mitigations as may be specified in the warrant or order.

18. Execution in the States of certain capital sentences not ordinarily executable there.

(1) Where a [a][Court established by the authority of the Central Government] exercising, in or with respect to territory beyond the limits of the States, jurisdiction which [b][the [c][Central Government]] has in such territory,—

(a) has sentenced any person to death, and,

(b) being of opinion that such sentence should, by reason of there being in such territory no secure place for the confinement of such person or no suitable appliances for his execution in a decent and humane manner, be executed in the States has issued its warrant for the execution of such sentence to the officer in charge of a prison in the States,

such officer shall, on receipt of the warrant, cause the execution to be carried out at such place as may be prescribed therein in the same manner and subject to the same conditions in all respects as if it were a warrant duly issued under the provisions of section 381 of the Code of Criminal Procedure, 1898.

(2) The prisons of which the officers in charge are to execute sentences under any such warrants as aforesaid [d][shall in each State be such as the State Government] may, by general or special order, direct.

[e][*(3)* * * * * * * *]

[a] *Substituted* "for British Court" by A. C. A. O. 1948. [b] *Substituted* for "the Governor-General in Council" by A. O., 1937. [c] *Substituted* for "Crown" by A.C.A.O., 1948. [d] *Substituted* for the words "shall be such as the Governor-General in Council or a Local Government authorised by the Governor-General in Council in this behalf" by A.O., 1937. [e] Sub-section *(3)* and the Proviso thereto were *omitted* by the A.L.O., 1950.

PART V

PERSONS UNDER SENTENCE OF PENAL SERVITUDE

19–27. *[Repealed by the Criminal Law (Removal of Racial Discriminations) Act, 1949 (17 of 1949), S. 4 [6.4.1949].]*

PART VI

REMOVAL OF PRISONERS

28. References in this Part to prisons, etc., to be construed as referring also to Reformatory Schools.

In this Part, all references to prisons or to imprisonment or confinement shall be construed as referring also to Reformatory Schools or to detention therein.

[a][**29.** Removal of prisoners.

(1) The [b][State Government] may, by general or special order, provide for the removal of any prisoner confined in a prison—

(a) under sentence of death, or

(b) under, or in lieu of, a sentence of imprisonment or transportation, or

(c) in default of payment of a fine, or

(d) in default of giving security for keeping the peace or for maintaining good behaviour,

to any other prison in [c][the State [d][* * *]].

(2) [e][Subject to the orders, and under the control, of the State Government,] the Inspector General of Prisons may, in like manner, provide for the removal of any prisoner confined as aforesaid in a prison in the State to any other prison in the State [f][* * *].]

[a] *Substituted* for the original section by the Amending Act, 1903 (I of 1903), S. 3 & Sch. II. [b] *Substituted* for "Governor General in Council" by A.O., 1937 [1-4-1937]. [c] *Substituted* for the words "British India or to any prison in Berar" by A. O., 1937. The words "or to any prison in Berar" were *added* by the Prisoners (Amendment) Act, 1923 (XVII of 1923), S. 2. [d] The words "or, with the consent of the State Government concerned, to any prison in any other State" were *omitted* by the Transfer of Prisoners Act, 1950 (XXIX of 1950), S. 4 [12-4-1950]. [e] *Substituted* for "The Local Government, and (subject to its orders and under its control)" by A O., 1937 [1-4-1937]. [f] The words "or, in the case of a prisoner so confined in a prison in the Central Provinces for his removal to any other prison in the Province or to any prison in Berar", which had been *added* by Act XVII of 1923, S. 2, were *omitted* by A.O., 1937 [1-4-1937].

STATE AMENDMENT

MADRAS

In its application to the State of Madras, in section 29—

(i) in sub-section *(1)*, in clause *(b)*, for the words "or transportation" *substitute* the words "or imprisonment for life";

(ii) after sub-section *(2)*, *add* the following sub-section, namely,—

"*(3)* Subject to the orders, and under the control, of the State Government, any person who is detained in custody in a prison pending inquiry or trial under any writ, warrant or order of any Court may, by order, be directed to be removed—

(i) from one subsidiary jail to another subsidiary jail in the district, by the Collector of the district or by his Personal Assistant (not below the rank of Deputy Collector),

(ii) from one subsidiary jail to another subsidiary jail within the jurisdiction of a Revenue Divisional Officer, by the Revenue Divisional Officer,

(iii) from a subsidiary jail in one district to a subsidiary jail in another district, by the Collector of the district from which the person is removed with the consent of the Collector of the other district,

(iv) by the Inspector-General of Prisons—

(a) from one Central Jail to another Central jail or to a district jail or a subsidiary jail ;

(b) from one district jail to another district jail or a Central jail or a subsidiary jail; or

(c) from one subsidiary jail to another subsidiary jail or to a district jail or a Central jail.' — Mad. Act XI of 1958, S. 8 [4-6-1958].

30. Lunatic prisoners how to be dealt with.

(1) Where it appears to the State Government that any person detained or imprisoned under any order or sentence of any Court is of unsound mind, the State Government may, by a warrant setting forth the grounds of belief that the person is of unsound mind, order his removal to a lunatic asylum or other place of safe custody within the State, there to be kept and treated as the State Government directs during the remainder of the term for which he has been ordered or sentenced to be detained or imprisoned, or, if on the expiration of that term it is certified by a medical officer that it is necessary for the safety of the prisoner or others that he should be further detained under medical care or treatment, then until he is discharged according to law.

(2) Where it appears to the State Government that the prisoner has become of sound mind, the State Government shall, by a warrant directed to the person

having charge of the prisoner, if still liable to be kept in custody, remand him to the prison from which he was removed, or to another prison within the State, or, if the prisoner is no longer liable to be kept in custody, order him to be discharged.

(3) The provisions of section 9 of the [a]Lunatic Asylums Act, 1858, shall apply to every person confined in a lunatic asylum under sub-section *(1)* after the expiration of the term for which he was ordered or sentenced to be detained or imprisoned; and the time during which a prisoner is confined in a lunatic asylum under that sub-section shall be reckoned as part of the term of detention or imprisonment which he may have been ordered or sentenced by the Court to undergo.

[b][*(4)* In any case in which the State Government is competent under sub-section *(1)* to order the removal of a prisoner to a lunatic asylum or other place of safe custody within the State, the State Government may order his removal to any such asylum or place within any other State or within [c][any part of India to which this Act does not extend] by agreement with the State Government of such other State [d][* * *]; and the provisions of this section respecting the custody, detention, remand and discharge of a prisoner removed under sub-section *(1)* shall, so far as they can be made applicable, apply to a prisoner removed under this sub-section.]

[a] *See* now the Indian Lunacy Act, 1912 (IV of 1912). [b] *Substituted* for the original sub-section (4) by the Devolution Act, 1920 (XXXVIII of 1920), S. 2 & Sch. I. [c] *Substituted* for "any Part B State" by 2 A. L.O., 1956 [1-11-1956]. [d] The words "or with such State or the Ruler thereof, as the case may be" were *omitted*, *ibid.*

31. Removal of prisoners from territories under one Local Government to territories under another. *[Repealed by the Amending Act, 1903 (1 of 1903), S. 4 and Sch. III.]*

PART VI-A
STATE AMENDMENTS

BIHAR

In its application to the State of Bihar, after Part VI insert the following Part, namely,—

"PART VI-A.

31-A. *Constitution of District Parole Board.*—There shall be established for each district a District Parole Board consisting of the District Magistrate, the Superintendent of Police, two members of the State Legislature to be nominated by the State Government and the Superintendent of the District Jail, or, if there is a Central Jail in the District, the Superintendent of that Jail.

31-B. *Release of prisoners on parole.*—*(1)* The State Government, or any authority to which the State Government may delegate its powers in this behalf, may, on recommendation of the District Parole Board, direct that a prisoner may be released, either without conditions or upon such conditions as may be specified in the direction, for any period not exceeding thirty days at a time, excluding the time required for journeys and the days of departure from, and the arrival at, the prison :

Provided that no prisoner shall be released under this sub-section, unless—

(a) he has served a period of not less than one year excluding remissions of his sentence;

(b) his conduct in prison has been, in the opinion of the District Parole Board, uniformly good ;

(c) there is, in the opinion of the District Parole Board, reasonable probability that during the period of his release he shall not commit any crime; and

(d) in the case of a second or subsequent release, not less than six months have elapsed from the date of the expiry of his previous release :

Provided further that no prisoner shall be released under this sub-section more than three times.

(2) The provisions of sub-section *(1)* shall not apply to a prisoner,—

(i) who has been convicted of an offence specified in the Schedule annexed to this Part; or

(ii) who has been classified as a habitual criminal under the rules made under the Prisons Act, 1894, and has had more than three previous convictions.

(3) The period of release of a prisoner under sub-section *(1)* shall ccount towards the total period of his sentence, provided that he surrenders on the due date and his conduct has been satisfactory during the period he was outside the jail on parole.

31-C. *Power to release prisoners for special reasons.* — *(1)* Notwithstanding anything to the contrary contained in section 31-B or in any other law for the time being in force, the State Government, or any authority to which the State Government may delegate its powers in this behalf, may, for any special reasons, direct that a prisoner may be released for a period not exceeding fifteen days (excluding the time required for journeys and the days of departure from, or arrival at, the prison), either without conditions or upon such conditions specified in the direction as the prisoner accepts, and may, at any time, cancel his release.

(2) The authority directing the release of any prisoner under sub-section *(1)* may require him to enter into a bond with or without sureties for the due observance of the conditions specified in the direction.

(3) If any person released under sub-section *(1)* fails to fulfil any of the conditions imposed upon him under the said sub-section or in the bond entered into by him, the bond shall be declared to be forfeited and any person bound thereby shall be liable to the penalty thereof ;

Provided that no prisoner shall, without the special sanction of the State Government, be released under this section, unless—

(i) he has served at least six months of his sentence including remissions ;

(ii) his conduct has been, in the opinion of the Superintendent of the Jail in which he is serving his sentence, uniformly good;

(iii) he is not a habitual criminal under the rules made under the Prisons Act, 1894 ; and

(iv) the offence for which he has been convicted, does not, in the opinion of the authority directing the release, involve grave moral turpitude or mental depravity.

31-D. *Surrender of a prisoner on the expiry of the period of a temporary release.*—*(1)* Any prisoner released under section 31-B, or section 31-C, shall surrender himself to the officer-in-charge of the prison from which he was released ; and, if the prisoner does not surrender himself, he may be arrested by any police officer without a warrant and shall be remanded to custody to undergo the unexpired period of his sentence.

(2) Any prisoner, who does not surrender himself as required by sub-section *(1)*, shall be liable, upon conviction, to be punished with imprisonment of either description for a term which may extend to two years or to a fine which may extend to five hundred rupees, or with both.

31-E. *Power to make rules.* — *(1)* The State Government may make rules for carrying out the purposes of this Part.

(2) In particular and without prejudice to the generality of the foregoing provision such rules may provide for—

(a) the procedure to be followed in respect of the proceedings for the release of prisoners ;

(b) the conditions of release of prisoners including conditions for supervision during the period of such release ;

(c) travelling allowances for prisoners during the period of release ;

(d) restrictions on the movements of prisoners during the period of release ; and

(e) travelling allowances for non-official members attending the meetings of the District Parole Board.

THE SCHEDULE

[*See* Section 31-B (2).]

1. An offence punishable under section 119 of the Indian Penal Code.
2. An offence punishable under section 121, 121-A, 122, 123, 128 or 130 of the Indian Penal Code.
3. An offence punishable under section 131 or 132 of the Indian Penal Code.
4. An offence punishable under section 19 or 195 of the Indian Penal Code.
5. An offence punishable under section 232, 235, 238 or 240 of the Indian Penal Code.
6. An offence punishable under section 302, 303, 304, 306 or 307 of the Indian Penal Code.
7. An offence punishable under section 313, 314 or 316 of the Indian Penal Code.
8. An offence punishable under section 364, 366, 366-A, 366-B, 367 or 372 of the Indian Penal Code.
9. An offence punishable under section 376 or 377 of the Indian Penal Code.
10. An offence punishable under section 392, 394, 395, 396, 397, 398, 399 or 400 of the Indian Penal Code.
11. Any conspiracy to commit or any attempt to commit or any abetment of any of the aforesaid offences." —Bihar Act XXIII of 1956, S. 2 [10-10-1956].

MADHYA PRADESH

In its application to the State of Madhya Pradesh, after Part VI of the Prisoners Act, 1900, the following Part shall be deemed to be *inserted*, namely :—

"PART VI-A

Temporary Release of Prisoners."

31-A. *(1) Temporary release of prisoners.* — The State Government or any authority to which the State Government may delegate its power in this behalf may, subject to such conditions as may be prescribed by rules, release, temporarily for a period not exceeding ten days in a year excluding the time required for journeys and the days of departure from, and the arrival at the prison, any prisoner who has been sentenced to a term of imprisonment of not less than three years.

(2) The provisions of sub-section *(1)* shall not apply to a prisoner who has been classified as an habitual criminal for the purpose of the rules for the time being in force made under the Prisons Act, 1894, or the same Act, as applied to Berar, and who has had more than three previous convictions.

(3) No prisoner shall be released under sub-section *(1)* unless—

(a) he has, at the time of his release, served one-half of his sentence including remission or a period of not less than two years of his sentence, including remission, whichever is less ;

(b) his conduct in prison has been good ; and

(c) twelve months have elapsed from the date of the expiry of the period of his previous release, it any, under this section.

(4) The period of release of a prisoner under sub-section *(1)* shall not count towards the total period of his sentence.

31-B. *Surrender by prisoner after the release period.* — *(1)* On the expiry of the period for which a prisoner was released under sub-section *(1)* of section 31-A he shall surrender himself to the officer in charge of the prison from which he was released.

(2) If a prisoner does not surrender himself as required by sub-section *(1)*, he may be arrested by any police officer without a warrant and shall be remanded to undergo the unexpired portion of his sentence.

31-C. *Penalty.* — Any prisoner who does not surrender himself as required by sub-section *(1)* of section 31-B shall be liable upon conviction to be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

—C. P. and Berar Act IV of 1939, S. 2 [2-6-1939]
read with M. P. Act XXIII of 1958, S. 3 (1).

WEST BENGAL

In its application to West Bengal, after Part VI *insert* the following Part, namely,—

"PART VI-A

Temporary Release of Prisoners.

31-A. *Temporary release of prisoners.* — *(1)* The State Government or such authority as the State Government may empower in this behalf may, subject to the provisions of this Part and to such conditions as may be prescribed by rules made under section 31-C, at any time, release, temporarily for a period not exceeding one month excluding the time required for journey from and to the prison, any prisoner who, having been sentenced to imprisonment for a term of more than two years, has actually undergone imprisonment for not less than one year :

Provided that before a prisoner is released under this sub-section he shall have to execute a bond, with or without sureties as the State Government or other authority making the order of release may determine, for good behaviour during the period of release and for observing the conditions of the release :

Provided further that a prisoner who has previously been temporarily released under this sub-section shall not again be so released unless after his return to prison from the last temporary release there shall have elapsed—

(a) in the case of a prisoner sentenced to imprisonment for a term of less than five years, a period of one year, or

(b) in the case of a prisoner sentenced to imprisonment for a term of five years or more, a period of two years.

Explanation. — In this Part "prisoner" does not include a person convicted of any offence under Chapter VI or Chapter VII or under any of sections 392 to 402 (inclusive), of the Indian Penal Code or classified as a habitual criminal for the purpose of the rules for the time being in force made under the Prisons Act, 1894.

(2) No prisoner shall be released under sub-section *(1)* unless—

(a) he shall have, after the expiry of the period of release, at least one year of further imprisonment to undergo ;

(b) he has undergone, with remission earned, imprisonment for—

(i) in the case of a prisoner sentenced to imprisonment for a term of less than five years, half the period of his sentence, or

(ii) in the case of a prisoner sentenced to imprisonment for a term of five years or more, half the period of his sentence or a period of three years, whichever is less;

(c) the officer in charge of the prison certifies that the conduct of the prisoner in the prison has been good.

(3) Every prisoner shall, when released under sub-section *(1)*, remain within West Bengal during the period of such release.

(4) The provisions of sections 514, 514A, 514B and 515 of the Code of Criminal Procedure, 1898 shall, as far as may be, apply in respect of bonds executed, with or without sureties, in pursuance of the first proviso of sub-section *(1)*.

(5) The order granting release may be cancelled by the State Government or other authority making the order for any reason considered sufficient by it and shall be so cancelled if, during the period of release, the prisoner contravenes any of the conditions of the release or commits any offence.

(6) Subject to the provisions of sub-section *(2)* of section 31B, the period of release of a prisoner under sub-section *(1)* shall count towards the total period of his sentence.

31B. *Surrender by prisoner after release period.*—*(1)* On the expiry of the period for which a prisoner is released under sub-section *(1)* of section 31A, he shall surrender himself to the officer-in-charge of the prison from which he is released.

(2) If a prisoner does not surrender himself as required by sub-section *(1)*, he may be arrested by any police officer without a warrant and shall be remanded to undergo the unexpired portion of his sentence (the period of release not being counted towards the total period of his sentence) and shall also be punishable under section 46 of the Prisons Act, 1894, as if he had committed a prison-offence referred to in section 45 of that Act.

31C. *Power to make rules.*—*(1)* The State Government may make rules for carrying out the purposes of this Part.

(2) In particular and without prejudice to the generality of the foregoing provision such rules may provide for—

(a) the procedure to be followed in respect of the proceedings for the release of prisoners under section 31A;

(b) the conditions of release of prisoners under section 31A including conditions for supervision during the period of such release;

(c) travelling allowances for prisoners during the period of release under section 31A; and

(d) restrictions on the movements of prisoners during the period of release under section 31A." —W. B. Act XIII of 1955, S. 3 [19-4-1955].

PART VII

PERSONS UNDER SENTENCE OF TRANSPORTATION[aa]

32. Appointment of places for confinement of persons under sentence of transportation and removal thereto.

[a][*(1)*] The [b][State Government] may appoint places within [c][the State] to which persons under sentence of transportation[aa] shall be sent; and the [b][State Government], or some officer duly authorised in this behalf by the [b][State Government], shall give orders for the removal of such persons to the places so appointed, except when sentence of transportation[aa] is passed on a person already undergoing transportation[aa] under a sentence previously passed for another offence.

[d][*(2)* In any case in which the State Government is competent under sub-section *(1)* to appoint places within the States and to order the removal thereto of persons under sentence of transportation[aa] the State Government may appoint such places in any other State by agreement with the State Government of that State, and may by like agreement give orders or duly authorise some officer to give orders for the removal thereto of such persons.]

[aa] For the interpretation of the expression 'transportation', *see* S. 53A of the Penal Code. [a] Section 32 was re-numbered as sub-section *(1)* of that section by the Devolution Act, 1920 (XXXVIII of 1920), S. 2 and Sch. I. [b] *Substituted* for "Governor-General-in-Council", *ibid.* [c] *Substituted* for "British India", *ibid.* [d] *Inserted, ibid.*

STATE AMENDMENT

MADRAS

In the application of the Act to the State of Madras, *omit* Part VII.
—Mad. Act XI of 1958, S. 9 [4-6-1958].

PART VIII
DISCHARGE OF PRISONERS

33. Release, on recognizance, by order of High Court, of prisoner recommended for pardon.

[a][Any High Court] may, in any case in which it has recommended to Government the granting of a free pardon to any prisoner, permit him to be at liberty on his own recognizance.

[a] *Substituted* for "Any Court which is a High Court for a Part A State" by 2 A. L. O. 1956 [1-11-1956].

PART IX
PROVISIONS FOR REQUIRING THE ATTENDANCE OF PRISONERS AND OBTAINING THEIR EVIDENCE

34—52. *[Repealed by the Prisoners (Attendance in Courts) Act, 1955 (32 of 1955), S. 10.]*

53. Repeals. *[Repealed by the Repealing and Amending Act, 1914 (10 of 1914), S. 3 and Sch. II.]*

THE FIRST SCHEDULE. *[Repealed by the Prisoners (Attendance in Courts) Act, 1955 (32 of 1955), S. 10.]*

THE SECOND SCHEDULE. *[Repealed, Ibid.]*

THE THIRD SCHEDULE. *[Repealed by the Repealing and Amending Act, 1914 (10 of 1914), S. 3 and Sch. II.]*

[THE] PRISONERS (ATTENDANCE IN COURTS) ACT, 1955
(ACT XXXII of 1955)

[The Act printed here is as on 15-2-1961.]

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THE FIRST SCHEDULE.

THE SECOND SCHEDULE.

STATEMENT OF OBJECTS AND REASONS

"Part IX of the Prisoners Act, 1900, deals with the attendance of prisoners and obtaining their evidence in Courts. Some of the provisions in this Part for securing the attendance of a prisoner in Court to give evidence or to stand his trial, are cumbersome and result in avoidable delay in the trial of criminal cases and in needless detention of prisoners who are already under trial.

The Bill seeks to simplify the procedure for securing the attendance of prisoners in Courts by repealing Part IX of the Prisoners Act and re-enacts its provisions with suitable modifications as a separate law while extending at

the same time the provisions of this law to the whole of India except Jammu and Kashmir. The Bill provides that any civil or criminal Court may, if it thinks that the evidence of any person confined in any prison is material in respect of any matter pending before it, make an order in the prescribed form and send that order direct to the officer-in-charge of the prison who will be required to comply with it. It will not be necessary, as at present, to send such an order to the District or Sub-Divisional Magistrate of the area where the prison is situated or to the Government of the State if the prisoner is in a different State. No civil Court may, however, make an order in respect of a person confined in a prison situate outside the State in which the Court is held. In such cases, a commission may suffice. The Bill also provides (as in section 43 of the present Act) that in certain circumstances and subject to certain exceptions the officer-in-charge of the prison may abstain from carrying out the order, as for example, where the prisoner is unfit to be removed by reason of sickness or other infirmity or is under committal for trial or is in custody for a period which would expire before the date on which he is required to be produced before the Court."

—Gaz. Ind., 1953, Extra., Pt. II-Sec. 2, page 1165.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by 3 A. L. O., 1956.

[THE] PRISONERS (ATTENDANCE IN COURTS) ACT, 1955

(ACT XXXII OF 1955)[a]

[20th September, 1955.]

An Act to provide for the attendance in Courts of persons confined in prisons for obtaining their evidence or for answering a criminal charge.

BE it enacted by Parliament in the Sixth Year of the Republic of India as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. Ind., 1953, Extra., Pt. II-Sec. 2, page 1165.

1. Short title, extent and commencement.

(1) This Act may be called THE PRISONERS (ATTENDANCE IN COURTS) ACT, 1955.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date[a] as the Central Government may, by notification in the Official Gazette, appoint.

[a] The date so appointed is 1st January 1956, *see* S. R. O. 3447, dated 8-11-1955 published in Gaz. Ind., 1955, Pt. II-Sec. 3, page 2229.

2. Definitions.

In this Act—

(a) "confinement in a prison" — references to confinement in a prison, by whatever form of words, include references to confinement or detention in a prison under any law providing for preventive detention,

(b) "prison" includes—

(i) any place which has been declared by the State Government, by general or special order, to be a subsidiary jail; and

(ii) any reformatory, Borstal institution or other institution of a like nature;

[a][*(c)* "State Government", in relation to a Union territory, means the administrator thereof.]

[a] *Substituted* by 3 A. L. O., 1956 [1-11-1956].

3. Power of Courts to require appearance of prisoners to give evidence or answer a charge.

(1) Any civil or criminal Court may, if it thinks that the evidence of any person confined in any prison is material in any matter pending before it, make an order in the form set forth in the First Schedule, directed to the officer in charge of the prisou :

Provided that no civil Court shall make an order under this sub-section in

respect of a person confined in a prison situated outside the State in which the Court is held.

(2) Any criminal Court may, if a charge of an offence against a person confined in any prison is made or pending before it, make an order in the form set forth in the Second Schedule, directed to the officer in charge of the prison.

(3) No order made under this section by a civil Court which is subordinate to a District Judge shall have effect unless it is counter-signed by the District Judge; and no order made under this section by a criminal Court which is inferior to the Court of a Magistrate of the first class shall have effect unless it is countersigned by the District Magistrate to whom that Court is subordinate or within the local limits of whose jurisdiction that Court is situate.

(4) For the purposes of sub-section *(3)*, a Court of Small Causes outside a presidency town or the city of Hyderabad shall be deemed to be subordinate to the District Judge within the local limits of whose jurisdiction such Court is situate.

4. Power of State Government to exempt certain persons from operation of section 3.

(1) The State Government may, having regard to the matters specified in sub-section *(2)*, by General or special order, direct that any person or class of persons shall not be removed from the prison in which he or they may be confined, and thereupon so long as any such order remains in force, the provisions of section 3 shall not apply to such person or class of persons.

(2) Before making an order under sub-section *(1)*, the State Government shall have regard to the following matters, namely :—

(a) the nature of the offence for which or the grounds on which the confinement has been ordered in respect of the person or class of persons;

(b) the likelihood of the disturbance of public order if the person or class of persons is allowed to be removed from the prison ;

(c) the public interest, generally.

5. Prisoners to be brought up.

Upon delivery of any order made under section 3 to the officer in charge of the prison in which the person named therein is confined, that officer shall cause him to be taken to the Court in which his attendance is required, so as to be present in the Court at the time in such order mentioned, and shall cause him to be detained in custody in or near the Court until he has been examined or until the judge or presiding officer of the Court authorises him to be taken back to the prison in which he was confined.

6. Officer in charge of prison when to abstain from carrying out order.

Where the person in respect of whom an order is made under section 3—

(a) is, in accordance with the rules made in this behalf, declared to be unfit to be removed from the prison where he is confined by reason of sickness or other infirmity ; or

(b) is under committal for trial ; or

(c) is under remand pending trial or pending a preliminary investigation ; or

(d) is in custody for a period which would expire before the expiration of the time required for removing him under this Act and for taking him back to the prison in which he is confined ;

the officer in charge of the prison shall abstain from carrying out the order and shall send to the Court from which the order had been issued a statement of reasons for so abstaining :

Provided that such officer as aforesaid shall not so abstain where—

(i) the order has been made by a criminal Court ; and

(ii) the person named in the order is confined under committal for trial or under remand pending trial or pending a preliminary investigation and is not declared in accordance with the rules made in this behalf to be unfit to be removed from the prison where he is confined by reason of sickness or other infirmity ; and

(iii) the place, where the evidence of the person named in the order is required, is not more than five miles distant from the prison in which he is confined.

7. Commissions for examination of prisoners.

In any of the following cases, that is to say,—

(a) where it appears to any civil Court that the evidence of a person confined in a prison is material in any matter pending before it and that the attendance of such person in Court cannot be secured by reason of the provisions of section 6 or of an order under section 4 or of the District Judge declining under sub-section *(3)* of section 3 to countersign an order for removal ; or

(b) where it appears to any civil Court as aforesaid that the evidence of a person confined in a prison which is situated outside the State in which, or is more than fifty miles distant from the place at which, such Court is held is material in any such matter ;

the Court may, if it thinks fit, issue a commission under the provisions of the Code of Civil Procedure, 1908, for the examination of the person in the prison in which he is confined.

8. Certain provisions of the Code of Criminal Procedure and the Code of Civil Procedure to apply.

Save as otherwise provided in this Act and any rules made thereunder, the provisions of the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, as the case may be, shall, so far as may be, apply in relation to the examination on commission or otherwise of any person confined in a prison as they apply in relation to the examination on commission of any other person.

9. Power to make rules.

(1) The State Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the procedure for obtaining the countersignature of an order made under section 3 ;

(b) the authority by whom and the manner in which a declaration that a person confined in prison is unfit to be removed therefrom, may be made ;

(c) the conditions, including payment of costs and charges, subject to which an order made under section 3 by a civil Court may be executed ;

(d) the manner in which a process directed against any person confined in a prison issued from any court may be served upon him ;

(e) the escort of persons confined in a prison to and from courts in which their attendance is required and for their custody during the period of such attendance ;

(f) the amount to be allowed for the costs and charges of such escort ; and

(g) the guidance of officers in all other matters connected with the enforcement of this Act.

10. Repeal.

(1) Part IX of the Prisoners Act, 1900 and the First and Second Schedules to the said Act are hereby repealed.

(2) If immediately before the commencement of this Act, there is in force in any Part B State[a] to which this Act extends any law corresponding to the provisions of this Act, that law shall, in so far as it relates to matters dealt with in this Act, stand repealed on such commencement :

Provided that anything done or any action taken under any such law shall be deemed to have been done or taken under the corresponding provisions of this Act and shall continue to have effect accordingly, unless and until superseded by anything done or any action taken under this Act.

[a] The following were the Part B States : Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin.

THE FIRST SCHEDULE

[*See* sub-section *(1)* of section 3]

Court of

To the officer in charge of the.....*(State name of prison)*.

You are hereby required to produce , now confined in , under safe and sure conduct before the Court of at on the day of next by of the clock in the forenoon of the same day, there to give evidence in a matter now pending before the said Court, and after the said has then and there given his evidence before the said Court or the said Court has dispensed with his further attendance, cause him to be conveyed under safe and sure conduct back to the prison.

The day of

A.B.

(Countersigned) *C.D.*

THE SECOND SCHEDULE

[*See* sub-section *(2)* of section 3]

Court of

To the officer in charge of the.....*(State name of prison)*.

You are hereby required to produce , now confined in , under safe and sure conduct before the Court of at on the day of next by of the clock in the forenoon of the same day, there to answer a charge now pending before the said Court, and after such charge has been disposed of or the said Court has dispensed with his further attendance, cause him to be conveyed under safe and sure conduct back to the said prison.

The day of

A.B.

(Countersigned) *C.D.*

[THE] PRISONS ACT, 1894

(ACT IX of 1894)

[The Act printed here is as on 15-2-1961.]

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STATEMENT OF OBJECTS AND REASONS

"There are at present four different Acts in force for the regulation of jails in British India and for the enforcement of discipline therein. These Acts differ *inter se* in various important points, namely, as to the jail-offences enumerated in them, as to the punishments which might be inflicted for these offences, and as to the authorities competent to inflict these punishments. In consequence divergent systems of jail management have grown up in the several provinces, whereby there has been a sacrifice of that uniform enforcement of sentences of imprisonment which effective general administration requires. The object of this Bill is to repeal the four local Acts and to prescribe a uniform system of prison management in India.

The Bill is mainly (based) on Act XXVI of 1870, *(an Act to amend the law relating to Prisons)*, which is in force in the North-Western Provinces and Oudh, the Punjab, the Central Provinces, Coorg and Burma, with amendments embodying the conclusions arrived at by the Government of India on the Report of the Jail Committee of 1889 and the Report of the Prison Conference of 1892, as stated in the Resolution recorded in the Home Department of the 9th November, 1892, and in the Circular letter to Local Governments and Administrations, dated the 25th March, 1893, to which it appeared necessary to give legislative form."

* * * * * *

—Gazette of India, 1894, Part V, Page 14.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937; A. C. A. O., 1948; A. L. O., 1950; 2 A. L. O., 1956; Mah. A. L. O , 1960.
—Amended by Acts XIII of 1910; X of 1914; XVII of 1925; VI of 1930.
—Amended in its application to—
(a) Andhra Pradesh by An. P. Act XXIII of 1958;
(b) Assam by Asm. Act XII of 1956;
(c) Bihar by Bih. Act XXXI of 1956;
(d) Madhya Pradesh by C. P. & B. Act X of 1939;
(e) Madras by Mad. Acts XIV of 1938; V of 1940; XVIII of 1947; XIX of 1947.
(f) Maharashtra by Bom. Acts XXIII of 1951; XXVII of 1953; XXXIX of 1957; XXIII of 1959; XLV of 1959; Mah. Act XIV of 1960.
(g) Orissa by Ori. Acts XXIII of 1956; XXIX of 1958;
(h) Punjab by Punj. Acts IX of 1926; XXII of 1957;
(i) Uttar Pradesh by U.P. Act IX of 1958;
(j) West Bengal by W. B. Act XXII of 1957;
—Extended by Acts LIX of 1949; XXX of 1950.
—Extended in its application to areas in State of—
(a) Andhra Pradesh by An. P. Act XXIII of 1958.
(b) Bombay by Bom. Acts IV of 1950; XXIII of 1959.
(c) Madhya Pradesh by M. P. Act XII of 1950.
(d) Madras by Mad. Acts XXXV of 1949; XXII of 1957.
(e) Punjab by Punj. Acts V of 1950; V of 1957.
—Extended to North East Frontier Agency by Reg. III of 1960.
—Repealed in part by Act I of 1938.
—Repealed in part in Madhya Pradesh by C. P. & B. Act XV of 1940.
—Repealed in part by W. B. Act VII of 1948.

COGNATE ACTS AND PROVISIONS

See UNDER PRISONERS ACT, 1900.

[THE] PRISONS ACT, 1894
(ACT IX OF 1894)[a]

[22nd March, 1894.]

An Act to amend the law relating to Prisons.

WHEREAS it is expedient to amend the law relating to prisons in [b][India except the territories which, immediately before the 1st November, 1956, were comprised in Part B States], and to provide rules for the regulation of such prison; It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1894, Pt. V, page 14; for Report of the Select Committee, *see ibid*, page 63.

This Act has been *declared* to be in force in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation 1872 (III of 1872), S. 3; in the Khondmal District by the Khondmals Laws Regulation, 1936 (IV of 1936), S. 3 and Schedule; and in the Angul District by the Angul Laws Regulation, 1936 (V of 1936), S. 3 and Schedule.

For separate treatment of political prisoners in the Central Provinces and Berar, the Central Provinces and Berar Prisons (Amendment) Act, 1939 (X of 1939) was passed on 24-6-1939; but that Act was *repealed* by S. 2 of the Central Provinces and Berar Prisons (Amendment) Repealing Act, 1940 (XV of 1940), and with effect from the date on which the Repealing Act came into force, [*i.e.*, from 28-11-1940,] the Prisons Act, 1894, applied to C. P. and Berar as if the C. P. and Berar Prisons (Amendment) Act, 1939, had not been passed : *See* C. P. Act XV of 1940, S. 2.

This Act has, in its application, been extended to—

(a) the new provinces and merged States by the Merged States (Laws) Act, 1949 (LIX of 1949), S. 3 [1-1-1950];

(b) the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (XXX of 1950), S. 3 [16-4-1950];

(c) the transferred territories in the Andhra Pradesh as specified in the States Reorganisation Act, 1956, S. 3 (1) and as amended in its application to the Andhra Pradesh—*see* An. P. Act XXIII of 1958, S. 3 and Sch. [w. e. f. 1-2-1960];

(d) the States merged in the State of Bombay by Bom. Act IV of 1950;

(e) the rest of the State of Bombay as it was in force in the pre-reorganised State of Bombay (excluding the transferred territories)—*see* Bom. Act XXIII of 1959, S. 2 (1);

(f) the States merged in the State of former Madhya Pradesh by M. P. Act XII of 1950;

(g) the States merged in the State of Madras by Mad. Act XXXV of 1949, S. 3 and Sch. [w. e. f. 1-1-1950];

(h) the transferred territory in the State of Madras—*see* Madras Act XXII of 1957, S. 3 and Sch. [18-12-1957];

(i) the States merged in the State of Punjab by Punj. Act V of 1950;

(j) the transferred territories, that is, Pepsu in the State of Punjab—*see* Punj. Act V of 1957, S. 4 (1) [3-4-1957];

(k) the North East Frontier Agency—*see* Reg. III of 1960, S. 3 and Sch. [1-11-1960].

[b] *Substituted* for "Part A States and Part C States" by 2 A. L. O., 1956 [1-11-1956].

Immediately before 1-11-1956 the following were Part B States : Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin.

STATE AMENDMENTS

ANDHRA PRADESH

In the Preamble after the words and letter "comprised in Part B States" *add* the words and figures "other than the territories specified in sub-section *(1)* of section 3 of the States Reorganisation Act, 1956". —An. P. Act XXIII of 1958, S. 3 and Sch. [w. e. f. 1-2-1960].

GUJARAT

In its application to the State of Gujarat, the amendment is the same as that of Maharashtra, except "Gujarat" is to be *substituted* for "Maharashtra".

MADRAS

In its application to the added territories in the State of Madras, in the Preamble *omit* the

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Preamble — Note 1

[1] Once a prisoner is convicted and sent to jail he will continue to remain in the custody of jail official and he is to be governed only by the Provisions of the Prisons Act and the Prisoners Act. The Magistrate has no power to release him from jail or to change the nature of his custody, i. e., from custody of the prison to that of police custody even for the purpose of investigation by police. 1956 Madh B 130 (131, 132) [(S) AIR V 43 C 59] : 1956 Cri L Jour 619.

words "other than the territories specified in sub-section *(1)* of section 3 of the States Reorganisation Act, 1956", which were added by An. P. Act XXIII of 1958.
—Mad. (Ad. Ter.) A. L. O., 1961 [w. r. e. f. 1-4-1960].

MAHARASHTRA

In its application to the State of Maharashtra, in the Preamble, after the words and letter "comprised in Part B States" *insert* the words and figures "other than any such territories forming part of the State of Maharashtra by section 8 of the States Reorganisation Act, 1956".
—Bom. Act XXIII of 1959, S. 2 (2) (a). [1-6-1959].

CHAPTER I

PRELIMINARY

1. Title, extent and commencement.

(1) This Act may be called THE PRISONS ACT, 1894.

[a][*(2)* It extends to the whole of India except [b][the territories which, immediately before the 1st November, 1956, were comprised in Part B States];] and

(3) It shall come into force on the first day of July, 1894.

(4) Nothing in this Act shall apply to civil jails in the [bb][State of Maharashtra] [c][as it existed immediately before the 1st November, 1956] outside the city of Bombay, and those jails shall continue to be administered under the provisions of sections 9 and 16 (both inclusive) of [d]Bombay Act 2 of 1874, as amended by subsequent enactments.

[a] *Substituted* by the A. L. O., 1950 [26-1-1950]. [b] *Substituted* for "Part B States" by 2 A. L. O., 1956 [1-11-1956]. [bb] *Substituted* for "State of Bombay" by the Central Acts on State and Concurrent Subjects (Mah. Ad.) Order, 1960 [1-5-1960]. [c] *Inserted*, *ibid.* [d] The Civil Jails Act, 1874.

STATE AMENDMENTS

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, in sub-section *(2)* of section 1 after the words and letter "comprised in Part B States" *add* the words and figures "other than the territories specified in sub-section *(1)* of section 3 of the States Reorganisation Act, 1956".
—An. P. Act XXIII of 1958, S. 3 and Sch. [w. e. f. 1-2-1960].

GUJARAT

In its application to the State of Gujarat, the amendments are the same as those of Maharashtra, except in sub-section *(4)*. The words "State of Gujarat" are to be *substituted* for the words "State of Bombay outside Greater Bombay".
—Bom. Act XXIII of 1959, S. 2 [as adapted].

MADRAS

In its application to the added territory in the State of Madras, in sub-section *(2)* of section 1 *omit* the words and figures "other than the territories specified in sub-section *(1)* of section 3 of the States Reorganisation Act, 1956", which were added by An. P. Act XXIII of 1958.
—Mad. (Ad. Ter.) A. L. O., 1961 [w. r. e. f. 1-4-1960].

MAHARASHTRA

In its application to the State of Maharashtra, in section 1, (a) in sub-section *(2)* after the words and letter "comprised in Part B States" *insert* the words and figures "other than any such territories forming part of the State of Bombay by section 8 of the States Reorganisation Act, 1956"; (b) *delete* sub-section *(3)*; (c) in sub-section *(4)* for the words and figures "as it existed immediately before the 1st November, 1956 outside the City of Bombay, and those jails shall continue to be administered" *substitute* the words "outside Greater Bombay, and those jails shall be administered"; and (d) in the marginal note for the word "commencement" *substitute* the word "application". —Bom. Act XXIII of 1959, S. 2 (2) (b) [1-6-1959].

2. Repeal. *[Repealed by the Repealing Act, 1938 (1 of 1938), S. 2 and Schedule.]*

3. Definitions.

In this Act—

(1) "prison" means any jail or place used permanently or temporarily under the general or special orders of a State Government for the detention of

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Section 3 — Note 1

S. 3 (1) : Prison

[1] The Borstal Institution is not a prison within the meaning of the definition in S. 3. 1936 Rang 485 (487) [AIR V 23] : 14 Rang 625 : 38 Cri L Jour 33 (FB). (Per *Roberts C. J.*, and *Leach J.*, *Dunkerlay J. Dissenting.*)

[2] Judicial lock-up is a prison. 1924 Lah

prisoners, and includes all lands and buildings appurtenant thereto, but does not include—

(a) any place for the confinement of prisoners who are exclusively in the custody of the police ;

(b) any place specially appointed by the State Government under section 541 of the [a]Code of Criminal Procedure, 1882 ; or

(c) any place which has been declared by the State Government, by general or special order, to be a subsidiary jail ;

[a] *See* now the Code of Criminal Procedure, 1898 (V of 1898).

In its application to the North East Frontier Agency, references to the Code of Criminal Procedure, 1882, shall, unless the context otherwise requires, be construed as references to the corresponding law in force in the N.E.F. Agency—*see* Reg. III of 1960, S. 3 & Sch.

STATE AMENDMENT

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in clause *(1)* of section 3, between the words "for the detention" and "of prisoners" *insert* the words "and reformation".

— U. P. Act IX of 1958, S. 2 [27-2-1958].

(2) "criminal prisoner" means any prisoner duly committed to custody under the writ, warrant or order of any Court or authority exercising criminal jurisdiction, or by order of a Court-martial :

(3) "convicted criminal prisoner" means any criminal prisoner under sentence of a Court or Court-martial, and includes a person detained in prison under the provisions of Chapter VIII of the [a]Code of Criminal Procedure, 1882, or under the [b]Prisoners Act, 1871 :

[a] *See* now the Code of Criminal Procedure, 1898 (V of 1898).

In its application to the North East Frontier Agency, references to the Code of Criminal Procedure, 1882, shall, unless the context otherwise requires, be construed as references to the corresponding law in force in the N.E.F. Agency — *see* Reg. III of 1960, S. 3 & Sch.

[b] *See* now the Prisoners Act, 1900 (III of 1900).

(4) "civil prisoner" means any prisoner who is not a criminal prisoner :

Clause (4-A) STATE AMENDMENT

ANDHRA PRADESH

In its application to the State of Andhra Pradesh in section 3 after clause *(4) insert* the following clause, namely,—

"*(4-A)* 'furlough system' means the system of releasing prisoners in jails on furlough in accordance with the rules for the time being in force ;"

— An. P. Act XXIII of 1958, S. 3 & Sch. [w.e.f. 1-2-1960].

(5) "remission system" means the rules for the time being in force regulating the award of marks to, and the consequent shortening of sentences of, prisoners in jail:

Section 3 — Note 1 *(contd.)*

257 (258) [AIR V 11] : 4 Lah 448 : 25 Cri L Jour 93 (DB).

[3] Prison does not include police lock-up. 1956 Madh B 130 (131) [(S) AIR V 43 C 59] : 1956 Cri L Jour 619.

S. 3 (2) : Criminal Prisoner

[4] For the purpose of the application of this section, the prosecution must prove that the detention of the accused was legal as it was sanctioned by a competent authority on the basis of an offence charged against him. 1959 All 164 (166) [AIR V 46 C 40] : I L R (1959) 2 All 1 : 1959 Cri L Jour 283 (DB). (A person removed to jail custody merely for going on hunger strike is not a criminal prisoner within the meaning of S. 3 (2).)

[5] An under-trial prisoner is a prisoner. A person committed to custody in pursuance of a warrant or an order of a Court exercising criminal jurisdiction though not convicted is a criminal prisoner within sub-s. (2) of S. 3. 1924 Lah 257 (258) [AIR V 11] : 4 Lah 448 : 25 Cri L Jour 93 (DB).

[6] An approver is not a convicted person, but when his detention is ordered by a Court of Law under S. 337 (3), Criminal P. C., he comes within the category of 'Criminal Prisoner,' as defined by S. 3 (2) of the Prisons Act. 1931 Lah 476 (480) [AIR V 18] : 12 Lah 635 : 32 Cri L Jour 913 (DB) ✠ 1931 Lah 353 (357) [AIR V 18] : 12 Lah 604 : 32 Cri L Jour 785 (DB).

STATE AMENDMENTS

GUJARAT

Same as those of Maharashtra.

MAHARASHTRA

In its application to the State of Maharashtra, for clause *(5) substitute* :the following clauses, namely,—

"*(5)* 'remission system' means the system of regulating the award of marks to, and the consequent shortening of sentences of, prisoners in jail in accordance with the rules for the time being in force ;

(5A) 'furlough system' means the system of releasing prisoners in jail on furlough in accordance with the rules for the time being in force ;"

—Bom. Act XXVII of 1953, S. 2 [13-5-1953].

(5B) 'parole system' means the system of releasing prisoners in jail on Parole, by suspension of their sentences in accordance with the rules for the time being in force;"

— Bom. Act XXIII of 1959, S. 3 (a) [1-6-1959].

ORISSA

In its application to the State of Orissa, cls. *(5)* and *(5a)* are *substituted* for cl *(5)*. These clauses are the same as those of Maharashtra. —Orissa Act XXIX of 1958, S. 2 [19-11-1958].

(6) "history-ticket" means the ticket exhibiting such information as is required in respect of each prisoner by this Act or the rules thereunder :

(7) "Inspector General" means the Inspector General of Prisons :

(8) "Medical Subordinate" means an Assistant Surgeon, Apothecary or qualified Hospital Assistant : and

STATE AMENDMENTS

GUJARAT

Same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in section 3 *delete* clause *(8)*.

— Bom Act XLV of 1959, S. 2 [21-9-1959].

(9) "prohibited article" means an article the introduction or removal of which into or out of a prison is prohibited by any rule under this Act.

CHAPTER II

MAINTENANCE AND OFFICERS OF PRISONS

4. Accommodation for prisoners.

The State Government shall provide, for the prisoners in the territories under such Government, accommodation in prisons constructed and regulated in such manner as to comply with the requisitions of this Act in respect of the separation of prisoners.

5. Inspector General.

An Inspector General shall be appointed for the territories subject to each State Government, and shall exercise, subject to the orders of the State Government, the general control and superintendence of all prisons situated in the territories under such Government.

STATE AMENDMENTS

GUJARAT

Same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Maharashtra, section 5 shall be *renumbered* as sub-section *(1)* thereof and after the sub-section so *renumbered add* the following, namely,—

"*(2)* The State Government may also appoint one or more Deputy Inspectors-General of Prisons for the whole of such territories or any part thereof, and they shall exercise, carry out or discharge all or any of the powers, duties and functions of the Inspector-

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Section 4 — Note 1

[1] Section 4 imposes upon the Local Government the duty of providing for prisoners' accommodation in respect of approvers whose detention is ordered under section 337 (3) Criminal P. C., in prisons as ordained by that Act. 1931 Lah 476 (480) [AIR V 18] : 12 Lah 635 : 32 Cri L Jour 913 (DB).

General under this Act, or under any law for the time being in force, as the Inspector-General may delegate to them, with the prior approval of the State Government."

—Bom. Act XXIII of 1959, S. 3 (b) [1-6-1959].

6. Officers of prisons.

For every prison there shall be Superintendent, a Medical Officer (who may also be the Superintendent), a Medical Subordinate, a Jailer and such other officers as the State Government thinks necessary :

Provided that [a][the State Government of Bombay] may [b][* * *] declare by order in writing that in any prison specified in the order the office of Jailer shall be held by the person appointed to be Superintendent.

[a] *Substituted* for "the Governor of Bombay in Council" by A. O., 1937. [b] The words "with the previous sanction of the Governor-General in Council" were *omitted*, *ibid*.

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, in the Proviso to sub-section *(1)* for "State Government of Bombay" the words "State Government of Gujarat" are to be *substituted* ; the rest of the amendments are the same as those of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in section 6—

(a) renumber the section as sub-section *(1)* ;

(b) in sub-section *(1)* so *renumbered*, after the words "a Superintendent" *insert* the brackets and words "(who may be a Deputy Inspector-General of Prisons)" ;

(c) delete the words "a Medical Subordinate" ;

(d) in the Proviso for "State Government of Bombay" *substitute* "State Government of Maharashtra" ;

(e) insert the following as sub-section *(2)*, namely,—

"*(2)* Where one or more Deputy Superintendents are appointed for a prison, they shall, subject to the general or special orders of the Inspector-General, exercise, carry out or discharge all or any of the powers, duties and functions of a Superintendent under this Act, or any law for the time being in force, as the Suprintendent may delegate to them."

—Bom. Act XLV of 1959, S. 3 [21-9-1959] and Mah. A. C. A. O., 1960 [1-5-1960].

PUNJAB

In its application to the State of Punjab, at the end of section 6 *add* the following Proviso, namely,—

"Provided further that in the Punjab the State Government may appoint for any prison a Deputy Superintendent instead of a Jailer, and an Assistant Superintendent instead of a Deputy or Assistant Jailer, and these officers when so appointed shall exercise the same powers, shall discharge the same duties, and shall be subject to the same disabilities as Jailers and Deputy or Assistant Jailers respectively."

—Punjab Act IX of 1926 [1-9-1926] read with Punj. Act V of 1957, S. 4 (1).

7. Temporary accommodation for prisoners.

Whenever it appears to the Inspector General that the number of prisoners in any prison is greater than can conveniently or safely be kept therein, and it is not convenient to transfer the excess number to some other prison,

or whenever from the outbreak of epidemic disease within any prison, or for any other reason, it is desirable to provide for the temporary shelter and safe custody of any prisoners,

provision shall be made, by such officer and in such manner as the State Government may direct, for the shelter and safe custody in temporary prisons of so many of the prisoners as cannot be conveniently or safely kept in the prison.

CHAPTER III
DUTIES OF OFFICERS
Generally

8. Control and duties of officers of prisons.

All officers of a prison shall obey the directions of the Superintendent ; all officers subordinate to the Jailer shall perform such duties as may be imposed

on them by the Jailer with the sanction of the Superintendent or be prescribed by rules under section [a][59].

[a] *Substituted* for "60" by A. O., 1937.

9. Officers not to have business dealings with prisoners.

No officer of a prison shall sell or let, nor shall any person in trust for or employed by him sell or let, or derive any benefit from selling or letting, any article to any prisoner or have any money or other business dealings, directly or indirectly, with any prisoner.

10. Officers not to be interested in prison contracts.

No officer of a prison shall, nor shall any person in trust for or employed by him, have any interest, direct or indirect, in any contract for the supply of the prison : nor shall he derive any benefit, directly or indirectly, from the sale or purchase of any article on behalf of the prison or belonging to a prisoner.

Superintendent

11. Superintendent.

(1) Subject to the orders of the Inspector General, the Superintendent shall manage the prison in all matters relating to discipline, labour, expenditure, punishment and control.

(2) Subject to such general or special directions as may be given by the State Government, the Superintendent of a prison other than a central prison or a prison situated in a presidency-town shall obey all orders not inconsistent with this Act or any rule thereunder which may be given respecting the prison by the District Magistrate,[a] and shall report to the Inspector General all such orders and the action taken thereon.

[a] In its application to North East Frontier Agency, reference to the District Magistrate shall be construed as reference to the Political Officer or the Additional Political Officer of any Division.—*see* Reg. III of 1960

STATE AMENDMENTS

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, in sub-section *(2)* of section 11, for the words "the District Magistrate" *substitute* the words "the District Collector".

— An. P. Act XXIII of 1958, S. 3 & Sch. [w.e.f. 1-2-1960].

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in section 11 in sub-section *(2)*, *delete* the words "a central prison or".

— Bom. Act XLV of 1959, S. 4 [21-9-1959].

12. Records to be kept by Superintendent.

The Superintendent shall keep, or cause to be kept, the following records :—

(1) a register of prisoners admitted ;

(2) a book showing when each prisoner is to be released ;

(3) a punishment book for the entry of the punishments inflicted on prisoners for prison-offences ;

(4) a visitors' book for the entry of any observations made by the visitors touching any matters connected with the administration of the prison;

(5) a record of the money and other articles taken from prisoners ;

and all such other records as may be prescribed by rules under section 59 [a][* *].

[a] The words and figures "or S. 60" were *omitted* by A. O., 1937.

Medical Officer

13. Duties of Medical Officer.

Subject to the control of the Superintendent, the Medical Officer shall have charge of the sanitary administration of the prison, and shall perform such

[a]duties as may be prescribed by rules made by the State Government under section [b][59].

[a] For rules as to Medical Officer's duties under S. 13, *see* different local Rules and Orders. [b] *Substituted* for "60" by A.O., 1937.

14. Medical Officer to report in certain cases.

Whenever the Medical Officer has reason to believe that the mind of a prisoner is, or is likely to be, injuriously affected by the discipline or treatment to which he is subjected, the Medical Officer shall report the case in writing to the Superintendent, together with such observations as he may think proper.

This report, with the orders of the Superintendent thereon, shall forthwith be sent to the Inspector General for information.

15. Report on death of prisoner.

On the death of any prisoner, the Medical Officer shall forthwith record in a register the following particulars, so far as they can be ascertained, namely :—

(1) the day on which the deceased first complained of illness or was observed to be ill.

(2) the labour, if any, on which he was engaged on that day,

(3) the scale of his diet on that day,

(4) the day on which he was admitted to hospital,

(5) the day on which the Medical Officer was first informed of the illness,

(6) the nature of the disease,

(7) when the deceased was last seen before his death by the Medical Officer or Medical Subordinate,

(8) when the prisoner died, and

(9) (in cases where a post-mortem examination is made) an account of the appearances after death,

together with any special remarks that appear to the Medical Officer to be required.

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in section 15 in clause *(7) delete* the words "or Medical Subordinate". — Bom. Act XLV of 1959, S. 5 [21-9-1959].

Jailer

16. Jailer.

(1) The Jailer shall reside in the prison, unless the Superintendent permits him in writing to reside elsewhere.

(2) The Jailer shall not, without the Inspector General's sanction in writing, be concerned in any other employment.

17. Jailer to give notice of death of prisoner.

Upon the death of a prisoner, the Jailer shall give immediate notice thereof to the Superintendent and the Medical Subordinate.

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in section 17 for the words "Medical Subordinate" *substitute* the words "Medical Officer". —Bom. Act XLV of 1959, S. 6 [21-9-1959].

18. Responsibility of Jailer.

The Jailer shall be responsible for the safe custody of the records to be kept under section 12, for the commitment warrants and all other documents confided to his care, and for the money and other articles taken from prisoners.

19. Jailer to be present at night.

The Jailer shall not be absent from the prison for a night without permission in writing from the Superintendent; but, if absent without leave for a night from unavoidable necessity, he shall immediately report the fact and the cause of it to the Superintendent.

20. Powers of Deputy and Assistant Jailers.

Where a Deputy Jailer or Assistant Jailer is appointed to a prison, he shall, subject to the orders of the Superintendent, be competent to perform any of the duties, and be subject to all the responsibilities, of a Jailer under this Act or any rule thereunder.

Subordinate Officers

21. Duties of gate-keeper.

The officer acting as gate-keeper, or any other officer of the prison, may examine anything carried in or out of the prison, and may stop and search or cause to be searched any person suspected of bringing any prohibited article into or out of the prison, or of carrying out any property belonging to the prison, and, if any such article or property be found, shall give immediate notice thereof to the Jailer.

22. Subordinate officers not to be absent without leave.

Officers subordinate to the Jailer shall not be absent from the prison without leave from the Superintendent or from the Jailer.

23. Convict officers.

Prisoners who have been appointed as officers of prisons shall be deemed to be public servants within the meaning of the Indian Penal Code.

CHAPTER IV

ADMISSION, REMOVAL AND DISCHARGE OF PRISONERS

24. Prisoners to be examined on admission.

(1) Whenever a prisoner is admitted into prison, he shall be searched, and all weapons and prohibited articles shall be taken from him.

(2) Every criminal prisoner shall also, as soon as possible after admission, be examined under the general or special orders of the Medical Officer, who shall enter or cause to be entered in a book, to be kept by the Jailer, a record of the state of the prisoner's health, and of any wounds or marks on his person, the class of labour he is fit for if sentenced to rigorous imprisonment, and any observations which the Medical Officer thinks fit to add.

(3) In the case of female prisoners the search and examination shall be carried out by the matron under the general or special orders of the Medical Officer.

25. Effects of prisoners.

All money or other articles in respect whereof no order of a competent Court has been made, and which may with proper authority be brought into the prison by any criminal prisoner or sent to the prison for his use, shall be placed in the custody of the Jailer.

26. Removal and discharge of prisoners.

(1) All prisoners, previously to being removed to any other prison, shall be examined by the Medical Officer.

(2) No prisoner shall be removed from one prison to another unless the

Medical Officer certifies that the prisoner is free from any illness rendering him unfit for removal.

(3) No prisoner shall be discharged against his will from prison, if labouring under any acute or dangerous distemper, nor until, in the opinion of the Medical Officer, such discharge is safe.

CHAPTER V

DISCIPLINE OF PRISONERS

27. Separation of prisoners.

The requisitions of this Act with respect to the separation of prisoners are as follows :—

(1) in a prison containing female as well as male prisoners, the females shall be imprisoned in separate buildings, or separate parts of the same building, in such manner as to prevent their seeing, or conversing or holding any intercourse with, the male prisoners :

(2) in a prison where male prisoners under the age of [a][twenty-one] are confined, means shall be provided for separating them altogether from the other prisoners and for separating those of them who have arrived at the age of puberty from those who have not :

(3) unconvicted criminal prisoners shall be kept apart from convicted criminal prisoners ; and

(4) civil prisoners shall be kept apart from criminal prisoners.

[a] *Substituted* for "eighteen" by the Prisons (Amendment) Act, 1930 (VI of 1930), S. 2.

28. Association and segregation of prisoners.

Subject to the requirements of the last foregoing section, convicted criminal prisoners may be confined either in association or individually in cells or partly in one way and partly in the other.

29. Solitary confinement.

No cell shall be used for solitary confinement unless it is furnished with the means of enabling the prisoner to communicate at any time with an officer of the prison, and every prisoner so confined in a cell for more than twenty-four hours, whether as a punishment or otherwise, shall be visited at least once a day by the Medical Officer or Medical Subordinate.

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in section 29 for the words "or Medical Subordinate" *substitute* the words "or any officer authorised by the Medical Officer in this behalf". — Bom. Act XLV of 1959, S. 7 [21-9-1959].

30. Prisoners under sentence of death.

(1) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Jailer and all articles shall be taken from him which the Jailer deems it dangerous or inexpedient to leave in his possession.

(2) Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the charge of a guard.

CHAPTER VI

FOOD, CLOTHING AND BEDDING OF CIVIL AND UNCONVICTED CRIMINAL PRISONERS

31. Maintenance of certain prisoners from private sources.

A civil prisoner or an unconvicted criminal prisoner shall be permitted to maintain himself, and to purchase, or receive from private sources at proper hours, food, clothing, bedding or other necessaries, but subject to examination and to such rules as may be approved by the Inspector General.

32. Restriction on transfer of food and clothing between certain prisoners.

No part of any food, clothing, bedding or other necessaries belonging to any civil or unconvicted criminal prisoner shall be given, hired or sold to any other prisoner ; and any prisoner transgressing the provisions of this section shall lose the privilege of purchasing food or receiving it from private sources, for such time as the Superintendent thinks proper.

33. Supply of clothing and bedding to civil and unconvicted criminal prisoners.

(1) Every civil prisoner and unconvicted criminal prisoner unable to provide himself with sufficient clothing and bedding shall be supplied by the Superintendent with such clothing and bedding as may be necessary.

(2) When any civil prisoner has been committed to prison in execution of a decree in favour of private person, such person, or his representative, shall, within forty-eight hours after the receipt by him of a demand in writing, pay to the Superintendent the cost of the clothing and bedding so supplied to the prisoner ; and in default of such payment the prisoner may be released.

STATE AMENDMENTS

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, same as that of Madras.
— Mad. Act XIX of 1947, S. 2 read with An. P. Act XXIII of 1958, S. 3 & Sch. [w.e.f. 1-2-1960].

MADRAS

In its application to the State of Madras, in section 33 for sub-sect. *(2) substitute* the following, namely, —

"(2) When a civil prisoner has been committed to prison by a Court in execution of any decree or order in favour of a private person, such person shall immediately deposit or cause to be deposited in Court, to meet the cost of the prisoner's clothing and bedding, such amount as may be fixed by the Court in accordance with the rules, if any, made by the State Government in that behalf ; and in default of such deposit, the prisoner may be released."

—Mad. Act XIX of 1947, S. 2 [7-11-1947] read with XXXV of 1949 and XXII of 1957.

Section 31 — Note 1

[1] A person who is merely arrested on suspicion during the course of a police investigation cannot be placed on a worse footing than an unconvicted criminal prisoner to whom such amenities are allowed under Ss. 31 to 33 of the Prisons Act and the conduct of the police in refusing to allow legal advisers of accused to interview him and the relatives to supply him food and clothing during police investigation held was unjustifiable. 1932 Lah 13 (14) [A I R V 19] : 12 Lah 211 : 32 Cri L Jour 1022.

Section 33 — Note 1

[1] When a civil prisoner was released by the Jail authorities for non-supply of the clothing to be supplied to him under S. 33 but it was discovered that the requisition on the arresting creditor was wrongly addressed and did not reach him till four days after the petitioner was released, the release was held due to a mistake of the jail authorities and not for any default of the decree-holder under S. 33. ('12) 6 Low Bur Rul 61 (62).

CHAPTER VII

EMPLOYMENT OF PRISONERS

34. Employment of civil prisoners.

(1) Civil prisoners may, with the Superintendent's permission, work and follow any trade or profession.

(2) Civil prisoners finding their own implements, and not maintained at the expense of the prison, shall be allowed to receive the whole of their earnings ; but the earnings of such as are furnished with implements or are maintained at the expense of the prison shall be subject to a deduction, to be determined by the Superintendent, for the use of implements and the cost of maintenance.

35. Employment of criminal prisoners.

(1) No criminal prisoner sentenced to labour or employed on labour at his own desire shall, except on an emergency with the sanction in writing of the Superintendent, be kept to labour for more than nine hours in any one day.

(2) The Medical Officer shall from time to time examine the labouring prisoners while they are employed, and shall at least once in every fortnight cause to be recorded upon the history-ticket of each prisoner employed on labour the weight of such prisoner at the time.

(3) When the Medical Officer is of opinion that the health of any prisoner suffers from employment on any kind or class of labour, such prisoner shall not be employed on that labour but shall be placed on such other kind or class of labour as the Medical Officer may consider suited for him.

STATE AMENDMENT

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, in sub-sect. *(1)* of section 35, for the words "nine hours" *substitute* the words "eight hours".

— An. P. Act XXIII of 1958, S. 3 & Sch. [w. e. f. 1-2-1960].

36. Employment of criminal prisoners sentenced to simple imprisonment.

Provision shall be made by the Superintendent for the employment (as long as they so desire) of all criminal prisoners sentenced to simple imprisonment; but no prisoner not sentenced to rigorous imprisonment shall be punished for neglect of work excepting by such alteration in the scale of diet as may be established by the rules of the prison in the case of neglect of work by such a prisoner.

CHAPTER VIII

HEALTH OF PRISONERS

37. Sick prisoners.

(1) The names of prisoners desiring to see the Medical Subordinate or appearing out of health in mind or body shall, without delay, be reported by the officer in immediate charge of such prisoners to the Jailer.

(2) The Jailer shall, without delay, call the attention of the Medical Subordinate to any prisoners desiring to see him, or who is ill, or whose state of mind or body appears to require attention, and shall carry into effect all written directions given by the Medical Officer or Medical Subordinate respecting alterations of the discipline or treatment of any such prisoner.

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in section 37—

(1) in sub-section *(1)*, for the words "Medical Subordinate" *substitute* the words "Medical Officer";

(2) in sub-section *(2)*—

(a) for the words "Medical Subordinate", where they occur for the first time, *substitute* the words "Medical Officer";

(b) *delete* the words "or Medical Subordinate".

—Bom. Act XLV of 1959, S. 8 [21-9-1959].

38. Record of directions of Medical Officers.

All directions given by the Medical Officer or Medical Subordinate in relation to any prisoner, with the exception of orders for the supply of medicines or directions relating to such matters as are carried into effect by the Medical Officer himself or under his superintendence, shall be entered day by day in the prisoner's history-ticket or in such other record as the State Government may by rule direct, and the Jailer shall make an entry in its proper place stating in respect of each direction the fact of its having been or not having been complied with, accompanied by such observations, if any, as the Jailer thinks fit to make, and the date of the entry.

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in section 38—

(1) *delete* the words "or Medical Subordinate";

(2) in the marginal note, for the word 'Officers' *substitute* the word 'Officer'.

—Bom. Act XLV of 1959, S. 9 [21-9-1959].

39. Hospital.

In every prison an hospital or proper place for the reception of sick prisoners shall be provided.

STATE AMENDMENTS

SECTIONS 39-A, 39-B, 39-C—

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, same as those of Madras.

—*See* An. P. Act XXIII of 1958, S. 3 and Sch.

MADRAS

In its application to the State of Madras, after section 39, the following sections shall be *inserted*, namely:—

"**39A.** *Power of Superintendent to send a prisoner to hospital or asylum for special treatment.*—The Superintendent may, if in his opinion, a prisoner requires special treatment in a hospital outside the prison or in an asylum as defined in the Indian Lunacy Act, 1912, send him to such hospital or asylum subject to the prisoner or any relative or friend of the prisoner executing such bond and abiding by such other conditions, if any, as the State Government may by rule or order prescribe. Any period during which the prisoner is undergoing treatment in such hospital or asylum or spent by him in going thereto or returning therefrom shall be deemed to be part of the period of his detention in the prison.

Explanation I.—Nothing contained in this section shall be deemed to affect the operation of section 30 of the Prisoners Act, 1900, in cases to which that section applies.

Explanation II.—In this section, 'prisoner' means a convicted criminal prisoner".

—Mad. Act XIV of 1938, S. 2 [25-10-1938], as amended by Mad. Act V of 1940 [9-4-1940].

"**39B.** *Punishment for escape or attempt to escape from hospital or asylum.* — If any prisoner dealt with under section 39A escapes or attempts to escape from the hospital or asylum to which he has been sent or when going thereto or returning therefrom, he shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

The punishment under this section shall be in addition to the punishment for which the prisoner was liable for the offence of which he was already convicted.

"**39C.** *Provisions applicable to bonds referred to in section 39-A.*—The provisions of Chapter XLII of the Code of Criminal Procedure, 1898, shall so far as may be, apply to the bonds referred to in section 39-A".

—Mad. Act V of 1940, S. 3 [9-4-1940] read with XXXV of 1949 and XXII of 1957.

CHAPTER IX
VISITS TO PRISONERS

40. Visits to civil and unconvicted criminal prisoners.

Due provision shall be made for the admission, at proper times and under proper restrictions, into every prison of persons with whom civil or unconvicted criminal prisoners may desire to communicate, care being taken that so far as may be consistent with the interests of justice, prisoners under trial may see their duly qualified legal advisers without the presence of any other person.

41. Search of visitors.

(1) The Jailer may demand the name and address of any visitor to a prisoner, and, when the Jailer has any ground for suspicion, may search any visitor, or cause him to be searched, but the search shall not be made in the presence of any prisoner or of another visitor.

(2) In case of any such visitor refusing to permit himself to be searched, the Jailer may deny him admission; and the grounds of such proceeding, with the particulars thereof, shall be entered in such record as the State Government may direct.

CHAPTER X
OFFENCES IN RELATION TO PRISONS

42. Penalty for introduction or removal of prohibited articles into or from prison and communication with prisoners.

Whoever, contrary to any rule under section [a][59] introduces or removes or attempts by any means whatever to introduce or remove, into or from any prison, or supplies or attempts to supply to any prisoner outside the limits of a prison, any prohibited article,

and every officer of a prison who, contrary to any such rule, knowingly suffers any such article to be introduced into or removed from any prison, to be possessed by any prisoner, or to be supplied to any prisoner outside the limits of a prison,

and whoever, contrary to any such rule, communicates or attempts to communicate with any prisoner,

and whoever abets any offence made punishable by this section,

shall, on conviction before a Magistrate, be liable to imprisonment for a term not exceeding six months, or to fine not exceeding two hundred rupees or to both.

[a] *Substituted* for "60" by A. O., 1937.

Section 40 — Note 1

[1] Neither the High Court nor the trial Court has any jurisdiction to go into the question whether the Superintendent of Jail, in refusing the prisoner permission to interview certain persons has or has not disregarded or observed the provisions of the Prisons Act in this respect; and presuming the order of the Superintendent is improper the prisoner's redress lay to the superior executive authority. Apart from enforcement of writ in such cases, Court has no power of supervision over the administration of a prison. 1932 Lah 390 (392) [AIR V 19] : 14 Lah 182 : 33 Cri L Jour 531 (DB).

Section 42 — Note 1

[1] The first accused was a prisoner at the Penitentiary and the second accused an uncle of the first. The second accused received a wire from a relation which contained matters pertaining to the first accused. He wrote a message on the back of the telegram intending that that writing should be read by the first accused, and handed the telegram to a jail warder who carried the telegram to the first accused in the jail. The latter, thereupon, read the telegram as well as the communication written on the back of it and wrote a reply on the back of the same telegram and handed it to the warder for being carried to the second accused—*Held*, that the 1st accused was rightly convicted of an offence under S. 42 read with S. 107, I. P. C. A prisoner can abet the communication to himself. 1923 Mad 596 (596, 597) [AIR V 10]: 24 Cri L Jour 449.

[2] Carrying a bundle of newspapers from a prisoner inside the jail, to one outside the jail premises, is an offence under S. 42. 1924 Bom 385 (385) [AIR V 11] : 25 Cri L Jour 1382 (DB).

43. Power to arrest for offence under section 42.

When any person, in the presence of any officer of a prison, commits any offence specified in the last foregoing section, and refuses on demand of such officer to state his name and residence, or gives a name or residence which such officer knows, or has reason to believe, to be false, such officer may arrest him, and shall without unnecessary delay make him over to a Police-officer, and thereupon such Police-officer shall proceed as if the offence had been committed in his presence.

44. Publication of penalties.

The Superintendent shall cause to be affixed, in a conspicuous place outside the prison, a notice in English and the Vernacular setting forth the acts prohibited under section 42 and the penalties incurred by their commission.

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In section 44 for the word 'Vernacular' *substitute* the words "regional language".

—Bom. Act XXIII of 1959, S. 3 (c) [1-6-1959].

CHAPTER XI

PRISON-OFFENCES

45. Prison-offences.

The following acts are declared to be prison-offences when committed by a prisoner :—

(1) such wilful disobedience to any regulation of the prison as shall have been declared by rules made under section 59 to be a prison-offence;

(2) any assault or use of criminal force ;

(3) the use of insulting or threatening language ;

(4) immoral or indecent or disorderly behaviour ;

(5) wilfully disabling himself from labour ;

(6) contumaciously refusing to work ;

(7) filing, cutting, altering or removing handcuffs, fetters or bars without due authority ;

(8) wilful idleness or negligence at work by any prisoner sentenced to rigorous imprisonment ;

(9) wilful mismanagement of work by any prisoner sentenced to rigorous imprisonment ;

(10) wilful damage to prison-property ;

(11) tampering with or defacing history-tickets, records or documents ;

(12) receiving, possessing or transferring any prohibited article ;

Section 45 — Note 1

[1] Ordinary Criminal Courts have jurisdiction to try offences under the Penal Code which are also prison offences under S. 45 of the Act. There is no ouster of jurisdiction by Prisons Act. 1960 Raj 288 (289) [AIR V 47 C 72] : I L R (1960) 10 Raj 1027 : 1960 Cri L Jour 1661 (DB).

[2] The Punjab Communist Detenus Rules, 1950, constitute a self-contained Code regulating the place and conditions of detention of Communist detenus in the Punjab and hence Ss. 45, 46 and 52 of this Act have no application to their cases. 1953 S C 325 (332) [AIR V 40 C 77] : 1953 S C R 730 : 1953 Cri L Jour 1432. (Proceedings taken by Jail Superintendent against the detenus in respect of jail offences held to be no judicial proceedings.)

[3] The refusal by a prisoner to eat the food prescribed by the prison diet scale constitutes a prison offence within the meaning of Section 45 (1) by reason of the rules framed under Section 59. The motive for not eating the food has nothing to do with the aforesaid offence. 1944 Pat 388 (389) [AIR V 31] : 23 Pat 499 : 46 Cri L Jour 188 (DB) ✣ 1960 All 124 (125) [AIR V 47 C 25] : 1960 Cri L Jour 203 (DB).

[4] Offence under S. 45 (2), Prisons Act corresponds to offence under S. 322, Penal Code and not under S. 353, Penal Code. 1960 Raj 288 (290) [AIR V 47 C 72] : I L R (1960) 10 Raj 1027 : 1960 Cri L Jour 1661 (DB).

(13) feigning illness ;
(14) wilfully bringing a false accusation against any officer or prisoner ;
(15) omitting or refusing to report, as soon as it comes to his knowledge, the occurrence of any fire, any plot or conspiracy, any escape, attempt or preparation to escape, and any attack or preparation for attack upon any prisoner or prison-official ; and
(16) conspiring to escape, or to assist in escaping, or to commit any other of the offences aforesaid.

46.[a] Punishment of such offences.

The Superintendent may examine any person touching any such offence, and determine thereupon, and punish such offence by—

(1) a formal warning :

Explanation.—A formal warning shall mean a warning personally addressed to a prisoner by the Superintendent and recorded in the punishment-book and on the prisoner's history-ticket ;

(2) change of labour to some more irksome or severe form [b][for such period as may be prescribed by rules made by the [c][State Government]];

(3) hard labour for a period not exceeding seven days in the case of convicted criminal prisoners not sentenced to rigorous imprisonment ;

(4) such loss of privileges admissible under the remission system for the time being in force as may be prescribed by rules made by the [c][State Government];

(5) the substitution of gunny or other coarse fabric for clothing of other material, not being woollen, for a period which shall not exceed three months ;

(6) imposition of handcuffs of such pattern and weight, in such manner and for such period, as may be prescribed by rules made by the [c][State Government] ;

(7) imposition of fetters of such pattern and weight, in such manner and for such period, as may be prescribed by rules made by the [c][State Government] ;

(8) separate confinement for any period not exceeding [d][three] months ;

Explanation —Separate confinement means such confinement with or without labour as secludes a prisoner from communication with, but not from

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Section 46 — Note 1

[1] The Punjab Communist Detenus Rules, 1950, constitute a Self-contained Code regulating the place and conditions of detention of the detenus. Hence S. 46 does not apply to their case. 1953 S C 325 (332) [AIR V 40 C 77] : 1953 S C R 730 : 1953 Cri L Jour 1432.

[2] Prison offences have been made cognizable and punishable by the Superintendent of Prisons by S. 46 and a number of punishments have been specified which can be awarded by the Superintendent of Prisons in such cases. 1960 Raj 288 (289) [AIR V 47 C 72] : I L R (1960) 10 Raj 1027 : 1960 Cri L Jour 1661 (DB).

[3] Under S. 46 of the Prisons Act the Superintendent is empowered to examine any person touching any prison offence. This, however, does not mean that he need not examine the necessary witnesses to prove the commission of the offence. Where, apart from the question whether it was necessary to record the evidence of the witnesses, the punishments did not appear to be based on proper evidence, the High Court held that this was tantamount to miscarriage of justice and the punishments were liable to be quashed. 1957 Madh Pra 48 (49) [(S) AIR V 44 C 25] : 1957 Cri L Jour 758 (DB).

[4] From the mere imposition of fetters and the restriction on a person that he might take exercise in the cell-yard it cannot be presumed that these were by way of punishment. 1952 Cal 319 (320) [AIR V 39] (DB).

[5] Whipping for insubordination may be legally administered in jails under proper precautions and in accordance with the rules given in the Jail Manual. In prisons where habitual and other long term convicts are confined, such a whipping for the purpose of enforcing discipline may, at times, be a regrettable necessity, but it is not arguable that an illegal and unauthorized beating or torture can be justified in the case of alleged insubordination. 1940 Lah 210 (215) [AIR V 27]: I L R (1940) Lah 521 : 41 Cri L Jour 639.

sight of, other prisoners, and allows him not less than one hour's exercise per diem and to have his meals in association with one or more other prisoners ;

(9) penal diet,—that is, restriction of diet in such manner and subject to such conditions regarding labour as may be prescribed by the State Government :

Provided that such restriction of diet shall in no case be applied to a prisoner for more than ninety-six consecutive hours, and shall not be repeated except for a fresh offence nor until after an interval of one week ;

(10) cellular confinement for any period not exceeding fourteen days :

Provided that after each period of cellular confinement an interval of not less duration than such period must elapse before the prisoner is again sentenced to cellular or solitary confinement ;

Explanation.—Cellular confinement means such confinement with or without labour as entirely secludes a prisoner from communication with, but not from sight of, other prisoners ;

[e][* * * * *]

[e][*(11)*] penal diet as defined in clause *(9)* combined with [f][cellular] confinement [g][* *];

[e][*(12)*] whipping, provided that the number of stripes shall not exceed thirty:

Provided that nothing in this section shall render any female or civil prisoner liable to the imposition of any form of handcuffs or fetters, or to whipping.

[a] For former rules under cls. (4), (6) and (7), *see* Gaz. Ind., 1923, Pt. I, p. 1751. [b] *Inserted* by the Prisons (Amendment) Act, 1925 (XVII of 1925) S. 2. [c] *Substituted* for "Governor-General in Council" by A. O., 1937. [d] *Substituted* for 'six' by Act XVII of 1925, S. 2. [e] Original cl. (11) was *repealed* and cls. (12) and (13) were renumbered as (11) and (12) respectively, *ibid.* [f] *Substituted* for 'solitary', *ibid.* [g] The words "as defined in cl. (11)" were *repealed*, *ibid.*

STATE AMENDMENTS

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, in section 46—

(a) in cl. *(4)* after the words "the remission system" *insert* the words "or furlough system" ;

(b) omit cl. *(5)* ;

(c) in cl. *(8)*, for the words "three months" *substitute* the words "two months" ;

(d) omit cl. *(12)* ;

(e) in the Proviso, *omit* the words "or to whipping *[or render any prisoner on hunger-strike liable to whipping]."

— An. P. Act XXIII of 1958, S. 3 & Sch. [w.e.f. 1-2-1960].

ASSAM

In its application to the State of Assam, in section 46 —

(1) omit cl. *(12)*, and the words "or to whipping" appearing in the Proviso to the said section and *substitute* a full stop for the comma appearing after the word 'fetter' in the said Proviso ;

(2) add the following clauses after cl. *(11)*, namely,—

(12) forfeiture of class, grade, or prison privileges for a period not exceeding three months ;

(13) permanent or temporary reduction from a higher to a lower class or grade."

— Assam Act XII of 1956, S. 2 [2-5-1956].

BIHAR

In its application to the State of Bihar, in section 46—

(i) omit cl. *(12)* ; and

(ii) in the Proviso, *omit* the words "or to whipping".

Bih. Act XXXI of 1956, S. 2 [24-11-1956].

GUJARAT

In its application to the State of Gujarat, same as those of Maharashtra.

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* These words were *added* by Mad. Act XVIII of 1947.

MADRAS

In its application to the State of Madras, in section 46, *add* at the end of the Proviso the words "or render any prisoner on hunger-strike liable to whipping".

— Mad. Act XVIII of 1947, S. 2 (i) [6-11-1947].

MAHARASHTRA

In its application to the State of Bombay, in section 46—

(a) in cl. *(4)*, for the words "the remission system" *substitute* the words "the remission or furlough or parole system" ;

—Bom. Acts XXVII of 1953, S. 3 [13-5-1953] read with and as amended by XXIII of 1959, S. 3 (d) [1-6-1959].

(b) for cl. *(5) substitute* the following, namely,—

"*(5)* exclusion from the privilege of earning wages for a specified period ;

(5A) temporary or permanent reduction from a higher to lower grade or class, or forfeiture of the grade or class, or of all or specified prison privileges ;"

(c) omit cls. *(9)* and *(11)* ; —Bom. Act XXIII of 1959, S. 3 (d) [1-6-1959].

(d) omit cl. *(12)* and *omit* the words "or to whipping" from the Proviso ;

—Bom. Act XXXIX of 1957, S. 4 [28-9-1957].

ORISSA

In its application to the State of Orissa, in section 46—

(a) in cl. *(4)* for the words "the remission system" *substitute* the words "the remission or furlough system" ; — Ori. Act XXIX of 1958, S. 3 [19-11-1958].

(b) after cl. *(4) insert* the following clause, namely,—

"*(4a)* temporary forfeiture of class, grade or prison-privileges or temporary or permanent reduction from a higher to a lower class or grade";

— Orissa Act XXIII of 1956, S. 2 [31-10-1956].

(c) omit cl. *(5)*; — Orissa Act XXIX of 1958, S. 3 [19-11-1958].

PUNJAB

In its application to the State of Punjab, in section 46, for cl. *(4)* the following shall be, and shall be deemed always to have been, *substituted*, namely,—

"*(4) (a)* temporary forfeiture of class, grade or prison privileges,

(b) temporary or permanent reduction from a higher to a lower class or grade,

(c) such loss of privileges admissible under the remission system for the time being in force as may be prescribed by rules made by the State Government."

— Punj. Act XXXVII of 1957, S. 2 [6-11-1957].

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in section 46 after cl. *(4)*, *insert* the following clause, namely,—

"*(4A)* forfeiture or reduction of grade, either temporarily or permanently, and temporary forfeiture of prison privileges;" — U. P. Act IX of 1958, S. 3 [27-2-1958].

WEST BENGAL

In its application to the State of West Bengal, in section 46—

(1) cls. *(5)*, *(9)* with the Proviso thereof, *(11)* and *(12)* shall be *omitted*; and

(2) at the end of the Proviso, the words, "or to whipping" shall be *omitted*.

— W. B. Act XXII of 1957, S. 3 [w.e.f. 6-1-1958].

47. Plurality of punishment, under section 46.

[a][*(1)*] Any two of the punishments enumerated in the last foregoing section may be awarded for any such offence in combination, subject to the following exceptions, namely :—

(1) formal warning shall not be combined with any other punishment except loss of privileges under clause *(4)* of that section ;

(2) penal diet shall not be combined with change of labour under clause *(2)* of that section, nor shall any additional period of penal diet awarded singly be combined with any period of penal diet awarded in combination with [b][cellular] confinement;

[c][*(3)* cellular confinement shall not be combined with separate confinement, so as to prolong the total period of seclusion to which the prisoner shall be liable ;]

(4) whipping shall not be combined with any other form of punishment except cellular [d][and] separate confinement and loss of privileges admissible under the remission system ;

[*][*(5)* no punishment will be combined with any other punishment in contravention of rules made by the [1][State Government].]

[*][*(2)* No punishment shall be awarded for any such offence so as to combine, with the punishment awarded for any other such offence, two of the punishments which may not be awarded in combination for any such offence.]

[a] The original S. 47 was renumbered as S. 47 (1) by the Prisons (Amendment) Act, 1925 (XVII of 1925), S. 3. [b] *Substituted* for "solitary", *ibid*. [c] *Substituted* for the original exception (3). *ibid*. [d] *Substituted* for "or" by the Repealing and Amending Act, 1914 (X of 1914), S. 2, Sch. I. [e] *Inserted* by Act XVII of 1925, S. 3. [f] *Substituted* for "Governor-General in Council" by A. O., 1937.

STATE AMENDMENTS

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, in sub-s. *(1)* of S. 47, *omit* cl. *(4)*.
— An. P. Act XXIII of 1958, S. 3 & Sch. [w. e. f. 1-2-1960].

ASSAM

In its application to the State of Assam, same as that of Andhra Pradesh.
—Assam Act XII of 1956, S. 3 [2-5-1956].

BIHAR

In its application to the State of Bihar, same as that of Andhra Pradesh.
— Bih. Act XXXI of 1956, S. 3 [24-11-1956].

GUJARAT

In its application to the State of Gujarat, same as those of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in S. 47 in sub-s. *(1)*—
(a) *omit* cl. (2) — Bom. Act XXIII of 1959, S. 3 (e) [1-6-1959].
(b) *omit* cl. (4) — Bom. Act XXXIX of 1957, S. 4 (2) [28-9-1957].

ORISSA

In its application to the State of Orissa, in cl. *(4)* of S. 47 (1) for the words "the remission system" *substitute* the words "the remission or furlough system."
—Orissa Act XXIX of 1958, S. 4 [19-11-1958].

WEST BENGAL

In its application to the State of West Bengal, in sub-s. *(1)* of S. 47, *omit* cls. *(2)* and *(4)*.
— W. B. Act XXII of 1957, S. 4 [w. e. f. 6-1-1959].

48. Award of punishments under sections 46 and 47.

(1) The Superintendent shall have power to award any of the punishments enumerated in the two last foregoing sections, subject, in the case of separate confinement for a period exceeding one month, to the previous confirmation of the Inspector General.

(2) No officer subordinate to the Superintendent shall have power to award any punishment whatever.

STATE AMENDMENTS

SECTION 48A

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, after S. 48 *insert* the following section, namely,—

"48-A. *Punishment for breach of conditions or suspension or remission of sentence or of grant of furlough.*—If any prisoner fails without sufficient cause to observe any of the conditions on which his sentence was suspended or remitted or furlough was granted to him, he shall be deemed to have committed a prison offence and the Superintendent may, after obtaining his explanation, punish such offence by —

(1) a formal warning as provided in cl. *(1)* of S. 46 ;
(2) reduction in grade if such prisoner has been appointed an officer of prison ;
(3) loss of privileges admissible under the remission or furlough system ; or
(4) loss of such other privileges as the State Government may by general or special order, direct." —An. P. Act XXIII of 1958, S. 3 & Sch. [w. e. f. 1-2-1960].

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, S. 48-A is the same as that of Andhra Pradesh, except the following :

(i) after the word 'furlough' where it occurs for the first time, *insert* the words "or release on parole";

(ii) after the word 'furlough' where it occurs for the second time, *insert* the words "or parole". — Bom. Acts XXVII of 1953 S. 5 [13-5-1953] read with and as amended by XXIII of 1959, S. 3 (f) [1-6-1959].

ORISSA

In its application to the State of Orissa, S. 48-A is the same as that of Andhra Pradesh. —Orissa Act XXIX of 1958, S. 5 [19-11-1958].

49. Punishments to be in accordance with foregoing sections.

Except by order of a Court of Justice, no punishment other than the punishments specified in the foregoing sections shall be inflicted on any prisoner, and no punishment shall be inflicted on any prisoner otherwise than in accordance with the provisions of those sections.

50. Medical Officer to certify to fitness of prisoner for punishment.

(1) No punishment of penal diet, either singly or in combination, or of whipping, or of change of labour under section 46, clause *(2)*, shall be executed until the prisoner to whom such punishment has been awarded has been examined by the Medical Officer, who, if he considers the prisoner fit to undergo the punishment, shall certify accordingly in the appropriate column of the punishment-book prescribed in section 12.

(2) If he considers the prisoner unfit to undergo the punishment, he shall in like manner record his opinion in writing and shall state whether the prisoner is absolutely unfit for punishment of the kind awarded, or whether he considers any modification necessary.

(3) In the latter case he shall state what extent of punishment he thinks the prisoner can undergo without injury to his health.

STATE AMENDMENTS

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, in sub-section *(1)* of section 50, *omit* the words "or of whipping". —An. P. Act XXIII of 1958, S. 3 & Sch. [w.e.f. 1-2-1960].

ASSAM

In its application to the State of Assam, same as that of Andhra Pradesh. — Assam Act XII of 1956, S. 4 [2-5-1956].

BIHAR

In its application to the State of Bihar, same as that of Andhra Pradesh. — Bih. Act XXXI of 1956, S. 4 [24-11-1956].

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to State of Bombay, in sub-section *(1)* of section 50—

(a) omit the words "or of whipping". — Bom. Act XXXIX of 1957, S. 4 (3) [28-9-1957].

(b) omit the words " of penal diet, either singly or in combination, or". — Bom. Act XXIII of 1959, S. 3 (g) [1-6-1959].

WEST BENGAL

In its application to the State of West Bengal, in sub-section *(1)* of section 50, *omit* the words "of penal diet, either singly or in combination, or of whipping, or". — W. B. Act XXII of 1957, S. 5 [w.e.f. 6-1-1958].

51. Entries in punishment-books.

(1) In the punishment-book prescribed in section 12 there shall be recorded, in respect of every punishment inflicted, the prisoner's name, register number and the class (whether habitual or not) to which he belongs, the prison-offence of which he was guilty, the date on which such prison-offence was committed, the number of previous prison-offences recorded against the prisoner, and the date of his last prison-offence, the punishment awarded, and the date of infliction.

Section 51 — Note 1

[1] The fact of interpolation certainly indicates that the punishment book is not kept properly, but from that it cannot be presumed that there must have been some punishment inflicted on the prisoner for a certain offence. 1952 Cal 319 (320) [AIR V 39] (DB).

(2) In the case of every serious prison-offence, the names of the witnesses proving the offence shall be recorded, and, in the case of offences for which whipping is awarded, the Superintendent shall record the substance of the evidence of the witnesses, the defence of the prisoner, and the finding with the reasons therefor.

(3) Against the entries relating to each punishment the Jailer and Superintendent shall affix their initials as evidence of the correctness of the entries.

STATE AMENDMENTS

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, for sub-section *(2)* of section 51, *substitute* the following sub-section, namely,—

"*(2)* In the case of every serious prison offence, the names of the witnesses proving the offence shall be recorded." — An. P. Act XXIII of 1959, S. 3 & Sch. [w.e.f. 1-2-1960].

ASSAM

In its application to the State of Assam, in sub-section *(2)* of section 51, *omit* the words "in the cases of offences for which whipping is awarded' and the commas before these words and thereafter. — Assam Act XII of 1956, S. 5 [2-5-1956].

BIHAR

In its application to the State of Bihar, in sub-section *(2)* of section 51, *omit* the words beginning with "and, in the cases of offences" and ending with "with the reasons therefor." — Bih. Act XXXI of 1956, S. 5 [24-11-1956].

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, same as that of Bihar.
— Bom. Act XXXIX of 1957, S. 4 (4) [28-9-1957] read with XXIII of 1959.

WEST BENGAL

In its application to the State of West Bengal, same as that of Bihar.
— W. B. Act XXII of 1957, S. 6 [w.e.f. 6-1-1958].

SECTIONS 51A and 51B STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, Ss. 51A and 51B are the same as those of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, after section 51 *insert* the following sections, namely,—

"**51A.** *Power to arrest without warrant person committing breach of conditions of suspension of sentence, etc.*—If any condition on or subject to which a sentence has been suspended or remitted or release on parole or furlough is granted is, in the opinion of the authority exercising such power, not fulfilled, such authority may cancel its order granting such suspension, remission or release on parole or furlough, and thereupon the person in whose favour such order was made may, if at large, be arrested by any Police Officer without warrant, and remanded to undergo the unexpired portion of his sentence.

51B. *Criminal liability for breach of conditions of suspension of sentence, etc.*—*(1)* If any prisoner fails without sufficient cause to observe any of the conditions on or subject to which his sentence was suspended or remitted, or release on parole or furlough was granted to him, he shall, on conviction, be punished (such punishment being in addition to any punishment which such prisoner was undergoing when he committed such offence) with imprisonment for a term which may extend to two years or with fine which may extend to one thousand rupees, or with both.

(2) No Court shall take cognizance of an offence under this section except with the previous sanction of the State Government or the authority which granted suspension or remission of the sentence." — Bom. Act XXIII of 1959, S. 3 (h) [1-6-1959].

52. Procedure on committal of heinous offence.

If any prisoner is guilty of any offence against prison-discipline which, by reason of his having frequently committed such offences or otherwise, in the

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Section 52 — Note 1

[1] The section does not, in any way, infringe the principles of equality before the law vouchsafed by Art. 14 of the Constitution. 1960 All 124 (126) [A I R V 47 C 25] : 1960 Cri L Jour 203 (DB).

[2] The Act does not contain any provision ousting the jurisdiction of the ordinary criminal Courts to try offences under the Penal Code which are also prison offences mentioned in S. 45 of the Act. S. 52 does not purport to take away the jurisdiction of the ordinary

opinion of the Superintendent, is not adequately punishable by the infliction of any punishment which he has power under this Act to award, the Superintendent may forward such prisoner to the Court of the District Magistrate[a] or of any Magistrate of the first class [b][or Presidency Magistrate] having jurisdiction, together with a statement of the circumstances, and such Magistrate shall thereupon inquire into and try the charge so brought against the prisoner, and, upon conviction, may sentence him to imprisonment which may extend to one year, such term to be in addition to any term for which such prisoner was undergoing imprisonment when he committed such offence, or may sentence him to any of the punishments enumerated in section 46 :

[c][Provided that any such case may be transferred for inquiry and trial by the District Magistrate[a] to any Magistrate of the first class and by a Chief Presidency Magistrate to any other Presidency Magistrate : and]

Provided also that no person shall be punished twice for the same offence.

[a] In its application to North East Frontier Agency, references to District Magistrate shall be construed as references to the Political Officer or the Additional Political Officer of any Division.—*see* Reg. III of 1960. [b] *Inserted* by the Prisons (Amendment) Act, 1910 (XIII of 1910), S. 2. [c] *Substituted* for the original Proviso, *ibid.*

Section 52 — Note 1 *(contd.)*

Courts of law. 1960 Raj 288 (289) [A I R V 47 C 72] : I L R (1960) 10 Raj 1027 : 1960 Cri L Jour 1661 (DB).

[3] A person detained in the custody of a superintendent of jail under an order of the Governor under S. 3 (1) (a) (ii) of the Preventive Detention Act, 1950, is not a prisoner within the meaning of S. 52 of the Prisons Act and therefore is not liable to be punished under that provision. 1954 All 626 (629) [AIR V 41 C 242]: 1954 Cri L Jour 1328 (DB).

[4] The Punjab Communist Detenus Rules, 1950 constitute a self-contained Code regulating the place and conditions of detention of the detenus. Hence S. 52 does not apply to their case. 1953 S C 325 (332) [A I R V 40 C 77] : 1953 S C R 730 : 1953 Cri L Jour 1432.

[5] Section cannot apply where the breach is only the first breach of discipline and there is no evidence to show that the Superintendent considered the offence as one which could not be adequately punished by him under the Act. ('50) 54 Cal W N (2 D R) 105 (106, 107) (DB).

[6] The act of going on hunger-strike is an offence within the meaning of para. 742 of the U. P Jail Manual and it is punishable under S. 52. 1959 All 164 (165) [A I R V 46 C 40] : I L R (1959) 2 All 1 : 1959 Cri L Jour 283 (DB).

[7] Mere refusal to take food even on repeated occasions will not by itself turn this refusal into a hunger-strike. It is only when this refusal is meant to be used as a weapon for seeking redress of grievances that it assumes the character of hunger strike, punishable under S. 52. 1959 All 164 (166) [AIR V 46 C 40] : ILR (1959) 2 All 1 : 1959 Cri L Jour 283 (DB).

[8] If a person is removed to jail merely because he has gone on hunger strike and then after placing him inside the jail, the jail authorities prosecute him under S. 52, obviously such a prosecution would be illegal. But where a person goes on hunger strike and he has also committed some offence on the basis of which he was rightly sent to jail custody then it cannot be pleaded by him that because he had started the hunger strike earlier he can ignore the rules of jail discipline. 1959 All 164 (166) [A I R V 46 C 40] : ILR (1959) 2 All 1: 1959 Cri L Jour 283 (DB).

[9] Where a formal warning was given by the Superintendent to the prisoners for refusing to take food, trial for same offence is illegal. The prisoners cannot be punished twice for the same offence in view of the second proviso to S. 52 of the Act. 1960 All 124 (125) [A I R V 47 C 25] : 1960 Cri L Jour 203 (DB).

[10] There is no provision in S. 52 for any previous sanction of the Inspector-General for the prosecution of a prisoner. It is not open to the State Government to make a rule, like R. 742 of the U. P. Jail Manual which provides for such sanction, against the provisions of S. 52. 1955 N U C (All) 1519 [A I R V 42].

[11] Jail Superintendent sending offender for trial by Magistrate — No statement by Superintendent as to adequacy of his power to punish offender nor finding by Magistrate on that question—The absence of such a finding does not affect conviction. 1944 Pat 388 (389) [AIR V 31] : 23 Pat 499 : 46 Cri L Jour 188 (DB).

[*See also* 1955 NUC (All) 1519 [A I R V 42]. (Non-mention of opinion by Jail Superintendent does not affect jurisdiction of Magistrate.)]

[12] From the facts that merely because the Jail Superintendent does not mention the correct facts or the correct provision under which the prisoners committed jail offence, it cannot be said that he has not given any thought to the question whether he can punish them adequately himself or not. 1955 N U C (All) 1519 [AIR V 42].

[13] The U. P. Security Prisoners Rules (1944) are applicable so long as the security prisoners are in detention. Once the prisoners are released, the rules do not apply and they cannot be punished under S. 52. 1955 N U C (All) 1519 [AIR V 42].

STATE AMENDMENTS

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, same as that of Madras.
—Mad. Act XVIII of 1947, S. 2 read with An. P. Act XXIII of 1958, S. 3.

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MADRAS

In its application to the State of Madras, in section 52, for the words and figures "sentence him to any of the punishments enumerated in section 46" *substitute* the words and figures "sentence him to any of the punishments to which he is liable under section 46".
—Mad. Act XVIII of 1947, S. 2 [6-11-1947].

MAHARASHTRA

In its application to the State of Bombay, in section 52—

(a) omit the words "of the District Magistrate or";

(b) in the first Proviso, *omit* the words "by the District Magistrate or to any Magistrate of the first class and"
—Bom. Acts XXIII of 1951, S. 2 and Sch. read with XXIII of 1959, S. 2.

53. Whipping.

(1) No punishment of whipping shall be inflicted in instalments, or except in the presence of the Superintendent and Medical Officer or Medical Subordinate.

(2) Whipping shall be inflicted with a light ratan not less than half an inch in diameter on the buttocks, and in case of prisoners under the age of sixteen it shall be inflicted, in the way of school discipline, with a lighter ratan.

STATE AMENDMENTS

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, section 53 shall be *omitted*.
—An. P. Act XXIII of 1958, S. 3 and Sch. [w. e. f. 1-2-1960].

ASSAM

In its application to the State of Assam, same as that of Andhra Pradesh.
—Assam Act XII of 1956, S. 6 [2-5-1956].

BIHAR

In its application to the State of Bihar, same as that of Andhra Pradesh.
—Bih. Act XXXI of 1956, S. 6 [24-11-1956].

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, section 53 shall be *deleted*.
—Bom. Acts XXXIX of 1957, S. 4 (5) read with XXIII of 1959 [1-6-1959].

WEST BENGAL

In its application to the State of West Bengal, same as that of Andhra Pradesh.
—W. B. Act XXII of 1957, S. 7 [w. e. f. 6-1-1958].

54. Offences by prison-subordinates.

(1) Every Jailer or officer of a prison subordinate to him who shall be guilty of any violation of duty or wilful breach or neglect of any rule or regulation or lawful order made by competent authority, or who shall withdraw from the duties of his office without permission, or without having given previous notice in writing of his intention for the period of two months, or who shall wilfully over-stay any leave granted to him, or who shall engage without authority in any employment other than his prison-duty, or who shall be guilty of cowardice, shall be liable, on conviction before a Magistrate, to fine not exceeding two hundred rupees, or to imprisonment for a period not exceeding three months, or to both.

(2) No person shall under this section be punished twice for the same offence.

Section 54 — Note 1

[1] Where a medical officer suspected by the Jailer to be conveying a letter to a prisoner refuses to submit himself for search, the offence is one under S. 186, I. P. C., and not under S. 54 of the Prisons Act. ('13) 14 Cri L Jour 619 (620) : 7 Sind L R 49 (DB).

CHAPTER XII

MISCELLANEOUS

55. Extramural custody, control and employment of prisoners.

A prisoner, when being taken to or from any prison in which he may be lawfully confined, or whenever he is working outside or is otherwise beyond the limits of any prison in or under the lawful custody or control of a prison-officer belonging to such prison, shall be deemed to be in prison and shall be subject to all the same incidents as if he were actually in prison.

56. Confinement in irons.

Whenever the Superintendent considers it necessary (with reference either to the state of the prison or the character of the prisoners) for the safe custody of any prisoners that they should be confined in irons, he may, subject to such rules and instructions as may be laid down by the Inspector General with the sanction of the State Government, so confine them.

57. Confinement of prisoners under sentence of transportation in irons.

(1) Prisoners under sentence of transportation[a] may, subject to any rules made under section [b][59], be confined in fetters for the first three months after admission to prison.

(2) Should the Superintendent consider it necessary, either for the safe custody of the prisoner himself or for any other reason, that fetters should be retained on any such prisoner for more than three months, he shall apply to the Inspector General for sanction to their retention for the period for which he considers their retention necessary, and the Inspector General may sanction such retention accordingly.

[a] For the construction of reference to transportation, *see* S. 53A of the Penal Code, 1860. [b] *Substituted* for '60' by A. O., 1937.

STATE AMENDMENTS

BIHAR

In its application to the State of Bihar, in sub-s. (1) of S. 57, for the word 'transportation' *substitute* the words "imprisonment for life".

— Bih. Act XXXI of 1956, S. 7 [24-11-1956].

WEST BENGAL

In its application to the State of West Bengal, S. 57 shall be *omitted*.

— W. B. Act XXII of 1957, S. 8 [w. e. f. 6-1-1958].

58. Prisoners not to be ironed by Jailer except under necessity.

No prisoner shall be put in irons or under mechanical restraint by the Jailer of his own authority, except in case of urgent necessity, in which case notice thereof shall be forthwith given to the Superintendent.

STATE AMENDMENT

SECTION 58-A

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, after S. 58 *insert* the following section, namely,—

"58-A. *Power to release a prisoner on furlough.*— The State Government or any authority empowered by it may release a prisoner on furlough in accordance with rules for the time being in force." — An. P. Act XXIII of 1958, S. 3 & Sch. [w. e. f. 1-2-1960].

Section 56 — Note 1

[1] From the mere imposition of fetters and the restriction on a person that he might take exercise in the cell yard it cannot be presumed that these were by way of punishment. 1952 Cal 319 (320) [AIR V 39] (DB).

59. Power to make rules.

[a][The State Government may] make rules consistent with this Act—

(1) defining the acts which shall constitute prison-offences;

(2) determining the classification of prison-offences into serious and minor offences;

(3) fixing the punishments admissible under this Act which shall be awardable for commission of prison-offences or classes thereof;

(4) declaring the circumstances in which acts constituting both a prison-offence and an offence under the Indian Penal Code may or may not be dealt with as a prison-offence ;

(5) for the award of marks and the shortening of sentences;

(6) regulating the use of arms against any prisoner or body of prisoners in the case of an outbreak or attempt to escape ;

(7) defining the circumstances and regulating the conditions under which prisoners in danger of death may be released ;

[b][*(8)* for the classification of prisons, and description and construction of wards, cells and other places of detention ;

(9) for the regulation by numbers, length or character of sentences, or otherwise, of the prisoners to be confined in each class of prisons;

(10) for the government of prisons and for the appointment of all officers appointed under this Act ;

(11) as to the food, bedding and clothing of criminal prisoners and of civil prisoners maintained otherwise than at their own cost ;

(12) for the employment, instruction and control of convicts within or without prisons ;

(13) for defining articles the introduction or removal of which into or out of prisons without due authority is prohibited ;

(14) for classifying and prescribing the forms of labour and regulating the periods of rest from labour ;

(15) for regulating the disposal of the proceeds of the employment of prisoners ;

(16) for regulating the confinement in fetters of prisoners sentenced to transportation[c];

(17) for the classification and the separation of prisoners ;

(18) for regulating the confinement of convicted criminal prisoners under section 28 ;

(19) for the preparation and maintenance of history-tickets;

(20) for the selection and appointment of prisoners as officers of prisons ;

(21) for rewards for good conduct ;

(22) for regulating the transfer of prisoners whose term of transportation[c] or imprisonment is about to expire subject, however, to the consent of the State Government of any other State to which a prisoner is to be transferred ;

Section 59 — Note 1

[1] The Prisons Act does not confer on any authority a power to commute or remit sentences; it provides only for the regulation of prisons and for the treatment of prisoners confined therein. Section 59 of the Prisons Act confers a power on the State Government to make rules, *inter alia* for rewards for good conduct. Therefore, the rules made under the Act should be construed within the scope of the Act. The rules, *inter alia* provide for three types of remissions by way of rewards for good conduct, namely, (i) ordinary, (ii) special and (iii) State. For the working out of the said remissions, under Rule 1419 (c) of the rules framed by the State of Bombay, transportation for life is ordinarily to be taken as 15 years' actual imprisonment. The rule cannot be construed as a statutory equation of 15 years' actual imprisonment for transportation for life. The equation is only for a particular purpose, namely, for the purpose of 'remission system' and not for all purposes. 1961 S C 600 (603) [AIR V 48 C 88] : 1961 (1) Cri L Jour 736.

(23) for the treatment, transfer and disposal of criminal lunatics or recovered criminal lunatics confined in prisons ;

(24) for regulating the transmission of appeals and petitions from prisoners and their communications with their friends;

(25) for the appointment and guidance of visitors of prisons ;

(26) for extending any or all of the provisions of this Act and of the rules thereunder to subsidiary jails or special places of confinement appointed under section 541 of the [d]Code of Criminal Procedure, 1882, and to the officers employed, and the prisoners confined, therein ;

(27) in regard to the admission, custody, employment, dieting, treatment and release of prisoners ; and

(28) generally for carrying into effect the purposes of this Act.]

[a] *Substituted* for the words "The Governor-General in Council may for any part of British India, and each Local Government with the previous sanction of the Governor-General in Council may for the territories under its administration" by A. O., 1937. [b] *Substituted* for the original cls.(8) and (9), *ibid*. [c] For the construction of reference to transportation, *see* S. 53A of the Penal Code, 1860. [d] *See* now the Code of Criminal Procedure, 1898 (V of 1898).

In its application to the North East Frontier Agency, references to the Code of Criminal Procedure, 1882 shall, unless the context otherwise requires, be construed as references to the corresponding law in force in the said Agency, *see* Reg. III of 1960.

STATE AMENDMENTS

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, for cl. (5) of S. 59 *substitute* the following clause, namely,—

"(5) for the award of marks, granting remission or furlough, determining the conditions on which and the authority by which such remission or furlough shall be granted and the consequent shortening of the sentence;"

—An. P. Act XXIII ot 1958, S. 3 & Sch. [w. e. f. 1-2-1960].

BIHAR

In its application to the State of Bihar, in section 59 —

(i) in cl. (16) for the word 'transportation' *substitute* the words "imprisonment for life"; and

(ii) in cl. (22) *omit* the words "transportation or".

— Bih. Act XXXI of 1956, S. 8 (24-11-1956].

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in S. 59 for cl. (5) *substitute* the following clause, namely, —

"(5) for the award of marks, the suspension, or remission and consequent shortening of sentences, and the grant of release on parole or furlough and determining the conditions on which and the authority by which the sentences may be suspended or remitted and the prisoners may be released on parole or furlough;"

— Bom. Act XXIII of 1959, S. 3 (i) [1-6-1959].

ORISSA

In its application to the State of Orissa, for cl. (5) of S. 59 *substitute* the following clause, namely,—

"(5) for the award of marks, granting remission or furlough, determining the conditions on which and the authority by which such remission or furlough shall be granted and the consequent shortening of the sentence."

— Orissa Act XXIX of 1958, S. 6 [19-11-1958].

WEST BENGAL

In its application to the State of West Bengal, in S. 59—

(1) clause (16) shall be *omitted* ;

(2) in cl. (22) *omit* the words "transportation or".

—W. B. Act XXII of 1957, S. 9 [w. e. f. 6-1-1958].

[a]60. Power of Local Government to make rules. *[Repealed by the A. O. 1937.]*

[a] This section has been incorporated with slight modifications in cls. (8) to (27) of S. 59.

61. Exhibition of copies of rules.

Copies of rules, under [a][section 59] so far as they affect the government of prisons, shall be exhibited, both in English and in the Vernacular, in some place to which all persons employed within a prison have access.

[a] *Substituted* for "Ss. 59 and 60" by A. O., 1937.

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in S. 61 for the word 'Vernacular' *substitute* the words "regional language". —Bom. Act XXIII of 1959, S. 3 (c) [1-6-1959].

62. Exercise of powers of Superintendent and Medical Officer.

All or any of the powers and duties conferred and imposed by this Act on a Superintendent or Medical Officer may in his absence be exercised and performed by such other officer as the State Government may appoint in this behalf either by name or by his official designation.

THE SCHEDULE.—Enactments repealed. *(Repealed by the Repealing Act, 1938 (1 of 1938), S. 2 and Sch.]*

[THE] PRIZE COMPETITIONS ACT, 1955

(ACT XLII of 1955)

[The Act printed here is as on 15-2-1961.]

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STATEMENT OF OBJECTS AND REASONS

"Crossword puzzles and similar competitions have of late been increasing at an alarming rate. Though they purport to be games of skill, they really provide a form of gambling to the public. These competitions have a deleterious effect on large sections of the people. The object of this Bill is to remove this evil, permitting at the same time reasonable scope for competitions which are mainly games of skill and intelligence, and which provide innocent amusement without encouraging the gambling spirit.

The subject-matter of the proposed legislation falls within Entry 34 in List II of the Schedule VII to the Constitution (State List). The State Legislatures of Bombay, Andhra and Patiala and East Punjab States Union have passed resolutions under Article 252

empowering Parliament to make a law on the subject. The Bill when passed will become applicable to these States and to all Part C States and to the Andaman and Nicobar Islands. It will also become applicable to such Part A and Part B States (except Jammu and Kashmir) as may pass resolutions under the said article adopting the Act."
—Gaz. of Ind., 1955, Extra., Pt. II-Section 2, page 352.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION
—Adapted by 3 A. L. O., 1956.

[THE] PRIZE COMPETITIONS ACT, 1955
(ACT XLII OF 1955)[a]

[22nd October, 1955.]

An Act to provide for the control and regulation of prize competitions.

WHEREAS it is expedient to provide for the control and regulation of prize competitions;

AND WHEREAS the Legislatures of the States of Andhra, Bombay, Madras, Orissa, Uttar Pradesh, Hyderabad, Madhya Bharat, Patiala and East Punjab States Union and Saurashtra have passed resolutions in terms of clause *(1)* of Article 252 of the Constitution in relation to the above-mentioned matter and matters ancillary thereto in so far as such matters are matters enumerated in List II in the Seventh Schedule to the Constitution;

BE it enacted by Parliament in the Sixth Year of the Republic of India as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1955, Extra., Pt. II-Section 2, page 352.

1. Short title, extent and commencement.

(1) This Act may be called THE PRIZE COMPETITIONS ACT, 1955.

(2) It extends to [a][the territories which, immediately before the 1st November, 1956, were comprised in] the States of Andhra, Bombay, Madras, Orissa, Uttar Pradesh, Hyderabad, Madhya Bharat, Patiala and East Punjab States Union and Saurashtra and all Part C States.

(3) It shall come into force on such date[b] as the Central Government may, by notification in the Official Gazette, appoint.

[a] *Inserted* by 3 A. L. O., 1956 [w. r. e. f. 1-11-1956]. [b] The Act came into force on 1-4-1956; *see* Gaz. of Ind., 1956, Extra., Pt. II-Section 3, page 647.

2. Definitions.

In this Act, unless the context otherwise requires,—

(a) "licensing authority" means any officer or authority appointed by the State Government, by notification in the Official Gazette, for the purpose of granting licences under this Act;

(b) "money" includes a cheque, postal-order or money-order;

(c) "prescribed" means prescribed by rules made under this Act;

(d) "prize competition" means any competition (whether called a cross-word prize competition, a missing-word prize competition, a picture prize competition or by any other name) in which prizes are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words or figures.

Section 2 — Note 1

[1] Though on a literal construction of S. 2 (d) the Act applies also to prize competitions in which success depends to a substantial degree on skill, having regard to the history of the legislation, the declared object thereof and the wording of the statute, the competitions which are sought to be controlled and regulated by the Act are only those competitions in which success does not depend to any substantial degree on skill. Having regard to the circumstances under which the resolutions came to be passed there cannot be any reasonable doubt that the law which the State legislatures moved Parliament to enact under Art. 252 (1) of the Constitution of India was one to control and regulate prize-competition of a gambling character. 1957 S C 628 (631, 632) [(S) AIR V 44 C 94] : 1957 S C R 930.

3. Interpretation.

For the purposes of this Act,—

(a) references to printing shall be construed as including references to writing and other modes of representing or reproducing letters, words or figures in a visible form ; and

(b) documents or other matters shall be deemed to be distributed if they are distributed to persons or places within or outside the territories to which this Act extends and the word 'distribution' shall be construed accordingly.

4. Prohibition of prize competitions where the prize offered exceeds one thousand rupees a month.

No person shall promote or conduct any prize competition or competitions in which the total value of the prize or prizes (whether in cash or otherwise) to be offered in any month exceeds one thousand rupees ; and in every prize competition, the number of entries shall not exceed two thousand.

5. Licensing of prize competitions where the prize offered does not exceed one thousand rupees a month.

Subject to the provisions of section 4, no person shall promote or conduct any prize competition or competitions in which the total value of the prize or prizes (whether in cash or otherwise) to be offered in any month does not exceed one thousand rupees unless he has obtained in this behalf a licence granted in accordance with the provisions of this Act and the rules made thereunder.

6. Licences for prize competitions.

(1) Every person desiring to obtain a licence referred to in section 5 shall make application in writing to the licensing authority in such form and manner as may be prescribed.

(2) On the receipt of such application, the licensing authority, after making such inquiry as it considers necessary, shall, by order in writing, either grant the licence or refuse to grant the licence.

Section 4 — Note 1

[1] As gambling competitions cannot be called a trade persons carrying them are not entitled to the protection of Art. 19 (1) (g) of the Constitution and the question whether the restrictions imposed by Ss. 4 and 5 and Rr. 11 and 12 framed under S. 20 of the Act are reasonable does not arise for consideration. But as regards prize competitions which involve substantial skill, even assuming that the Act applies to such competitions, the restrictions imposed by the aforesaid provisions cannot be said to be reasonable restrictions enacted in the public interest and as such are not saved by Art. 19 (6). 1957 S C 628 (631) [(S) AIR V 44 C 94] : 1957 S C R 930.

[*See* 1959 Cal 141 (145) [AIR V 46 C 36] : 1959 Cri L Jour 307. (Prize competitions which do not require substantial skill ought to be considered as gambling transactions—Case under West Bengal Prize Competitions Act (32 of 1957).]

[2] Assuming that S. 4 applies by virtue of the definition in S. 2 (d) to all kinds of competitions, its provisions are severable in their application to competitions in which success does not depend to any substantial extent on skill. Therefore, the restrictions imposed are valid in so far as gambling competitions are concerned. 1957 S C 628 (637) [(S) AIR V 44 C 94] : 1957 S C R 930.

Section 5 — Note 1

[1] As gambling competitions cannot be called a trade persons carrying them are not entitled to the protection of Art. 19 (1) (g) of the Constitution. Accordingly Ss. 4 and 5 and Rr. 11 and 12 framed under S. 20 of the Prize Competitions Act in their application to gambling competitions cannot be struck down as void on ground of violation of Art. 19 (1) (g). The competitions which are sought to be controlled and regulated by the Act are only those competitions in which success does not depend to any substantial degree on skill. Assuming however that the Act applies to all competitions including those in which success depends upon substantial skill, the restrictions imposed by the aforseaid provisions would be unreasonable and as such are not saved by Art. 19 (6). But this will not affect the validity of the provisions with regard to gambling competitions as they are severable. 1957 S C 628 (631) [(S) A I R V 44 C 94] : 1957 S C R 930.

(3) Where the licensing authority refuses to grant a licence it shall record a brief statement of the reasons for such refusal and furnish a copy thereof to the applicant.

(4) The fees on payment of which, the period for which, the conditions subject to which, and the form in which, a licence may be granted shall be such as may be prescribed.

7. Promoters of prize competitions to keep accounts and submit the same to the licensing authority.

Every person who promotes or conducts a prize competition in accordance with the provisions of this Act and the rules made thereunder shall keep accounts relating to such competition and submit to the licensing authority a statement of accounts in such form and at such intervals as may be prescribed.

8. Power to cancel or suspend licences.

(1) The licensing authority may, after giving the holder of any licence under this Act a reasonable opportunity of being heard, cancel or suspend the licence on any one or more of the following grounds, namely:—

(a) that there has been a breach of any of the conditions subject to which the licence was granted;

(b) that the holder of the licence has contravened any of the provisions of section 7.

(2) Whenever a licence is cancelled or suspended the licensing authority shall record a brief statement of the reasons for such cancellation or suspension and furnish a copy thereof to the person whose licence has been cancelled or suspended.

9. Penalty for promoting or conducting any prize competition in contravention of the provisions of sections 4 and 5.

If any person promotes or conducts any prize competition in contravention of the provisions of section 4 or section 5, he shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both.

10. Penalty for failure to keep and submit accounts.

If any person liable under section 7 to keep accounts or to submit statements of accounts fails to keep accounts or to submit statements of accounts as required by that section or keeps accounts or submits statements of accounts which are false and which he either knows or believes to be false or does not believe to be true, he shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both, but nothing contained in this section shall affect the provisions contained in section 8.

11. Penalty for other offences in connection with prize competitions.

If any person with a view to the promotion or conduct of any prize competition except in accordance with the provisions of a licence under this Act or in contravention of the provisions of this Act or in connection with any prize competion promoted or conducted except in accordance with such provisions—

(a) prints or publishes any ticket, coupon or other document for use in the prize competition; or

(b) sells or distributes or offers or advertises for sale or distribution, or has in his possession for the purpose of sale or distribution any ticket, coupon or other document for use in the prize competition; or

(c) prints, publishes or distributes, or has in his possession for the purpose of publication or distribution,—

(i) any advertisement of the prize competition, or

(ii) any list (whether complete or not) of prize winners in the prize competition, or

(iii) any such matter descriptive of, or otherwise relating to, the prize competition as is calculated to act as an inducement to persons to participate in that prize competition or any other prize competition; or

(d) brings, or invites any person to send, into the territories to which this Act extends, for the purpose of sale or distribution, any ticket, coupon or other document for use in, or any advertisement of, the prize competition; or

(e) sends, or attempts to send, out of the territories to which this Act extends any money or valuable thing received in respect of the sale or distribution of any ticket, coupon or other document for use in the prize competition; or

(f) uses any premises, or causes or knowingly permits any premises to be used, for purposes connected with the promotion or conduct of the prize competition; or

(g) causes or procures or attempts to procure any person to do any of the above-mentioned acts,

he shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

12. Offences by Corporations.

(1) If any person guilty of an offence under this Act is a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company, as well as the company, shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section *(1)*, where an offence under this Act has been committed with the consent or connivance of, or is attributable to gross neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(a) "company" means a body corporate and includes a firm or other association of individuals; and

(b) "director" in relation to a firm means a partner in the firm.

13. Power of licensing authority to call for and inspect accounts and documents.

The licensing authority may—

(a) require any person promoting or conducting a prize competition to produce before it the accounts and other documents kept by such person or to furnish to it such other information relating to the prize competition as it may require;

(b) inspect at all reasonable times the accounts and other documents kept by such person.

14. Power of entry and search.

(1) It shall be lawful for any police-officer not below the rank of Sub-inspector authorised by the State Government in this behalf by general or special order in writing,—

(a) to enter if necessary by force, whether by day or night, with such assistants as he considers necessary, any premises which he has reason to suspect, are being used for purposes connected with the promotion or conduct of any prize competition in contravention of the provisions of this Act ;

(b) to search the premises and the persons whom he may find therein ;

(c) to take into custody and produce before a Magistrate all such persons as are concerned or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of their having been concerned with the user of such premises for purposes connected with, or with the promotion or conduct of, any prize competition in contravention of the provisions of this Act ; and

(d) to seize all things found therein which are intended to be used or reasonably suspected to have been used in connection with such prize competition.

(2) All searches under this section shall be made in accordance with the provisions of the Code of Criminal Procedure, 1898.

15. Forfeiture of newspapers and publications containing prize competitions.

Where any newspaper or other publication contains any prize competition promoted or conducted in contravention of the provisions of this Act or except in accordance with the provisions of a licence under this Act or any advertisement in relation thereto, the State Government may, by notification in the Official Gazette, declare every copy of the newspaper and every copy of the publication containing the prize competition or the advertisement, to be forfeited to Government.

16. Appeals.

Any person aggrieved by the decision of the licensing authority refusing to grant a licence or cancelling or suspending a licence may, within such time as may be prescribed, prefer an appeal to the State Government and the decision of the State Government on such appeal shall be final.

17. Licensing authority and other officers to be public servants.

The licensing authority and any other officer acting under this Act shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

18. Jurisdiction to try offences.

No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

19. Protection of action taken under this Act.

No suit, prosecution or other legal proceeding shall lie against the licensing authority or any other officer of the Government for anything which is in good faith done or intended to be done under this Act or the rules made thereunder.

20. Power to make rules.

(1) The State Government may, by notification in the Official Gazette, and

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Section 20 — Note 1

[1] As gambling competitions cannot be called a trade persons carrying them are not entitled to the protection of Art. 19 (1) (g) of the Constitution. Accordingly Rr. 11 and 12 framed under S. 20 of the Act in their application to such competitions cannot be struck down as void on the ground of violation of

subject to the condition of previous publication, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) the form and manner of application for a licence and the fees, if any, for such licence ;

(b) the period for which, the conditions subject to which and the form in which, a licence may be granted ;

(c) the form in which and the intervals at which statements of accounts shall be submitted to the licensing authority ;

(d) the time within which an appeal against a decision of the licensing authority may be preferred to the State Government ;

(e) any other matter which is to be or may be prescribed.

[THE] PROBATION OF OFFENDERS ACT, 1958

(ACT XX of 1958)

[The Act printed here is as on 15-2-1961.]

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STATEMENT OF OBJECTS AND REASONS

"The question of release of offenders on probation of good conduct instead of sentencing them to imprisonment has been under consideration for some time. In 1931, the Government of India prepared a draft of Probation of Offenders Bill and circulated it to the then Local Governments for their views. However, owing to pre-occupation with other more important matters the Bill could not be proceeded with. Later in 1934, the Government of India informed Provincial Governments that there was no prospect of Central legislation being undertaken at the time and there would be no objection to the provinces undertaking such legislation themselves. A few provinces accordingly enacted their own probation laws.

2. In several States, however, there are no separate probation laws at all. Even in States where there are probation laws, they are not

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Section 20 — Note 1 *(contd.)*
fundamental right to carry on trade guaranteed by Art. 19(1)(g) of the Constitution. 1957 S C 628 (631) [(S) A I R V 44 C 94] : 1957 S C R 930.

uniform nor are they adequate to meet the present requirements. In the meantime, there has been an increasing emphasis on the reformation and rehabilitation of the offender as a useful and self reliant member of society without subjecting him to the deleterious effects of jail life. In view of the widespread interest in the probation system in the country, this question has been re-examined and it is proposed to have a Central law on the subject which should be uniformally applicable to all the States.

3. It is proposed to empower Courts to release an offender after admonition in respect of certain specified offences. It is also proposed to empower Courts to release on probation, in all suitable cases, an offender found guilty of having committed an offence not punishable with death or imprisonment for life. In respect of offenders under 21 years of age, special provision has been made putting restrictions on their imprisonment. During the period of probation, offenders will remain under the supervision of probation officers in order that they may be reformed and become useful members of society. The Bill seeks to achieve these objects."

—Gaz. of Ind., 1957, Extra., Pt. II-Sec. 2, page 842.

[THE] PROBATION OF OFFENDERS ACT, 1958

(ACT XX OF 1958)[a]

[16th May, 1958]

An Act to provide for the release of offenders on probation or after due admonition and for matters connected therewith.

BE it enacted by Parliament in the Ninth Year of the Republic of India as follows :—

[a] For Statement of Objects and Reasons *see* Gaz. of Ind., 1957, Ext. Pt. II-Sec. 2, p. 842 and for Joint Committee Report, *see* Gaz. of Ind., 1958, Pt. II-Sec. 2, p. 233.

1. Short title, extent and commencement.

(1) This Act may be called THE PROBATION OF OFFENDERS ACT, 1958.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force in a State on such date[a] as the State Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different parts of the State.

[a] In Bihar the Act came into force on 15-6-1959, *see* Bihar Gaz. 1959, Extra., D/- 6-6-1959.

In Kerala it came into force on 15-7-1958, *see* Ker. Gaz., 1958, Pt. I, p. 2186.

2. Definitions.

In this Act, unless the context otherwise requires,—

(a) "Code" means the Code of Criminal Procedure, 1898 ;

(b) "probation officer" means an officer appointed to be a probation officer or recognised as such under section 13 ;

(c) "prescribed" means prescribed by rules made under this Act ;

(d) words and expressions used but not defined in this Act and defined in the Code of Criminal Procedure, 1898, shall have the meanings respectively assigned to them in that Code.

3. Power of Court to release certain offenders after admonition.

When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code or any other law, and no previous conviction is proved against him and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4, release him after due admonition.

Explanation.—For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section 4.

OBJECTS AND REASONS

"The Committee feel that a person who has previously been released after admonition under this clause or released on probation under clause 4 should not again be entitled to any benefit under this clause. This has been provided by adding an Explanation to this clause."

— J. C. R.

4. Power of Court to release certain offenders on probation of good conduct.

(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the Court may direct, and in the meantime to keep the peace and be of good behaviour :

Provided that the Court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the Court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section *(1)*, the Court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section *(1)* is made, the Court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender.

(4) The Court making a supervision order under sub-section *(3)* shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the Court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The Court making a supervision order under sub-section *(3)* shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.

Section 4 — Note 1

[1] Section 4 speaks of punishment and not of imprisonment. The word 'punishment' is wide enough to comprehend both the punishment of imprisonment and the punishment of fine. Therefore, S. 4 empowers a court to remit the fine also. 1961 Pat 19 (21) [A I R V 48 C 5] : 1961 (1) Cri L Jour 144.

[2] It is only when the Court forms an opinion that in a given case the offender snould be released on probation of good conduct that the Court acts as provided by S. 4. 1961 Pat 19 (21) [AIR V 48 C 5] : 1961 (1) Cri L Jour 144.

[3] It is the duty of the court to satisfy itself in the case of an accused who is under 21 years of age that it would not be desirable to deal with him under S. 4 before sentencing him to imprisonment. ('61) 1961 (2) Cri L Jour 583 (584) (Manipur).

5. Power of Court to require released offenders to pay compensation and costs.

(1) The Court directing the release of an offender under section 3 or section 4, may, if it thinks fit, make at the same time a further order directing him to pay—

(a) such compensation as the Court thinks reasonable for loss or injury caused to any person by the commission of the offence; and

(b) such costs of the proceedings as the Court thinks reasonable.

(2) The amount ordered to be paid under sub-section *(1)* may be recovered as a fine in accordance with the provisions of sections 386 and 387 of the Code.

(3) A Civil Court trying any suit, arising out of the same matter for which the offender is prosecuted, shall take into account any amount paid or recovered as compensation under sub-section *(1)* in awarding damages.

6. Restrictions on imprisonment of offenders under twenty-one years of age.

(1) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the Court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it should not be desirable to deal with him under section 3 or section 4, and if the Court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

(2) For the purpose of satisfying itself whether it would not be desirable to deal under section 3 or section 4 with an offender referred to in sub-section *(1)*, the Court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender.

OBJECTS AND REASONS

"The Committee feel that it should be made clear in this clause [that is, S. 6] that the report of a probation officer should be considered by the Court only for the purpose of satisfying itself as to whether the offender should be dealt with under clause 3 or clause 4 [now section 3 or 4] and not for the purpose of determining the sentence to be imposed on the offender. Sub-clause *(2)* [now sub-section *(2)*] has been amended to make the intention clear."

—J. C. R.

7. Report of probation officer to be confidential.

The report of a probation officer referred to in sub-section *(2)* of section 4 or sub-section *(2)* of section 6 shall be treated as confidential :

Provided that the Court may, if it so thinks fit, communicate the substance thereof to the offender and may give him an opportunity of producing such evidence as may be relevant to the matter stated in the report.

Section 5 — Note 1

[1] Section 5 no doubt empowers the court to grant in appropriate cases compensation and costs but this is purely in the discretion of the court. The court will allow compensation and costs only when it thinks fit in any case. When no prayer for compensation and costs is made by the party or when the court in its discretion does not allow costs and compensation, the High Court sitting in revision, cannot interfere with the discretion of the court which does not appear to have been exercised capriciously and unreasonably. 1961 Pat 19 (21) [AIR V 48 C 5] : 1961 (1) Cri L Jour 144.

Section 6 — Note 1

[1] Section 6 lays down a special provision in respect of offenders under twentyone years of age. Section 4 is general. It applies to all kinds of offences, whether under or above twentyone years of age. The only limitation imposed by S. 6 is that in the first instance an offender under twentyone years of age will not be sentenced to imprisonment. Where therefore the Court deals with the offender under S. 4 of the Act, whether or not he was under twentyone years of age is of little consequence. 1961 Pat 19 (21) [AIR V 48 C 5] : 1961 (1) Cri L Jour 144.

[2] Where the age of the accused is seen to be 18 years, the Magistrate has no jurisdiction even if he found him guilty to punish him straightway to imprisonment under S. 6. ('61) 1961 (2) Cri L Jour 583 (584) (Manipur.)

OBJECTS AND REASONS

"The Committee are of opinion that the reports of probation officers under sub-clause *(2)* of clause 4 [now S. 4 (2)] and sub-clause *(2)* of original clause 7 [now S. 6 (2)] should be treated on the same footing. Though the reports may be confidential the Court should be empowered, if it so thinks fit, to communicate the contents thereof to the offender and to give him an opportunity of producing evidence in relation thereto. This clause has been *inserted* to achieve this object." —J. C. R.

8. Variation of conditions of probation.

(1) If, on the application of a probation officer, any Court which passes an order under section 4 in respect of an offender is of opinion that in the interests of the offender and the public it is expedient or necessary to vary the conditions of any bond entered into by the offender, it may, at any time during the period when the bond is effective, vary the bond by extending or diminishing the duration thereof so, however, that it shall not exceed three years from the date of the original order or by altering the conditions thereof or by inserting additional conditions therein :

Provided that no such variation shall be made without giving the offender and the surety or sureties mentioned in the bond an opportunity of being heard.

(2) If any surety refuses to consent to any variation proposed to be made under sub-section *(1)*, the Court may require the offender to enter into a fresh bond and if the offender refuses or fails to do so, the Court may sentence him for the offence of which he was found guilty.

(3) Notwithstanding anything hereinbefore contained, the Court which passes an order under section 4 in respect of an offender may, if it is satisfied on an application made by the probation officer, that the conduct of the offender has been such as to make it unnecessary that he should be kept any longer under supervision, discharge the bond or bonds entered into by him.

9. Procedure in case of offender failing to observe conditions of bond.

(1) If the Court which passes an order under section 4 in respect of an offender or any Court which could have dealt with the offender in respect of his original offence has reason to believe, on the report of a probation officer or otherwise, that the offender has failed to observe any of the conditions of the bond or bonds entered into by him, it may issue a warrant for his arrest or may, if it thinks fit, issue a summons to him and his sureties, if any, requiring him or them to attend before it at such time as may be specified in the summons.

(2) The Court before which an offender is so brought or appears may either remand him to custody until the case is concluded or it may grant him bail, with or without surety, to appear on the date which it may fix for hearing.

(3) If the Court, after hearing the case, is satisfied that the offender has failed to observe any of the conditions of the bond or bonds entered into by him, it may forthwith—

(a) sentence him for the original offence ; or

(b) where the failure is for the first time, then, without prejudice to the continuance in force of the bond, impose upon him a penalty not exceeding fifty rupees.

(4) If a penalty imposed under clause *(b)* of sub-section *(3)* is not paid within such period as the Court may fix, the Court may sentence the offender for the original offence.

10. Provision as to sureties.

The provisions of sections 122, 126, 126A, 406A, 514, 514A, 514B and 515 of the Code shall, so far as may be, apply in the case of bonds and sureties given under this Act.

11. Courts competent to make order under the Act, appeal and revision and powers of Courts in appeal and revision.

(1) Notwithstanding anything contained in the Code or any other law, an order under this Act may be made by any Court empowered to try and sentence the offender to imprisonment and also by the High Court or any other Court when the case comes before it on appeal or in revision.

(2) Notwithstanding anything contained in the Code, where an order under section 3 or section 4 is made by any Court trying the offender (other than a High Court), an appeal shall lie to the Court to which appeals ordinarily lie from the sentences of the former Court.

(3) In any case where any person under twenty-one years of age is found guilty of having committed an offence and the Court by which he is found guilty declines to deal with him under section 3 or section 4, and passes against him any sentence of imprisonment with or without fine from which no appeal lies or is preferred, then, notwithstanding anything contained in the Code or any other law, the Court to which appeals ordinarily lie from the sentences of the former Court may, either of its own motion or on an application made to it by the convicted person or the probation officer, call for and examine the record of the case and pass such order thereon as it thinks fit.

(4) When an order has been made under section 3 or section 4 in respect of an offender, the Appellate Court or the High Court in the exercise of its power of revision may set aside such order and in lieu thereof pass sentence on such offender according to law :

Provided that the Appellate Court or the High Court in revision shall not inflict a greater punishment than might have been inflicted by the Court by which the offender was found guilty.

12. Removal of disqualification attaching to conviction.

Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of section 3 or section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law :

Provided that nothing in this section shall apply to a person who, after his release under section 4, is subsequently sentenced for the original offence.

Note : Person against whom action is taken either under S. 3 or S. 4, is not disqualified by reason of such action, from standing for election to any of the Houses of Parliament or to any State Legislature.

13. Probation officers.

(1) A probation officer under this Act shall be—

(a) a person appointed to be a probation officer by the State Government or recognised as such by the State Government ; or

(b) a person provided for this purpose by a society recognised in this behalf by the State Government ; or

(c) in any exceptional case, any other person who, in the opinion of the Court, is fit to act as a probation officer in the special circumstances of the case.

(2) A Court which passes an order under section 4 or the District Magistrate of the district in which the offender for the time being resides may at any time, appoint any probation officer in the place of the person named in the supervision order.

Explanation. — For the purposes of this section, a presidency town shall be deemed to be a district and Chief Presidency Magistrate shall be deemed to be the District Magistrate of that district.

(3) A probation officer, in the exercise of his duties under this Act, shall be subject to the control of the District Magistrate of the district in which the offender for the time being resides.

14. Duties of probation officers.

A probation officer shall, subject to such conditions and restrictions, as may be prescribed,—

(a) inquire, in accordance with any directions of a Court, into the circumstances or home surroundings of any person accused of an offence with a view to assist the Court in determining the most suitable method of dealing with him and submit reports to the Court ;

(b) supervise probationers and other persons placed under his supervision and, where necessary, endeavour to find them suitable employment ;

(c) advise and assist offenders in the payment of compensation or costs ordered by the Court ;

(d) advise and assist, in such cases and in such manner as may be prescribed, persons who have been released under section 4; and

(e) perform such other duties as may be prescribed.

15. Probation officers to be public servants.

Every probation officer and every other officer appointed in pursuance of this Act shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

16. Protection of action taken in good faith.

No suit or other legal proceeding shall lie against the State Government or any probation officer or any other officer appointed under this Act in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or orders made thereunder.

17. Power to make rules.

(1) The State Government may, with the approval of the Central Government, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) appointment of probation officers, the terms and conditions of their service and the area within which they are to exercise jurisdiction ;

(b) duties of probation officers under this Act and the submission of reports by them ;

(c) the conditions on which societies may be recognised for the purposes of clause *(b)* of sub-section *(1)* of section 13 ;

(d) the payment of remuneration and expenses to probation officers or of a subsidy to any society which provides probation officers ; and

(e) any other matter which is to be, or may be, prescribed.

(3) All rules made under this section shall be subject to the condition of previous publication and shall, as soon as may be after they are made, be laid before the State Legislature.

18. Saving of operation of certain enactments.

Nothing in this Act shall affect the provisions of section 31 of the Reformatory Schools Act, 1897, or sub-section *(2)* of section 5 of the Prevention of Corruption Act, 1947 or the Suppression of Immoral Traffic in Women and Girls Act, 1956, or of any law in force in any State relating to juvenile offenders or borstal schools.

OBJECTS AND REASONS

"The Committee are of opinion that where any public servant commits criminal misconduct in the discharge of his duty and is punishable under sub section (2) of section 5 of the Prevention of Corruption Act, 1947. the provisions of this Bill should not apply to such a case. This clause has accordingly been amended to exclude sub-section (2) of section 5 of that Act from the operation of this enactment."—J. C. R.

19. Section 562 of the Code not to apply in certain areas.

Subject to the provisions of section 18, section 562 of the Code shall cease to apply to the States or parts thereof in which this Act is brought into force.

PROCEDURE OF THE HIGH COURT FOR UTTAR PRADESH
(ACT XIII OF 1869)

[The Act printed here is as on 15-2-1961.]

CONTENTS

SECTIONS

1. *[Repealed.]*
2. *[Repealed.]*
3. Power to award costs on petitions, etc.
4. Penalty for making false statements in support of petitions, etc.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. L. O., 1950.
— Repealed in part by Act X of 1875.

PROCEDURE OF THE HIGH COURT FOR UTTAR PRADESH
(ACT XIII OF 1869)[a]

[19th March, 1869.]

An Act further to amend the Procedure of the High Court of Judicature for [b]*[Uttar Pradesh].*

Preamble.

WHEREAS it is expedient to amend the procedure of the High Court of Judicature for [c][Uttar Pradesh] ; It is hereby enacted as follows : —

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1868, p. 1681. [b] *Substituted* for "the North Western Provinces" by A. L. O., 1950 [26-1-1950]. [c] *Substituted* for "the North Western Provinces of the Presidency of Fort William", *ibid.*

1. Trial of Natives and European British subjects conjointly. *[Repealed by the Advocate-General's (Powers) Act, 1875 (X of 1875).]*

2. Record of evidence. *[Repealed by the Advocate-General's (Powers) Act, 1875 (X of 1875).]*

3. Power to award costs on petitions, etc.

Whenever any petition, application or motion is made in any matter coming before the said Court in the exercise of its civil [a][* * *] or other jurisdiction, the Court shall have power to award and apportion costs in any manner it may think fit.

[a] The word "Criminal" is *omitted* as so much of S. 3 as relates to criminal jurisdiction was *repealed* by Act (X of 1875), S. 2.

[a]**4.** Penalty for making false statements in support of petitions, etc.

Whenever the Court shall require the statements in support of any such petition, application or motion to be verified by a declaration in writing, the person making such verification shall, if any such statement is false, and if he either knows or believes it to be false, or does not believe it to be true, be deemed to have intentionally given false evidence in a stage of a judicial proceeding.

[a] So much of S. 4 as relates to criminal jurisdiction was *repealed* by Act X of 1875, S. 2.

Note : Section 191 of the Indian Penal Code, 1860, defines "Giving false evidence" in these terms : Whoever being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe it to be true, is said to give false evidence.

Explanation 1.—A statement is within the meaning of this section, whether it is made verbally or otherwise.

Explanation 2 — A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know."

[THE] PROFESSIONS TAX LIMITATION (AMENDMENT AND VALIDATION) ACT, 1949

(ACT LXI OF 1949)

[The Act printed here is as on 15-2-1961.]

CONTENTS

SECTIONS
1. Short title.
2. Amendment of Schedule, Act XX of 1941. [Not printed].
3. Validation of imposition of tax on circumstances and property before commencement of Act.
4. Repeal of Ordinance XVII of 1949.

STATEMENT OF OBJECTS AND REASONS

"The Professions Tax Limitation (Amendment and Validation) Ordinance, 1949, was promulgated on the 21st July, 1949, amending the Professions Tax Limitation Act, 1941, to enable the Local Authorities in the United Provinces to continue levying "circumstances and property" tax at a rate higher than the limit of Rs. 50 per year, fixed by the Professions Tax Limitation Act. The present Bill seeks to replace the Ordinance by an Act of the Legislature."

— Gaz. of Ind., 1949, Pt. V, p. 466.

[THE] PROFESSIONS TAX LIMITATION (AMENDMENT AND VALIDATION) ACT, 1949

(ACT LXI OF 1949)[a]

[26th December, 1949]

An Act further to amend the Professions Tax Limitation Act, 1941, and to validate the imposition in the United Provinces of certain taxes on circumstances and property.

WHEREAS it has been judicially held that the tax on circumstances and property imposed under clause *(b)* of section 108 of the United Provinces District Boards Act, 1922,[b] is subject to the limitation of fifty rupees per annum prescribed in respect of tax on professions, trades, callings or employments by section 2 of the Professions Tax Limitation Act, 1941[c];

AND WHEREAS it is expedient further to amend the Professions Tax Limitation Act, 1941, for the purpose of excluding taxes on circumstances and property imposed in the United Provinces by municipal or district boards from the operation of section 2 of that Act and to validate the imposition thereof before the commencement of this Act;

It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1949, Pt. V, p. 466. [b] U. P. Act X of 1922. [c] Act XX of 1941. It has been *repealed* by A.L.O., 1950 [26-1-1950].

1. Short title.

This Act may be called THE PROFESSIONS TAX LIMITATION (AMENDMENT AND VALIDATION) ACT, 1949.

2. Amendment of Schedule, Act XX of 1941. *[Not reprinted as Act XX of 1941 has been repealed by A. L. O., 1950.]*

3. Validation of imposition of tax on circumstances and property before commencement of Act.

Notwithstanding anything to the contrary in any other law for the time being in force,—

(i) no tax on circumstances and property imposed before the commencement of this Act under clause *(ix)* of sub-section *(1)* of section 128 of the

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Section 3 — Note 1

[1] The result of the amending Act is that the tax on circumstances and property levied under S. 108 of the U. P. District Boards Act is not subject to the limitations laid down under the Professions Tax Limitation Act and

United Provinces Municipalities Act, 1916,[a] or clause *(b)* of section 108 of the United Provinces District Boards Act, 1922,[b] shall be deemed to be, or ever to have been invalid merely on the ground that the tax imposed exceeded the limit of fifty rupees per annum prescribed by the said Act, and the validity of the imposition of any such tax shall not be called in question in any Court ; and

(ii) no Court shall entertain any claim for the refund of any portion of the tax referred to in clause *(i)*, merely on the ground that such portion is in excess of the limit referred to therein, or enforce any decree or order directing the refund on that ground of any portion of such tax.

[a] U. P. Act II of 1916. [b] U. P. Act X of 1922.

4. Repeal of Ordinance 17 of 1949.

The Professions Tax Limitation (Amendment and Validation) Ordinance, 1949, is hereby repealed.

[THE] PROMISSORY NOTES (STAMP) ACT, 1926
(ACT XI of 1926)

[The Act printed here is as on 15-2-1961.]

STATEMENT OF OBJECTS AND REASONS

"The stamp duty on promissory notes was raised on 1st October, 1923 from a uniform rate of one anna to rates varying between one anna and four annas, but the use of postage stamps for two or four annas on such notes was not permitted until the Government of India issued Finance Department Notification No. 48 on the 5th January, 1925. The object of this Bill is to validate promissory notes stamped by inadvertence, during the interval between these two dates, with postage stamps of two or four annas representing the correct duty."

—Gaz. of Ind., 1926, Pt. V, page 70.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

— Adapted by A.C.A.O. 1948; A.L.O. 1950; 3 A.L.O., 1956.
— Extended to Berar by Act IV of 1941.
— Extended in Madras by Mad. Act XXXV of 1949.
— Extended in Punjab by Punj. Act V of 1950.

[THE] PROMISSORY NOTES (STAMP) ACT, 1926
(ACT XI OF 1926)[a]

[2nd March, 1926.]

An Act to provide for the validation of certain promissory notes.

WHEREAS it is expedient to provide for the validation of certain promissory notes stamped with postage stamps of the denomination of two or four annas ; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1926, Pt. V, page 70.

The Act was extended to Berar by Berar Laws Act, 1941 (IV of 1941), S. 2 and Sch. I.

It has also been extended to the States merged in the State of—

Madras : *see* Mad. Act XXXV of 1949, S. 3 [1-1-1950] ;
Punjab : *see* Punj. Act V of 1950, S. 3 [15-4-1954].

Section 3 — **Note 1** *(contd.)*

the maximum amount of such tax can be such as can be levied under the U. P. District Boards Act, 1922. The upper limit laid down under the rules framed by the U. P. Government under S. 114 (d) of the U. P. District Boards Act is Rs. 2,000. By the adaptation of Laws Order, 1950, the main Act, namely. the Professions Tax Limitation Act (1941) stood repealed. This means that the Act did not remain in force after the coming into force of the Constitution on the 26th of January, 1950, and that, therefore no question of its being void in view of Arts. 13 and 31 of the Constitution should arise. Even if any such question arose, it would not affect the validity of the Act prior to the 26th of January, 1950, in view of the amendment carried out in the principal Act and that amendment being deemed to exist from the very first day, the imposition of the tax for an amount larger than Rs. 50 was valid and its recovery from the assessee was also valid. The repeal of the Act would not revive the right which the assessee company had lost in the tax which had been realised from it validly. ('54) ILR (1954) 2 All 311 (323, 324).

1. Short title and extent.

(1) This Act may be called THE PROMISSORY NOTES (STAMP) ACT, 1926.

[a][*(2)* It extends to the whole of India except [b][the territories which, immediately before the 1st November, 1956, were comprised in Part B States].]

[a] *Substituted* for the original sub-section by A L.O., 1950 [26-1-1950]. [b] *Substituted* for "Part B States" by 3 A.L.O., 1956 [w.r.e.f. 1-11-1956]. Immediately before the 1st of November, 1956, the following were Part B States in India : Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin.

2. Validation of certain promissory notes.

A promissory note payable on demand for an amount exceeding two hundred and fifty rupees, executed after the 30th day of September, 1923, and before the 5th day of January, 1925, and stamped with an adhesive stamp or adhesive stamps inscribed for postage and of the value required by the law in force at the time the promissory note was executed, shall not, by reason only of the fact that the stamp or the stamps or any of them is or are of a description other than that required by such law, be deemed for any of the purposes of the Indian Stamp Act, 1899, or of the rules made thereunder, not to have been duly stamped.

Note : *see* the Statement of Objects and Reasons given above.

[THE] PROVIDENT FUNDS ACT, 1925
(ACT XIX of 1925)

[The Act printed here is as on 15-2-1961.]

CONTENTS

SECTIONS

1. Short title, extent and commencement.
2. Definitions.
3. Protection of compulsory deposits.
4. Provisions regarding repayments.
5. Rights of nominees.
6. Power to make deductions.
7. Protection for acts done in good faith.
8. Power to apply the Act to the Provident Fund.
9. Savings as to estates of soldiers.
10. *[Repeals.]*

THE SCHEDULE.

STATEMENT OF OBJECTS AND REASONS

"The Provident Funds Act at present provides that any sums standing to the credit of depositors in Provident Funds to which the Act applies at the decease of the depositor and which are payable, under the rules of the Fund, to the widow or children of the deceased shall vest in such widow or children. Such sums do not, therefore, form part of the estate of the deceased, and the interests of the widow or children are thereby fully protected. It is considered that this provision is unduly restrictive, and that the same degree of protection should be accorded to other dependants of the deceased besides his widow and children. Otherwise, the accumulations of a depositor, who dies before such accumulations are disbursed to him, may be held to be liable to meet the debts of the deceased, and the object of the Provident Fund in question may be frustrated.

The Act protects compulsory deposits in a Provident Fund from attachments but not from assignments which may have been made to take effect on the depositor's retirement or on his death. On the other hand, the rules regulating the General Provident Fund, which is one of the most important funds to which the Act applies, provide that Government will not be bound by or recognise any assignment or encumbrance executed or attempted to be created which affects the disposal of the accumulations of a depositor who dies before retirement. The validity of this provision is open to question. It is considered that, in order to give effect to the object for which Provident Funds have been constituted, it should be made clear that, with certain exceptions, in spite of debts, liabilities, assignments or any form of encumbrance, the depositor, on retirement, or his dependants or nominees, if he dies before retirement or after retirement but before actual disbursement, should receive intact the accumulations at his credit in the fund. The exceptions proposed to the provision are as follows :—

(i) The rights of third parties obtained before the proposed amendment comes into operation should be protected; and

(ii) in the case of contributory Provident Funds, the authority by which the

fund was constituted should be entitled to withhold amounts not exceeding the total contributions made by the authority and the interest or increment on such contributions, if those amounts are due to the authority under a liability incurred by the depositor, or if the depositor is dismissed from the authority's employment or resigns his employment within five years of the commencement thereof.

Again, under the Act as it stands, apart from the amounts which vest in the widow or children of a depositor, the disbursement of the accumulations in a fund at the time of the death of a depositor is impossible if the total assets exceed Rs. 2,000 without the production of probate or letters of administration or a succession certificate. It is considered desirable to permit such disbursement of the accumulations if the amount does not exceed Rs. 5,000 instead of Rs. 2,000 at present. A corresponding provision is contained in the Government Savings Bank Act under which the amount of a deposit which can be disbursed in this manner is Rs. 3,000 as compared with Rs. 1,000 before the Act was amended in 1917. Similarly, under the Indian Securities Act 1920, on the death of a person who was entitled to a Government security or securities, the prescribed officer may now determine who is the person entitled to the security or securities, if they do not in the aggregate exceed Rs. 5,000, without the production of probate, letters of administration or a succession certificate.

It has further been considered desirable to provide definitely in the Act for the rights of nominees and also to indicate that a deposit is a compulsory deposit within the meaning of the Act and continues to be so for so long as it remains in the hands of the administrators of the fund despite the existence of an option permitting withdrawal from the fund on the condition that the amount withdrawn shall be expended on the taking out of, or on contributions towards, an insurance policy.

In order to give effect to these suggestions and also to certain other minor points, it is considered desirable to amend the existing Act and to re-enact it in a consolidated form."

— Gazette of India, 1924, Part V, p. 122.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937; A. C. A. O., 1948; A. L. O., 1950.
—Amended by Acts XXVIII of 1925; VII of 1927; I of 1940; XXV of 1940; XI of 1946; XXXV of 1950; III of 1951.
—Amended in Uttar Pradesh by U. P. Act XIX of 1953.
—Extended by Acts LIX of 1949; XXX of 1950.
—Extended to Madhya Bharat by M. B. Act XXXIV of 1950.
—Extended to the States merged in the State of —
Bombay by Bom. Act IV of 1950;
Madhya Pradesh (former) by M. P. Act XII of 1950.
Punjab by Punj. Act V of 1950.

[THE] PROVIDENT FUNDS ACT, 1925
(ACT XIX OF 1925)[a]

[27th August, 1925.]

An Act to amend and consolidate the law relating to Government and other Provident Funds.

WHEREAS it is expedient to amend and consolidate the law relating to Government and other Provident Funds; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1924, Pt. V, p. 122.
This Act has been extended to —
(a) the new provinces and merged States by the Merged States (Laws) Act, 1949 (XLIX of 1949), S. 3 [1-1-1950]; (b) the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (XXX of 1950), S. 3 [16-4-1950]; (c) the States merged in the State of Bombay—*see* Bom. Act IV of 1950; (d) the States merged in the former State of Madhya Pradesh—*see* M. P. Act XII of 1950; (e) the States merged in the State of Punjab — *see* Punj. V of 1950; (f) the former State of the whole of Madhya Bharat—*see* M. B. Act XXXIV of 1950.

1. Short title, extent and commencement.

(1) This Act may be called THE PROVIDENT FUNDS ACT, 1925.

(2) It extends to the whole of India [a][except the State of Jammu and Kashmir] [b][* * *].

Preamble — Note 1

[1] The object of the Provident Funds Act is to facilitate the constitution of Provident Funds whose stability may be assured by Government approval for the benefit of persons employed by Government or local authorities. 1931 Pat 451 (453) [AIR V 18] : 10 Pat 315 (DB).

[2] Rules to be referred to if they deal with points not dealt with by Act. 1929 Sind 158 (159) [AIR V 16] : 24 Sind L R 1.

(3) It shall come into force on such date[c] as the Central Government may, by notification in the Official Gazette, appoint.

[a] *Substituted* for "except Part B States" by the Part B States (Laws) Act, 1951 (III of 1951), S. 3 & Sch. [1-4-1951]. [b] The words "including British Baluchistan" were *repealed* by A. C. A. O., 1948. [c] 1st April, 1926 ; *see* Gazette of India, 1925, Pt. I, p. 1182.

2. Definitions.

In this Act, unless there is anything repugnant in the subject or context,—

(a) "compulsory deposit" means a subscription to, or deposit in, a Provident Fund which, under the rules of the Fund, is not, until the happening of some specified contingency, repayable on demand otherwise than for the purpose of the payment of premia in respect of a policy of life insurance [a][or the payment of subscriptions or premia in respect of a family pension fund], and includes any contribution [b][* * *] and any interest or increment which has accrued under the rules of the fund on any such subscription, deposit or contribution, and also any such subscription, deposit, contribution, interest or increment remaining to the credit of the subscriber or depositor after the happening of any such contingency;

[a] *Inserted* by the Provident Funds (Amendment) Act, 1930 (I of 1930), S. 2. [b] The words "credited in respect of any such subscription or deposit" were *repealed*, *ibid.*

STATE AMENDMENT

UTTAR PRADESH

In its application to the whole of Uttar Pradesh, in cl. (a) of section 2 between the words "fund" and "and" insert the words "or for acquisition of *Bhumidhari* rights under the U. P. Zamindari Abolition and Land Reforms Act, 1950 or Privileges under the U. P. Agricultural Tenants (Acquisition of Privileges) Act, 1949".—U. P. Act XIX of 1953, S. 2 [w. r. e. f. 11-8-1949].

(b) "contribution" means any amount credited in a Provident Fund, by [a][any authority administering the Fund], by way of addition to, [b][a subscription to, or deposit or balance at the credit of an individual account in,] the Fund ; and "contributory Provident Fund" means a Provident Fund the rules of which provide for the crediting of contributions ;

[a] *Substituted* for the words "the authority by which the Fund has been constituted" by the Provident Funds (Amendment) Act, 1925 (XXVIII of 1925), S. 2. [b] *Substituted* for the words "or otherwise in respect of, a subscription to, or deposit in" by the Provident Funds (Amendment) Act, 1930 (I of 1930), S. 2.

Section 2 — Note 1

S. 2 (a)—Compulsory Deposit.

[1] The words "repayable on demand" show that a compulsory deposit is a deposit only so long as it remains in the fund and not after it has been paid over to the person to whose credit it has stood. 1927 Oudh 22 (23) [AIR V 14] : 1 Luck 313 : 29 Oudh Cas 278 (DB). (Case under Act IX of 1897.) ✠ 1956 Mad 283 (284) [(S) AIR V 43 C 87] : ILR (1956) Mad 491 (FB). (It can never be "a deposit" in the hands of the very person to whom the money belongs.)✠1949 Cal144 (150, 151) [AIR V 36 C 36] : ILR (1945) 1 Cal 277. (As soon as the provident fund money ceases to stand credited in the Provident Fund account, i.e., goes out of the fund, it no more remains a compulsory deposit in spite of the fact that the money has not actually reached the subscriber or is otherwise in the hands of the company.)

[2] Provident fund amount not paid to the subscriber after the date of his retirement is a compulsory deposit. 1952 S C 227 (228) [AIR V 39] : 1952 S C R 765.

[3] Mere transfer from one account to the other does not change the character of Provident Fund amount as a 'compulsory deposit'. 1955 Cal 509 (510) [AIR V 42 C 148]. (Transfer from open Provident Fund amount to Miscellaneous account, indicating that the account of the retired employee was closed, did not change its character as compulsory deposit.)

[4] Compulsory deposits do not cease to be so on the depositor leaving service but retain their character as long as they subsist in the funds. Contributions to the deposits and accretions thereon are also compulsory deposits. 1923 Cal 585 (587) [AIR V 10] : 50 Cal 347 (DB).

[5] Moneys standing to credit of undischarged insolvent in Government Provident Fund are compulsory deposits within S. 2 (a). 1933 Rang 148 (149) [AIR V 20] : 11 Rang 93.

[6] Deposit by an optional subscriber within R. 3 is a compulsory deposit. 1924 Pat 524 (525) [AIR V 11] : 3 Pat 74 (DB).

S. 2 (c)—Dependant.

[7] Section 2 (c) merely defines who is a dependant and does not purport to confer any right upon the dependant or make him or her

(c) "dependant" means any of the following relatives of a deceased subscriber to, or a depositor in, a Provident Fund, namely, a wife, husband, parent, child, minor brother, unmarried sister and a deceased son's widow and child, and, where no parent of the subscriber or depositor is alive, a paternal grand-parent ;

(d) "Government Provident Fund" means a Provident Fund, other than a Railway Provident Fund, constituted by the authority of [a][the Secretary of State, the Central Government, the Crown Representative or any State Government] for any class or classes of [b][persons in the service of the Government] or [c][of persons employed in educational institutions or employed by bodies existing solely for educational purposes], [d][and references in this Act to the Government shall be construed accordingly];

[a] *Substituted* for "the Government" by A. O., 1937. [b] *Substituted* for "the employees" by the Repealing and Amending Act, 1942 (XXV of 1942), S. 3 & Sch. II. [c] *Substituted* for the words "for teachers in educational institutions" by the Provident Funds (Amendment) Act, 1927 (VII of 1927) S. 2. [d] *Inserted* by A. O., 1937.

(e) "Provident Fund" means a fund in which subscriptions or deposits of any class or classes of employees are received and held on their individual accounts, and includes any contributions [a][* * *] and any interest or increment accruing on such subscriptions, deposits or contributions under the rules of the Fund ;

[a] The words "credited in respect of such subscriptions or deposits" were *repealed* by the Provident Funds (Amendment) Act, 1930 (I of 1930), S. 2.

[a][*(f)* "Railway administration" means—

(i) any company administering a railway or tramway in [b][any part of India]

Section 2 —Note 1:*(contd.)*

lawful representative. That is to be determined according to the ordinary law governing the parties in the absence of any nomination by the subscriber. 1946 Bom 304 (307) [AIR V 33 C 64] : ILR (1946) Bom 146 (DB).

[8] Married sisters of the deceased are not dependants, as defined in section 2 (c), Provident Funds Act. 1933 Sind 101 (101) [AIR V 20] : 26 Sind L R 429 ✠ 1930 Oudh 145 (146) [AIR V 17] : 5 Luck 712 (FB). (No attainment of status as unmarried sisters on widowhood.)

[9] Term 'Child' in Section 2 (c) of the Act is not confined to sons and daughters below the age of majority but includes also an adult child. 1940 Cal 395 (397) [AIR V 27] : ILR (1940) 1 Cal 476.

S. 2 (d)—Government Provident Fund.

[10] Section 2 (d) requires that the 'fund' should be constituted by the authority of the Government. The mere fact that the Provident Fund Rules framed by a private body have been approved by the Government, is not sufficient to show that the fund to which the rules relate was constituted by the Government in the absence of proof that the Government made any rules requiring the private body to maintain the Provident Fund. 1941 Lah 168 (169) [AIR V 28].

[11] The test of whether any individual person is an employee of the authority for the purpose of this Act is rather whether the authority admits that person to membership of the fund than the particular nature of his employment or his precise legal relationship with the employer. 1931 Pat 451 (453) [AIR V 18] : 10 Pat 315 (DB).

S. 2 (e)—Provident Fund.

[12] Definition of 'Provident Fund' in S. 2 (e) covers only funds organised by employer for the benefit of employees. 1939 Mad 485 (486) [AIR V 26].

[13] Before it can be held that the insured amount is an increment accruing on the subscriptions or contributions forming part of the Provident Fund, it must be established that the said sums are invested as forming part of the Provident Fund. But where the premiums are treated as advances to the subscriber, the insured amount cannot be treated as forming part of the Provident Fund. 1957 Andh Pra 887 (889) [AIR V 44 C 273] : ILR (1956) Andh 360 (DB) ✠ 1953 Mad 508 (509) [AIR V 40 C 191].

[14] Money in deposit with the Railway Administration in the Railway Provident Fund is provident fund within the meaning of the Act although the subscriber has retired from railway service. 1953 All 1 (3) [AIR V 40 C 1] : ILR (1953) 2 All 593 (DB).

S. 2 (f)—Railway administration.

[15] Tramways Act is a general Act applicable to the whole of British India and was not enacted for the purposes of the construction of any particular tramway and therefore cannot be called a Special Act. Hence a tramway company which was granted a licence with certain conditions is not a Railway administration within the meaning of S. 2 (f) as it was not operating either under a Special Act or by virtue of a contract with the Government because the licence which was a unilateral act of the Government could not constitute an agreement. 1937 Lah 915 (916) [AIR V 24] (DB).

either under a special Act of Parliament [c][of the United Kingdom] or an Indian law, or under contract with the Government, or

(ii) the manager of any railway or tramway administered by the [d][Central Government] or by a State Government, and includes, in any case referred to in sub-clause *(ii)* the [d][Central Government] or the State Government, as the case may be ;]

[a] *Substituted* for the original clause by A. O., 1937. [b] *Substituted* for "a Part A State or a Part C State" by the Part B States (Laws) Act, 1951 (III of 1951), S. 3 & Sch. [1-4-1951]. [c] *Inserted* by A. L. O., 1950. [d] *Substituted* for "Federal Railway Authority" by A. C. A. O. 1948.

(g) "Railway Provident Fund" means a Provident Fund constituted by the authority of a railway administration for any class or classes of its employees.

3. Protection of compulsory deposits.

(1) A compulsory deposit in any Government or Railway Provident Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor, and neither the Official Assignee nor any receiver appointed under the Provincial Insolvency Act, 1920, shall be entitled to, or have any claim on any such compulsory deposit.

(2) Any sum standing to the credit of any subscriber to, or depositor in, any such Fund at the time of his decease and payable under the rules of the Fund to any dependant of the subscriber or depositor, or to such person as may be authorized by law to receive payment on his behalf, shall, subject to any deduction authorized by this Act and, save where the dependant is the widow or child of the subscriber or depositor, subject also to the rights of an assignee under an assignment made before the commencement of this Act, vest in the dependant, and shall, subject as aforesaid, be free from any debt or other liability incurred by the deceased or incurred by the dependant before the death of the subscriber or depositor.

SECTION 3 — SYNOPSIS

1. Scope.

2. Sub-section (1).

3. Sub-section (2).

1. Scope. — [1] Section 3 deals only with 'the protection of compulsory deposits in a Provident Fund' and not with the title to them. 1946 Bom 304 (307) [AIR V 33 C 64] : ILR (1946) Bom 146.

[2] Sections 3 and 5 apply only to Government or Railway Provident Funds coming under S. 8. 1939 Mad 485 (486) [AIR V 26].

2. Sub-section (1).—[1] Prohibition against assignment or attachment in S. 3 (1) is based on grounds of public policy. Where the interdiction is absolute, to allow a judgment-creditor to get at the fund indirectly by means of appointment of a receiver would be to circumvent the statute. Such a frustration of the very object of the legislation should not be permitted. Execution therefore, cannot be sought against provident fund money by way of appointment of a receiver. 1952 S C 227 (228, 230) [AIR V 39]. (A I R 1951 Cal 25, *Reversed*; AIR 1951 Cal 285, *Overruled.*) ✣ 1952 Cal 349 (350) [AIR V 39] ✣ 1952 Nag 266 (268) [AIR V 39] : I L R (1951) Nag 540. (Cannot be attached in execution of decree against subscriber.) ✣ 1950 Mad 402 (404) [AIR V 37 C 180]. (Railway can object to attachment even if judgment-debtor does not claim exemption.)

[*See also* 1950 Cal 212 (212) [AIR V 37 C 74].]

[2] Under S. 3 of the Provident Funds Act there is an absolute interdiction to the attachment of a compulsory deposit in any Government or Railway Provident Fund account. The power of attachment of property under Ss. 3, 4, 5 of the Criminal Law Amendment Ordinance (1944) must be construed subject to the provisions of S. 3 of the Provident Funds Act, because there is nothing in the provisions of the Ordinance to suggest that there is an express or implied repeal of the prohibition contained in S. 3 of the Act and the principle to be followed is generalia specialibus non-derogant. Nor is there any difference as to the legal effect of attachment under the two statutes. Attachment creates no charge or lien upon the attached property but only prevents and avoids private alienations and that is the meaning and the effect of an attachment both under S. 3 (1) of the Provident Funds Act and Ss. 3, 4 and 5 of Ordinance No. XXXVIII of 1944. 1961 Pat 384 (386) [AIR V 48 C 114] : 1961 (2) Cri L Jour 522 (DB).

[3] Direction in the decree of a Court to the Railway Administration to send a portion of the provident fund to the subscriber's wife

Section 3 — Note 2 *(contd.)*

amounts to an assignment and is not binding because it contravenes the provisions of S. 3 (1). 1953 All 1 (4) [AIR V 40 C 1] : I L R (1953) 2 All 593 (DB). (A I R 1938 Oudh 48 held no longer good law in view of principles enunciated in AIR 1952 S C 227.)

[4] The protection contemplated by S. 3 extends only to a compulsory deposit. Once the money ceases to retain that character the protection comes to an end. 1946 Oudh 11 (13) [AIR V 33 C 6] (DB) ✠ ('61) 65 Cal W N 848 (855) (DB).

[5] A compulsory deposit in a fund is under S. 3 immune from attachment even after it has become payable and the immunity extends up to the time it remains to the credit of the subscriber. The immunity ceases as soon as the money ceases to stand credited in the Provident Fund account, and it is immaterial whether the money has actually reached the subscriber or is otherwise in the hands of the company. 1949 Cal 144 (150) [AIR V 36 C 36] : I L R (1945) 1 Cal 277 ✠ 1928 Mad 784 (784) [AIR V 15].

[6] The death or retirement of the depositor does not alter the character of compulsory deposits. 1923 Cal 585 (587) [AIR V 10] : 50 Cal 347 (DB) ✠ 1920 Cal 305 (308) [AIR V 7]: 46 Cal 982. (Where a Court attaches such property High Court will interfere in revision.)

[7] Compulsory deposit made in a General Provident Fund is not attachable even after the retirement of the subscriber. Rule 10 of the General Provident Rules which provides as to how the Accounts Officer ought to act on receipt of notice of attachment does not validate the notice of attachment as it is only a rule of procedure. 1929 All 417 (418) [AIR V 16] : 51 All 845.

[8] The immunity from attachment under S. 3 (1) does not attach to moneys paid over to the subscriber from his Provident Fund. 1956 Mad 283 (285) [(S) AIR V 43 C 87] : I L R (1956) Mad 491 (FB) ✠ 1942 Cal 292 (293) [AIR V 29]. (The test to apply in determining whether the money was paid is to see whether valid discharge has been obtained in respect of it.)

[9] Compulsory deposit in the hands of Government or institution does not vest in official receiver on the insolvency of the subscriber. But when such money comes into the hands of the subscriber it ceases its character of compulsory deposits and becomes his property. Therefore it will then vest in the receiver. 1935 Bom 396 (397) [AIR V 22] : 59 Bom 517 (DB) ✠ 1946 Oudh 11 (13) [AIR V 33 C 6] (DB) ✠ 1931 Mad 797 (798) [AIR V 18] (DB) ✠ 1920 Bom 58 (60) [AIR V 7] : 44 Bom 673 (DB). (Disposal of the fund by insolvent is not fraudulent and punishable under Provincial Insolvency Act, S. 43.)

[10] The contribution of the employee as well as the contribution from the employer are exempt from attachment. Where the subscriber dies while still in service his contribution cannot be attached for meeting his debts. 1938 Mad 234 (235) [AIR V 25] : I L R (1938) Mad 325 (DB).

[11] Provident fund subscription deducted from the salary and en route from the disbursing officer and the fund cannot be attached. That is so because before the time of payment the money does not belong to the judgment-debtor and at the time of payment it becomes a compulsory deposit. There is no intervening period between the two stages. 1939 Rang 432 (433) [AIR V 26] : 1939 Rang L R 504.

[12] The official assignee cannot call upon an undischarged insolvent to place the money standing to his credit at his disposal for the benefit of the creditors. The insolvent who refuses to obey such a direction does not become guilty of contempt of Court. 1933 Rang 148 (149) [AIR V 20] : 11 Rang 93.

[13] Official assignee is not entitled to anticipatory order under S. 33, Presidency-Towns Insolvency Act from Insolvency Court directing insolvent to hand over money to official assignee directly he receives it. 1936 Mad 855 (855) [AIR V 23].

[14] Unless the protection of S. 3 (1) has been extended by the Local Government, money of the insolvent in the fund of a District Council can be claimed by the official assignee. 1938 Rang 245 (246) [AIR V 25] : 39 Cri L Jour 754.

[15] Provident Fund maintained by a private aided college— Rules framed by Government for Provident Fund in aided colleges adopted — The fund in question becomes a fund constituted under the authority of Government from the date of adopting the rules — Hence a decree for the deposit obtained by an ex-employee of the institution cannot be attached by the authorities as against a decree obtained against him for malfeasance during the tenure of his office. 1937 Pat 22 (23, 24, 25) [AIR V 24] : 15 Pat 779 (DB).

[16] Decree-holder who is also the nominee of the judgment-debtor cannot attach the provident fund as he would be attaching only what is his own property. 1934 Lah 153 (155) [AIR V 21] : 36 Cri L Jour 217.

[17] A nomination which purports to confer upon the nominee the right to receive the sums standing to the credit of a subscriber is not invalid as contravening the prohibition against assignment or charge under S. 3 (1) merely because the nomination has been made in consideration of a loan and not on account of mere love and affection. 1935 Rang 449 (452) [AIR V 22].

3. Sub-section (2).—[1] One of the objects of the Provident Fund is that people should, in case of retirement, have something to live on, or in case of death, have something to leave. Where a subscriber has a family, he cannot leave his Provident Fund to anyone outside the family and must leave it to one or more members of the family, whether he likes them or not; but if he has not a family, then the subscriber may have something on which to live when he retires; and if he dies before he is able to enjoy his retirement and if he has no family, then he has something to leave. If he has no family, he is not compelled to leave it to an individual or individuals

Section 3 — Note 3 *(contd.)*

1942 Rang 64 (66) [AIR V 29] : 1941 Rang LR 712.

[2] The benefit of the exemption under S. 3 (2) is available when any sum standing to the credit of any subscriber or depositor is payable to any person who would be a dependant within the meaning of S. 2 (c) of the Act, whether he or she becomes entitled to the sum by virtue of a nomination or by virtue of the general law or special rule. Hence a compulsory deposit in a railway provident fund standing to the credit of a depositor and payable to his wife under nomination is free from liability to be attached by wife's creditor in execution of a decree against her for a debt incurred by her before the depositor's death, for she occupies the dual position of being both a nominee and a dependant. 1947 Mad 317 (318, 319) [AIR V 34 C 159] : ILR (1947) Mad 851.

[3] Provident fund money vesting in the dependant under S. 3 (2) is in every case free from any debt or liability incurred by the deceased or by the dependant before the death of the subscriber. 1956 Ajmer 7 (8) [AIR V 43 C 7]. (Death of subscriber during pendency of application for execution of decree against him—Provident fund paid to subscriber's sons as dependants could not be attached.)

[4] The Act does not override the rights of the dependants of the depositor to share the fund *inter se* according to the personal law of the deceased. S. 3 (2) is intended only to protect the fund from assignment or attachment by persons who became the creditors of the subscriber or the dependants during the lifetime of the subscriber. 1935 Sind 73 (77) [AIR V 22]. (Muhammadan nominee though entitled to receive the money does not become its absolute owner.)

[**But see** 1935 Bom 234 (236) [AIR V 22] : 59 Bom 475 (DB).]

[5] In order to claim the benefit of S. 3 (2) it is necessary to show that under Provident Fund Rules the amount standing to the credit of the deceased in the provident fund is payable to the dependant of the subscriber. The section is of no assistance where there are no such rules. In that case, *prima facie* the nominee is entitled to preference over the dependant. 1945 Cal 384 (385) [A I R V 32] (DB).

[6] The question as to whether a provident fund amount has to be paid to the nominee or dependant depends upon the particular rules governing the fund concerned. 1949 Nag 85 (87) [AIR V 36 C 29] : ILR (1948) Nag 357 (DB). ("Payable under the rules" in S. 3 (2) has no reference to the calculation of the amount.)

[7] Where a person has made a declaration that a certain person will be entitled on his death, to receive payment of his deposit in the institution the declaration is tantamount to a nomination which is quite a different thing from an assignment or charge which is void under S. 3(2), Provident Funds Act. 1935 Rang 449 (452) [AIR V 22].

[8] The effect of the statutory vesting of fund in the dependant after death of subscriber or depositor under S. 3 (2) is that it becomes absolute property of dependant. Where it vested in a son at death of father it cannot be held to have devolved upon him by inheritance and so cannot be regarded as assets of deceased father in the hands of son. 1934 Mad 173 (174) [AIR V 21] : 57 Mad 440 (DB) ✠ 1946 Oudh 73 (76) [AIR V 33 C 29] : 1943 Nag 333 (333) [AIR V 30] : ILR (1944) Nag 444. (No receiver can be appointed to recover decretal debt of subscriber from the fund.) ✠ 1937 All 562 (564) [AIR V 24] (DB). (Defendant can dispose of the amount by will.)

[*See also* 1949 Sind 38 (42) [AIR V 36 C 15]: ILR (1948) Kar 23(DB). (The effect of the provident fund vesting in the nominee, when the nominee is a dependant, is to confer on him the immediate right to possession and dominion over the amount, without affecting the beneficial rights of actual owners.)]

[9] *V* taking life assurance policy nominating first wife as beneficiary — *V* unable to pay premiums raising money by loan from the provident fund of which he was subscriber and mortgaging the policy to the fund —*V* marrying again after death of first wife— V dying without nominating second wife as beneficiary under the policy—Policy assigned to her as heir — *Held*, that the money under the policy was not protected by this Act and that it could be attached by a creditor of the husband as the second wife received the amount only as an asset of the deceased. 1945 Mad 267 (267) [AIR V 32].

[10] Where the dependant on whom the money in fund should devolve is the murderer of the subscriber the money would not vest in him. 1933 Nag 173 (175) [AIR V 20] : 29 Nag L R 238.

[11] Private company is not trustee for dependant or nominee. Such nominee or dependant takes by succession. 1928 Rang 312 (313) [AIR V 15] : 6 Rang 558.

[12] While a dependant of a subscriber is alive, there can be no nomination or succession to the fund. It passes to the dependant by vesting in the dependant and not by succession. 1951 All 815 (815) [AIR V 38 C 198]: I L R (1953) 2 All 323 (DB). (In such a case letters of administration obtained by any person other than the dependant are of no effect.)

[*See also* 1950 Nag 244 (246) [AIR V 37 C 76] : I L R (1951) Nag 407. (Where the nominee dies before the subscriber, the nomination in his favour actually becomes null and void and the personal heirs of the nominee have no *locus standi* at all to apply for a succession certificate for the purpose of claiming the provident fund amount in preference to a dependant of the deceased subscriber.)]

[13] Dependants themselves nominees — Money is payable to them in their capacity as nominees—Applicability of S. 3 (2) to a case where there is already a valid nomination is doubtful. 1936 Oudh 32 (34, 44) [AIR V 23] : 11 Luck 611 (FB).

[14] Section 3 does not prohibit the appointment of a non-dependant as nominee. 1945

4. Provisions regarding repayments.

(1) When under the rules of any Government or Railway Provident Fund the sum standing to the credit of any subscriber or depositor, or the balance thereof after the making of any deduction authorized by this Act, has become payable, the officer whose duty it is to make the payment shall pay the sum or balance, as the case may be, to the subscriber or depositor, or, if he is dead, shall—

(a) if the sum or balance, or any part thereof, vests in a dependant under the provisions of section 3, pay the same to the dependant or to such person as may be authorized by law to receive payment on his behalf; or

(b) if the whole sum or balance, as the case may be, does not exceed five thousand rupees, pay the same, or any part thereof, which is not payable under clause *(a)*, to any person nominated to receive it under the rules of the Fund, or, if no person is so nominated, to any person appearing to him to be otherwise entitled to receive it; or

(c) in the case of any sum or balance, or any part thereof, which is not payable to any person under clause *(a)* or clause *(b)* pay the same,—

(i) to any person nominated to receive it under the rules of the Fund, on production by such person of probate or letters of administration evidencing the grant to him of administration to the estate of the deceased or a certificate granted under the Succession Certificate Act, 1889,[a] or under the Bombay Regulation VIII of 1827,[b]

Section 3 — Note 3 *(contd.)*

Bom 43 (45) [AIR V 32] : ILR (1944) Bom 716 (DB) ✠ 1946 Bom 304 (306) [AIR V 33 C 64] : I L R (1946) Bom 146 ✠ 1939 Mad 489 (490) [AIR V 26] (DB). (Nominee under declaration of subscriber need not be dependant.)

[15] Contributory Provident Fund (Bengal) Rules, Rule 25 — Subscriber nominating wife as sole nominee — Subsequently marrying second wife who bore him two sons—No fresh nomination made—As between nominee (first wife) and sons of second wife, former held absolutely entitled to money standing to credit of subscriber at his death as money vested in her being also a dependant within S. 3 (2). 1947 Cal 176 (179) [AIR V 34 C 51] : I L R (1947) 1 Cal 160 (DB).

[16] Railway employee agreeing to transfer Provident Fund when he would receive them and creating equitable assignment not valid. 1939 Rang 97 (97) [AIR V 26] (DB).

Section 4 — Note 1

[1] Order directing payment of provident fund to person other than depositor is without jurisdiction as being in contravention of the statutory liability imposed by S. 4 (1) on the paying officer. 1951 Cal 285 (286) [A I R V 38 C 58].

[2] Rules relating to provident fund restricting payment to minors only are not contrary to the provisions of S. 4. 1955 Cal 245 (247) [AIR V 42 C 63] (DB).

[3] Clause (b) of S. 4 (1) is in no way subsidiary to cl. (a) but is on an equal footing with it and whether the sum is to be paid to the dependant or to the nominee depends entirely on the rules of the Provident Fund concerned. 1949 Nag 85 (87) [AIR V 36 C 29]: ILR (1948) Nag 357 (DB) ✠ 1946 Bom 304 (306, 308) [AIR V 33 C 64]: ILR (1946) Bom 146 (DB). (*Held*, nomination of person other than dependant is valid under G. I. P. Railway Provident Fund Rules.) ✠ 1939 Mad 489 (490, 491) [AIR V 26] (DB). (Rules relating to a Provident Fund not restricting declarations to be made in favour of dependants only – Depositor nominating a lady who claimed the deposit as a widow of the depositor— Lady found not to be legally married and therefore not a dependant under S. 2 — Still she was held to be entitled to the money in preference to the son of the deceased depositor.)

[But see 1940 Cal 395 (398) [A I R V 27]: ILR (1940) 1 Cal 476. (Appendix *D* of General Provident Fund Rules (Bengal Services) is negatived by S. 4 which makes the claims of nominee conditional upon the absence of dependants as defined in the Act.)]

[4] In the case of a will by a subscriber bequeathing the amount of his provident fund to a nominee it is the duty of the Accountant-General under S. 4 (1) to ascertain whether there was valid nomination or not and if there was, to pay the amount of the Provident fund to the nominee direct and not the executor named in the will. 1942 Rang 64 (68) [AIR V 29]: 1941 Rang L R 712 & 720 (DB).

[5] Letter given by the guardian of minor dependant authorising the administration who is administering the estate of the deceased subscriber to receive provident Fund money does not constitute the administrator into a person "authorised by law" to receive payment on behalf of the minor as required by S. 4 (1) (a). The right person to put in a claim on behalf of the minor is the guardian himself. 1951 All 815 (816) [AIR V 38 C 198]: ILR (1953) 2 All 323 (DB).

[6] Under S. 3 (2) the money vests in the dependant of the depositor or subscriber and where the dependant is the widow or the child of the depositor or subscriber, without

entitling the holder thereof to receive payment of such sum, balance or part, or

(ii) where no person is so nominated, to any person who produces such probate, letters or certificate :

Provided that, where the whole or any part of any sum standing to the credit of the subscriber or depositor has been assigned to any other person before the commencement of this Act, and notice in writing of the assignment has been received by the officer from the assignee, the officer shall, after making any deduction authorized by this Act and any payment due under clause *(a)* to or on behalf of the widow or children of the subscriber or depositor—

(i) if the subscriber or depositor or, if he is dead, the person to whom in the absence of any valid assignment the sum or balance would be payable under this sub-section gives his consent in writing, pay the sum or part or the balance thereof, as the case may be, to the assignee, or

(ii) if such consent is not forthcoming, withhold payment of the sum, part or balance, as the case may be, pending a decision of a competent Civil Court as to the person entitled to receive it.

(2) The making of any payment authorized by sub-section *(1)* shall be a full discharge to the Government or the railway administration, as the case may be, from all liability in respect of so much of the sum standing to the credit of the subscriber or depositor as is equivalent to the amount so paid.

[a] *See* now the Indian Succession Act, 1925 (XXXIX of 1925). [b] Administration of Estates Regulation.

5. Rights of nominees.

[a][*(1)* Notwithstanding anything contained in any law for the time being in force or in any disposition, whether testamentary or otherwise, by a subscriber to, or depositor in, a Government or Railway Provident Fund of the sum standing to his credit in the Fund, or of any part thereof, where any nomination, duly

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Section 4 — Note 1 *(contd.)*

being subject to any rights of the assignee under an assignment made before the commencement of the Act. The only thing that the authorities might insist on in such a case is the proof of identity and satisfaction of the identity may be had otherwise than by demanding letters of administration from the widows. 1930 Cal 252 (252) [AIR V 17] (DB).

[7] The effect of section 4 is that the nominee who holds the succession certificate is entitled to the Provident Fund amount in preference to others. 1935 Cal 271 (271) [AIR V 22] : 62 Cal 272 (DB). (Widow holding succession certificate in respect of the assets of her deceased husband— Nominee obtaining succession certificate in respect of the deposit — The latter is entitled to it and not the widow.)

[8] In order to find out what a valid and subsisting nomination is one has to turn to S. 4 and not to S. 5. Under S. 4 (1) (c) (i) a person who is properly nominated according to the rules of the fund is entitled to receive the money. 1946 Bom 138 (140, 142) [A I R V 33 C 31] (DB). (Rule 25 of the G.I.P. Ry. Provident Fund Rules providing that on the marriage or re-marriage of a member, who is not a Hindu, Muhammadan or Budhist, a nomination made by him does not subsist is not *ultra vires* of the Act.)

[9] The provision in Cl. (b) that the manager may pay money to any person entitled to receive it is not intended to come into operation so as to defeat the rules of any fund which tell the manager as to who is the proper person to receive it. 1928 Cal 743 (745) [AIR V 15]: 55 Cal 1231 (DB).

[10] Claimant for Provident Fund of deceased person other than nominee or dependant for more than Rs. 5,000 can obtain amount only on production of probate, letters of administration or succession certificate. 1933 Sind 101 (101) [AIR V 20] : 26 Sind L R 429.

[11] Assignment of all Provident Fund money to illegitimate son to exclusion of widow and daughters is *ultra vires* and Fund must be divided between the widow and the daughters in accordance with Rule 10 (2). 1920 Low Bur 89 (90) [AIR V 7].

[12] Paying deposit money by manager of fund to the brother of the deceased as guardian of deceased's son on his producing a certificate from an Honorary Magistrate that he is the guardian of his nephew does not amount to a valid discharge. 1928 Cal 743 (743) [A I R V 15]: 53 Cal 1231 (DB).

Section 5 — Note 1

[1] Section 5 deals with Government and Railway Funds. To Fund of private company, Act does not apply. 1939 Sind 107 (109) [AIR V 26]: ILR (1939) Kar 432 (DB) ✠ 1939 Mad 485 (486) [AIR V 26]. (Also to such funds as may by virtue of S. 8 have been brought within the ambit of its provision.)

[2] Section 5 (1) applies to dependant as well as non-dependant nominees. 1944 Mad 370 (370) [AIR V 31] (DB).

made in accordance with the rules of the Fund, purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber or depositor occurring before the sum has become payable or before the sum having become payable, has been paid, the said person shall, on the death as aforesaid of the subscriber or depositor, become entitled, to the exclusion of all other persons, to receive such sum or part thereof, as the case may be, unless—

(a) such nomination is at any time varied by another nomination made in like manner or expressly cancelled by notice given in the manner and to the authority prescribed by those rules, or

(b) such nomination at any time becomes invalid by reason of the happening of some contingency specified therein,—

and if the said person predeceases the subscriber or depositor, the nomination shall, so far as it relates to the right conferred upon the said person, become void and of no effect :

Provided that where provision has been duly made in the nomination in accordance with the rules of the Fund, conferring upon some other person such right in the stead of the person deceased, such right shall, upon the decease as aforesaid of the said person, pass to such other person.]

Section 5 — Note 1 *(contd.)*

[3] The words "notwithstanding anything contained in any law for the time being in force" have the effect of validating the wills notwithstanding anything contained in the personal law of the depositor. The words "any law" are wide and include the personal law of the depositor. Sub-section (1) has conferred upon the depositor power to give the Provident Fund money as he thinks best notwithstanding the provisions of his personal law. 1936 Oudh 32 (42) [AIR V 23]: 11 Luck 611 (FB).

[4] Valid nomination subsisting — Subscriber cannot, by will, deprive nominee of the money. 1947 Mad 96 (96) [A I R V 34 C 44]: ILR (1947) Mad 387 (DB)✠1939 Cal 642 (644) [AIR V 26]. (Fund in respect of which nomination is made —Money does not form part of estate of deceased.) ✠ ('57) 1957-1 Mad L Jour 126 (131).

[5] Nomination to receive Provident Fund money from a corporation is not a will, gift or trust in favour of the nominee. 1928 Lah 773 (774) [AIR V 15].

[**But see** 1930 Lah 437 (438) [A I R V 17]. (Form of Declaration amounts both to declaration of nominee and a will.)]

[6] Where the nomination is in the form of combined nomination and will, and the nominee is also the legatee, the nominee would become the owner of the money after the death of the subscriber. 1951 Ajmer 42 (44) [AIR V 38 C 29].

[7] Nomination is valid in spite of any prohibition in the personal law even if made before the passing of the Act of 1925. 1929 Rang 54 (55) [A I R V 16] : 6 Rang 682 (DB).

[8] A declaration of a nominee made by a person long before his becoming a subscriber to the provident fund is not a valid declaration. 1946 Oudh 73 (75) [A I R V 33 C 29].

[9] A nomination made in consideration of a loan and not on account of mere love and affection is not invalid as contravening the provisions of S. 3 (1). 1935 Rang 449 (452) [A I R V 22]. (Cases decided before amendment of the section in Provident Funds (Amendment) Act, 1946 (XI of 1946).)

[10] The nominee on the death of the subscriber is entitled to an absolute right to receive the provident fund unless the nomination had been cancelled or varied by nomination in favour of another by the subscriber. He is entitled to the grant of a certificate entitling him to receive payment and such certificate cannot be deemed invalidated or superseded by the grant of probate or letters of administration to another. 1932 Sind 115 (116) [A I R V 19].

[11] Nominee though not dependant takes absolute interest in fund. 1946 Bom 304 (308) [AIR V 33 C 64] : ILR (1946) Bom 146 (DB)✠ 1952 Ajmer 42 (1) (42) [AIR V 39]. (A nomination confers an absolute right on the nominee to appropriate to himself the amount of the Provident Fund money.)

[**See however** 1949 Sind 38 (46) [AIR V 36 C 15] : ILR (1948) Kar 23 (DB). (Nominee has nothing more than right to receive amount — Nominee does not get absolute title to it.)]

[12] The right of a nominee during the lifetime of the subscriber is purely a contingent right. Therefore no right to receive the sum vests absolutely in the nominee at the time of nomination. The nominee takes the money on the death of the subscriber by succession and is not entitled to get the succession certificate without paying the Court-fee therefor. 1939 Sind 52 (56, 57) [A I R V 26] : I L R (1939) Kar 359.

[13] If nominee of the provident fund subscriber dies previous to the death of the person entitled to the said fund it will be the first dependant of subscriber and not the heir of the nominee that is entitled to provident fund. 1929 Sind 158 (159) [AIR V 16] : 24 Sind L R 1 (DB)✠1957 Madh Pra 79 (83) [(S) AIR V 44 C 39] : ILR (1957) Madh Pra 133 (DB). (The nomination is in its nature testamentary and being ambulatory the death of the nominee in

(2) Notwithstanding anything contained in [b][the Indian Succession Act, 1925], or the Bombay Regulation VIII of 1827,[c] any [d][person, who becomes entitled as aforesaid, may be granted] a certificate under that Act, or that Regulation, as the case may be, entitling him to receive payment of such sum or part, and such certificate shall not be deemed to be invalidated or superseded by any grant to any other person of probate or letters of administration to the estate of the deceased.

[e][*(3)* The provisions of this section as amended by sub-section *(1)* of section 2 of the Provident Funds (Amendment) Act, 1946, shall apply also to all such nominations made before the date of the commencement[f] of that Act :

Provided that the provisions of this section as so amended shall not operate to affect any case, in which before the said date any sum has been paid, or has under the rules of the Fund become payable in pursuance of any nomination duly made in accordance with those rules.]

[a] *Substituted* for the original sub-section *(1)* by the Provident Funds (Amendment) Act, 1946 (XI of 1946), S. 2 [18-4-1946]. [b] *Substituted* for "the Succession Certificate Act, 1889" by the Repealing and Amending Act, 1950 (XXXV of 1950), S. 3 and Sch. [19-4-1950]. [c] Administration of Estates Regulation. [d] *Substituted* for the words "such person shall, on the death of the subscriber or depositor, be entitled to the grant of" by Act XI of 1946, S. 2 [18-4-1946]. [e] *Inserted*, *ibid.* [f] That is, 18th April, 1946.

6. Power to make deductions.

When the sum standing to the credit of any subscriber or depositor in any Government or Railway Provident Fund which is a contributory Provident Fund becomes payable, there may, if the authority [a][specified in this behalf in the rules of the Fund] so directs, be deducted therefrom and paid to [b][Government or the Railway Administration, as the case may be,]—

(a) any amount due under a liability incurred by the subscriber or depositor to [b][Government or the Railway Administration], but not exceeding in any case the total amount of any contributions credited to the account of the subscriber or depositor and of any interest or increment which has accrued on such contributions; or

(b) where the subscriber or depositor has been dismissed from [c][his employment] for any reasons specified in this behalf in the rules of the Fund, or where he has resigned such employment within five years of the com-

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Section 5 — Note 1 *(contd.)*

the life-time of the subscriber defeats the nomination.)

[**But see** 1950 Mad 210 (210) [A I R V 37 C 91] (DB). (Case before amendment of 1946 — Subscriber to fund nominating his wife — Wife predeceasing him — Money deposited in Fund passes to wife's heir.)]

[14] When the case does not come within S. 3 (2) prima facie the nominee is entitled to preference over other dependants. 1945 Cal 384 (385) [AIR V 32] (DB).

[15] Subscriber nominating wife as sole nominee—Subsequently marrying second wife who bore him two children—No fresh nomination made—As between nominee and second wife's sons the nominee was held entitled to money standing to the credit of the subscriber at his death. 1947 Cal 176 (179) [A I R V 34 C 51] : ILR (1947) 1 Cal 160 (DB).

[16] According to rules of provident fund a nomination ceasing to subsist on the marriage or remarriage of subscriber in the case of a person who is not a Hindu, Muhammadan or Buddhist—On his death the widow only takes and not the nominee. 1946 Bom 138 (141, 142) [AIR V 33 C 31].

[17] Government servant subscriber to General Provident Fund — Wife quarrelling with him and living separately till his death without reconciliation—She does not cease to be a member of his family so as to enable him to nominate other persons to receive the money to his credit in the fund. 1947 Mad 96 (97) [A I R V 34 C 44] : ILR (1947) Mad 387 (DB).

[18] Provident fund and gratuity do not form part of a deceased estate. 1938 Sind 160 (161) [A I R V 25] ✣ 1939 Cal 642 (644) [AIR V 26].

[**But see** 1928 Lah 773 (774) [A I R V 15]. (Fund forms part of the undisposed of estate of deceased.)]

Section 6 — Note 1

[1] District Board servant whose appeal against dismissal rejected — District Board seeking to forfeit their portion of the contribution to the Provident fund — *Held* District Board was debarred by S. 6 (b) of the Provident Funds Act otherwise from withholding its contribution to the Provident Fund. 1946 All 234 (241) [A I R V 33 C 51] : I L R (1946) All 21 (FB).

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mencement thereof, the whole or any part of the amount of any such contributions, interest and increment.

[a] *Substituted* for "by which the Fund has been constituted" by the Provident Funds (Amendment) Act, 1925 (XXVIII of 1925), S. 3. [b] *Substituted* for "that authority", *ibid*. [c] *Substituted* for "the employment of that authority", *ibid*.

7. Protection for acts done in good faith.

No suit or other legal proceeding shall lie against any person in respect of anything which is in good faith done or intended to be done under this Act.

8. Power to apply the Act to the Provident Fund.

[a][*1*.] The [b][appropriate Government] may, by notification in the Official Gazette, direct that the provisions of this Act shall apply to any Provident Fund established for the benefit of its employees by any local authority[c] within the meaning of the Local Authorities Loans Act, 1914, and, on the making of such declaration, this Act shall apply accordingly, as if such Provident Fund were a Government Provident Fund and such local authority were the Government.

[d][*(2)* The [e][appropriate Government] may, by notification in the Official Gazette, direct that the provisions of this Act shall apply to any Provident Fund established for the benefit of the employees of any of the institutions specified in the Schedule, or of any group of such institutions, and, on the making of such declaration, this Act shall apply accordingly, as if such Provident Fund were a Government Provident Fund and the authority having custody of the Fund were the Government :

Provided that section 6 shall apply as if the authority making the contributions referred to in that section were the Government.

(3) The [e][appropriate Government] may, by notification in the Official Gazette, add to the Schedule the name of any public institution it may deem fit, and any such addition shall take effect as if it had been made by this Act.]

[f][*(4)* In this section "the appropriate Government" means—

(a) in relation to a cantonment authority, a port authority for a major port, and any institution which, or the objects of which, appear to the Central Government to fall within List I in the Seventh Schedule to [g][the Constitution], the Central Government ; and

(b) in other cases, the State Government.

Explanation.—"The State Government" in relation to an institution registered under the Societies Registration Act, 1860, means the State Government of the State in which the society is registered.]

[a] The original S. 8 was *re-numbered* as sub-section *(1)* of that section by the Provident Funds (Amendment) Act, 1930 (I of 1930), S. 3. [b] *Substituted* for "Local Government" by A. O., 1937. [c] *See* section 2 of that Act. [d] *Inserted* by Act I of 1930, S. 3. [e] *Substituted* for "Governor-General in Council" by A.O., 1937. [f] *Inserted* by A.O., 1937. [g] *Substituted* for "the Government of India Act, 1935" by A.L.O., 1950.

Section 7 — Note 1

[1] Though the words "good faith" bear a liberal definition in the General Clauses Act, payments made in contravention of Provident Funds Act are not protected under all the circumstances and the definition contained in the former Act does not entitle a trustee or holder of fund to pay anybody without proper enquiry. 1937 Cal 314 (318, 319) [A I R V 24] (DB). (Railway Company, with knowledge of claim by a nominee, and after stating that they would hold the money till the issues in the proceedings commenced by nominee are terminated, paying it off to the widow of the subscriber was held not to have done so bona fide.)

[2] Even if the payment is made without due care and caution still if it is made 'honestly' it will be payment in 'good faith'. 1928 Mad 484 (484) [AIR V 15].

[3] Section 7 affords protection to officers acting bona fide — Suit against Govt. for sum which plaintiff considers is due to him under rules as special contribution to his Provident fund is not within ambit of S. 7. 1955 Assam 17 (20) [(S) A I R V 42 C 6] : I L R (1954) 6 Assam 383 (DB).

Section 8 — Note 1

[1] Act does not apply to mutual Benefit Fund or to share capital in Co-operative Credit Societies. 1939 Mad 485 (486) [A I R V 26].

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9. Savings as to estates of soldiers.

Nothing in section 4 or section 5 shall apply to money belonging to any estate for the purpose of the administration of which the Regimental Debts Act, 1893,[a] applies.

[a] The Regimental Debts Act, 1893 (56 & 57 Vict., c. 5) regulated the payment of regimental debts and collection and disposal of the effects of persons governed by the English Military Law, in case of death, insanity and the like. It extended to India but did not apply to "any native of India within the meaning of Indian Military Law" (section 25 of that Act). The said Act is now repealed by the British Statutes (Application to India) Repeal Act, 1960 (LVII of 1960).

10. Repeals. *[Repealed by the Repealing Act, 1927 (12 of 1927), S. 2 and Sch.]*

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[a]THE SCHEDULE

LIST OF INSTITUTIONS

[*See* sub-section (2) of section 8.]

[NOTE.—Items *added* from time to time by notifications issued under S. 8 up to and on 11-2-1961 have been incorporated in this list.]

1. The Pasteur Institute of India, Kasauli.
2. The Calcutta Improvement Tribunal.
3. A Court of Wards.
4. The Indian Central Cotton Committee.
5. The Trustees for the European Hospital for mental diseases at Ranchi.
6. The National Association for supplying female medical aid to the women of India.
7. A College affiliated to a University established by Statute.]
8. The Indian Coal Grading Board.
9. The Lady Minto's Indian Nursing Association.
10. The Indian Red Cross Society.
11. The Indian Lac Cess Committee.
12. The Madras State Branch of the Indian Red Cross Society.
13. The Imperial Bank of India.
14. The Bihar and Orissa Medical Examination Board.

[b][* * * * *]

16. The Institution created for the control of emigrant labour under the Tea Districts Emigrant Labour Act, 1932.
17. The Bombay Board of Film Censors.
18. The Calcutta University.
19. The Central Board of Irrigation.
20. The Reserve Bank of India.

[c][* * * * *]

22. The Banaras Hindu University.
23. The Medical Council of India.
24. The Indian Coffee Cess Committee.
25. The Inter-State Board for Anglo-Indian and European Education.
26. The Indian Research Fund Association.
27. The Delhi Joint Water and Sewage Board.
28. The Tuberculosis Association of India.
29. The Coal Mines Stowing Board.
30. A Group Committee of the Sleeper Pool of Indian Railways.
31. The Indian Coffee Market Expansion Board.
32. The Coal Mines Rescue Stations Committee.
33. The Indian Coffee Board.

[d][* * * * *]

35. The Indian Rubber Board.
36. The Indian Central Sugarcane Committee.
37. All-India Cattle Show Committee.
38. The Coal Mines Labour Welfare Fund.
39. The Indian Coconut Committee.
40. The Indian Central Tobacco Committee.
41. The Employees' State Insurance Corporation.
42. The Indian Tea Licensing Committee.
43. The Coal Board established under the Coal Mines (Conservation and Safety) Act, 1952.
44. The Delhi Road Transport Authority, New Delhi.
45. The Central Tea Board.
46. The Indian Central Oilseeds Committee.
47. The Central Institute of Research in Indigeous Systems of Medicine, Jamnagar.
48. The Indian Standards Institution, Delhi].

Hindu College, Delhi.
Ramjas College, Delhi.
Industrial Finance Corporation of India.
The College of Commerce, Delhi.
The Lady Irwin College for Women, New Delhi Vishwabharati:University.
The Dental Council of India.
The Hyderabad State Financial Corporation.
The Bombay State Financial Corporation.
The Saurashtra Financial Corporation.
The Bombay State Road Transport Corporation.
The Asbestos Cement Sheets Industry.
The Industrial and Power Alcohol Industry.
The Damodar Valley Corporation.
The Delhi State Electricity Board.
The State Bank of Hyderabad, constituted by the Hyderabad State Bank Act XIX of 1350 Fasli and renamed as such by the State Bank of Hyderabad Act, 1959 (LXXIX of 1956).
Kalavati Saran Children's Hospital, New Delhi.
The Indian Central Account Committee.
The Tea Board.
Indian Institute of Public Administration, New Delhi.
The School of Planning and Architecture, New Delhi.
Lady Shri Ram College for Women, New Delhi.
The Oil and Natural Gas Commission.
U. P. Financial Corporation, established (incorporated) under the State Financial Corporation Act, 1951 (LXIII of 1951).
[West Bengal State Electricity Board.
The Cochin Aided Schools Provident Fund.
The Travancore Devaswom Board.]

[a] The Schedule containing items 1 to 7 was *added* by the Provident Funds (Amendment) Act, 1930 (I of 1930), S. 4. [b] Item "15. The Punjab University" was *omitted* by A. C. A. O., 1948 [23-3-1948]. [c] Item "21. The Trustees of the Victoria Memorial Park, Rangoon" was *omitted*, *ibid*. [d] Item "34, The N. W. F. Provincial Branch of the Indian Red Cross Society" was *omitted*, *ibid*. [e] These items were *added* by West Bengal and Kerala States respectively.

[THE] PROVINCIAL INSOLVENCY ACT, 1920

(ACT V of 1920)

[The Act printed here is as on 1-3-1961.]

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STATEMENT OF OBJECTS AND REASONS

"The object of this Bill is to amend the Provincial Insolvency Act, 1907 (III of 1907), which contains the law of Insolvency in force in British India outside the Presidency-towns and the town of Rangoon. The Act came into force on the 1st January, 1908, and since then with the exception of a few unimportant amendments made in 1914, it has not been amended. Ten years' experience of the practical working of the Act has brought to light many defects which have from time to time provoked criticism from most of the Local Governments and not a few of the Judges who have had to administer its provisions. Numerous suggestions for the amendment of the Act on various points have also been received from time to time from the commercial communities and members of the legal profession.

The chief indictment of the Act is that it lends itself to the protection of fraudulent debtors, that it subjects an undischarged

insolvent to little or no practical inconvenience, and that its provisions for the punishment of fraudulent insolvents are not effective in practice.

One of the principal defects in the existing law arises from the fact that the conduct of debtor in many cases never comes under the scrutiny of the Court. The stage at which the misconduct of the debtor should come before the Court and at which most of the provisions affecting a fraudulent insolvent would operate, is when he applies for his discharge. But there is nothing in the Act which requires him to apply for his discharge, and in practice such applications are rare. To remedy this unsatisfactory state of the law, it is proposed to include in the Act provisions which will compel an insolvent to apply to the Court within a prescribed period for his discharge or to lose the protection afforded by the insolvency proceedings. The Court will have power to extend the prescribed period and, when the adjudication order is annulled owing to the failure of the insolvent to apply in time for his discharge, a fresh petition on the same facts will be barred. These proposed changes are affected by the proviso to proposed new section 6 C in clause 4 of the Bill, new sub-section *(1A) (ii)* in clause 10, the amendments in clause 11 (1), (3) and (4), and the amendments in clause 20.

It is now settled law that under the Act, as it stands, it is not open to the Court to reject the petition of a debtor on the ground that the application is an abuse of the law. While admitting that the object of an insolvency law is to deal with all insolvents, whether honest or not, and that no applicant who is in fact insolvent should be liable to have his petition dismissed in limine, it seems reasonable that the Court should have discretion as to the amount of protection to be afforded to a petitioning debtor in each individual case, the debtor being required to show that he is in fact unable to pay his debts, and that he has not concealed his property. These changes in the existing law are effected by the amendment in clauses 9 and 10 (2) and by clause 12, which inserts a new section 16A as to protection orders on the lines of section 25 of the Presidency-Towns Insolvency Act, 1909.

A further defect in the Act is the absence of provisions sufficiently defining the power of Courts to decide questions of law and fact arising in insolvency proceedings. In certain cases, e.g., those mentioned in sections 18 (3), 36 and 37, the Court is empowered to pass orders, and section 47 defines the general powers of the Court in regard to proceedings under the Act, but nowhere is a general power conferred on the Court to deal with and decide important questions of law and fact (e. g., a question of title to property) which may arise in the insolvency proceedings. This question has recently been the subject of conflicting decisions in the Allahabad and the Calcutta High Courts. In *Nilmoni Choudhury* v. *Durga Charan Choudhury* (22 C. W. N. 704), the Calcutta High Court dissenting from the Allahabad High Court held that the Insolvency Court has no such power, and that a question of title to the property should be tried in a separate suit. It is obviously desirable that this conflict between the two High Courts should be terminated, and having regard to the prevalence of *benami* transactions in India and the importance of arming Courts with adequate powers for the speedy realisation of assets in the interests of creditors, the Government of India are of opinion that the Court should be given full power to decide all questions raised in insolvency proceedings. Clause 3 of the Bill accordingly enacts a provision on the lines of section 7 of the Presidency-Towns Insolvency Act.

Proceedings instituted against fraudulent insolvents are frequently infructuous. This is largely due to the lack of precision in the Act as to the procedure to be adopted by the Court which desires to take action. The wording of sub-section *(2)* of section 43 is unduly vague, regard being had to the fact that it constitutes a criminal offence, and experience has shown that it frequently creates difficulties. It is proposed that the penal provisions of existing section 43 should be amended on the lines of section 103 of the Presidency-Towns Insolvency Act, and that the procedure to be followed on a charge should be defined on the lines of section 104 of that Act. It is proposed to embody these provisions in the two separate sections 43-A and 43-B inserted by clause 19 of the Bill, which also inserts a new section 43-C containing provisions similar to those of section 105 of the Presidency-Towns Insolvency Act. It seems desirable to make it clear that a dishonest insolvent who has been guilty of an offence under the Act can be proceeded against even after he has obtained his discharge, or after a composition submitted by him has been accepted.

A summary administration of petty insolvencies is, now largely governed by rules made by the High Courts under section 51 (2) (c) of the Act, but it seems desirable that the Act itself should contain more detailed provisions than at present, and that further simplification of procedure should be effected. It is proposed therefore that, in addition to any further modifications to be made by rules, section 48 should contain certain definite provisions, and it is thought that, if these changes are made, it would be well to confine summary administration to cases where the assets do not exceed Rs. 200 instead of the existing limit of Rs. 500, and to reserve a discretion to the Court to direct the ordinary procedure to be followed in cases where it thinks such a course desirable.

These amendments will, it is hoped, go far to check the abuses rendered possible by the defects in the existing law....."

—Gaz. of Ind., 1918, Part V, page 63.

PREVIOUS LEGISLATION

Provincial Insolvency Act, III of 1907—Repealed by the Provincial Insolvency Act, V of 1920.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937; A. C. A. O., 1948; 3 A. L. O., 1956.
—Amended by Acts IX of 1926; XXXIV of 1926; XXXIX of 1926; XI of 1927; X of 1930; X of 1935; XXXIV of 1939; XXV of 1948; III of 1950.
—Amended in its application to—
(a) Madhya Pradesh by C. P. Act II of 1936; M. P. Act XXIII of 1958.
(b) Madras by Mad. Act VIII of 1953.
(c) Maharashtra by Bom. Acts XV of 1939; LXVIII of 1948.
(d) Punjab by Punj. Acts VII of 1934; III of 1939.
(e) Uttar Pradesh by U. P. Act XXIV of 1954.
—Extended by Acts LIX of 1949; XXX of 1950.
—Extended in its application to—
a) Bombay by Bom. Act IV of 1950.
(b) Madhya Pradesh by M. P. Act XXIII of 1958.
(c) Madras by Mad. Act XXII of 1957.
(d) Punjab by Punj. Acts V of 1950; XXX of 1958.
—Repealed in part by Acts XXXVIII of 1920; XII of 1927; VIII of 1930.
—Repealed in its application to areas mentioned in Sch. A to Bom. Act XVII of 1945 : *See* S. 4 (1) of that Act.

ABBREVIATIONS

In this Act, whenever mentioned under the text of the sections of the Act—
P. I., 1907 means Provincial Insolvency Act, 1907.
P. T. I., 1909 means Presidency-Towns Insolvency Act, 1909.

[THE] PROVINCIAL INSOLVENCY ACT, 1920
(ACT V OF 1920)[a]

[25th February, 1920].

An Act to consolidate and amend the Law relating to Insolvency [b][* *] *as administered by Courts having jurisdiction outside the Presidency-towns* [c][* *].

WHEREAS it is expedient to consolidate and amend the law relating to insolvency [b][* *] as administered by Courts having jurisdiction outside the Presidency-towns [c][* *] ; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. India, 1918, Pt. V, p. 63; for Report of Select Committee, *see ibid*, 1919, Pt. V, p. 119 and *ibid*, 1920, Pt. V p. 9.

This Act has been extended to the new Provinces and merged States by the Merged States (Laws) Act, 1949 (LIX of 1949), S. 3 [1-1-1950] and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (XXX of 1950), S. 3 [16-4-1950].

Preamble — Note 1

[1] In a technical sense, it means the condition of standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors ; the law also generally allows the debtor to apply for the same administration. The justification for such proceeding by a creditor generally consists in an act of bankrupcty by the debtor, the conditions of which are defined and prescribed by the statute law. 1937 P C 95 (98) [AIR V 24].

[2] The Insolvency Laws are devised for the protection of distressed debtors and not for the purpose of enabling reckless or imprudent persons to incur with relative impunity obligations which they know they cannot perform. 1936 Rang 412 (413) [AIR V 23].

[3] The object of the Insolvency Act is to make all the property of the insolvent divisible amongst all his creditors. 1934 Pat 514 (515) [AIR V 21] (DB).

[4] The law of insolvency should be administered broadly with the special consideration, not for the particular protection of the insolvent where an act of insolvency has been clearly committed, but for the general protection of the creditors and the trading public. 1933 Rang 363 (370) [AIR V 20] : 12 Rang 64 (DB).

[5] The insolvency law has a twofold purpose to serve. One is to give relief to the debtor from the harassment of his creditors whose claims he is unable to meet and the other is to prevent a scramble among the creditors to get at the assets of the debtor promoting fraud and collusion between the creditor and debtor and facilitating the vicious principle of each one for himself and devil take the hindmost and provide a machinery by which all creditors are equitably satisfied. 1956 Mad 157 (Pr 9) [AIR V 43 C 44]. (The preference to be shown to the diligent creditor cannot be carried farther

This Act has been extended to the States merged in the States of Bombay by Bom. Act IV of 1950 and Punjab by Punj. Act V of 1950.

It has been extended to all the other regions of the State of Madhya Pradesh as it was in force in the Mahakoshal region by M. P. Act XXIII of 1958, S. 3 (1).

The Act as in force in the State of Madras has been extended to the transferred territory, that is, the Kanyakumari district and the Shencottah taluk of the Tirunelveli district by Mad. Act XXII of 1957, S. 3 [18-12-1957].

The Act as amended by Punj. Act III of 1939 as in force in the Punjab is extended to the territories comprised in the State of Pepsu by Punj. Act XXX of 1958, S. 4 (1) [7-11-1958].

This Act has ceased to apply to or to be in force in the areas specified in parts II, III and IV of Sch. A to Bom. Act XVII of 1945—*See* S. 4 (1) & Sch. D of that Act.

[b] The words "in the Provinces of India" were *omitted* by A. L. O., 1950. [c] The words "and the town of Karachi" were *repealed* by A C. A. O., 1948.

1. Short title and extent.

(1) This Act may be called the Provincial Insolvency Act, 1920.

(2) It extends to [a][the whole of India except [b][the territories which, immediately before the 1st November, 1956, were comprised in Part B States] and] the Scheduled Districts.

[a] *Substituted* for "all the Provinces of India except" by A. L. O., 1950 [26-1-1950].
[b] *Substituted* for "Part B States" by 3 A. L. O., 1956 [1-11-1956].

STATE AMENDMENT

MADHYA PRADESH

In its application to the State of Madhya Pradesh, in sub-section (2) of S. 1 after the words "Part B States" *add* the words "other than the Madhya Bharat and Sironj regions of the State of Madhya Pradesh."—M. P. Act XXIII of 1958, S. 3 & Sch., Part A, item 18.

Preamble — Note 1 *(contd.)*

than the advantages provided for under the Provincial Insolvency Act.)

[6] In construing a particular Insolvency Act, the Courts must confine itself to its express provisions and should not be guided by considerations of what the creditor could do under the provisions of the other laws. Cases under provisions of other Acts depend on different considerations and these decisions are likely to mislead a Court which has to construe a particular Insolvency Act. 1942 Cal 533 (536) [AIR V 29] : ILR (1942) 2 Cal 413 (DB).

[7] The provisions of the Provincial Insolvency Act must be construed strictly inasmuch as the status of the subject is sought to be affected thereby. 1939 Cal 313 (316) [AIR V 26] : ILR (1939) 1 Cal 425 (DB).

[8] The correct method of interpretation is to interpret the Act as it stands. 1931 Bom 50 (53) [AIR V 18] : 55 Bom 110 (DB).

[9] The insolvency law is mainly an administrative or adjective law, a law of machinery to bring about certain results, namely the satisfaction of the insolvent's debts. The provisions contained in the Act are therefore of a general character. 1931 All 162 (168) [AIR V 18] : 53 All 239 (FB).

[10] The Act is a self-contained Act in the matter of 'limitation' with respect to proceedings contemplated by it and therefore S. 29 (2) Limitation Act has no application to that Act. 1942 All 429 (432, 433) [AIR V 29] : ILR (1943) All 84 (FB)✣ 1927 Rang 263 (264) [AIR V 14] : 5 Rang 384 (DB).

[11] The provisions of the new Act, which have substantially altered the pre-existing law, cannot be given retrospective operation so as to take away the right enjoyed by the debtor under the Act of 1907, if the latter was in force when the application was made. 1928 Cal 221 (222) [AIR V 15] (DB)✣ 1932 Sind 71 (72, 73) [AIR V 19] : 26 Sind L R 204 (DB).

[12] There is no authority for holding that in spite of the passing of the Act V of 1920, all proceedings on petitions filed under Act III of 1907 should continue to be dealt with under the provisions of the old Act. 1924 Mad 368 (368) [AIR V 11]✣ 1916 Lah 360 (360) [AIR V 3].

[13] Petition filed before Act came into force—Adjudication after the Act—Mere filing of petition does not create vested rights. 1926 Mad 123 (124) [AIR V 13].

[14] The Provincial Insolvency Act is nothing more than a copy of the Bankruptcy Act of England regarding notice of suspension of payment and hence decisions on this provision in English Act are authorities for Indian Courts. 1933 Pat 461 (463) [AIR V 20]: 13 Pat 78 (DB).

[15] The basis of the Indian insolvency legislation is the English law of bankruptcy. In India, as in England, the law relating to bankruptcy is essentially the creation of statute. In both countries the basis of the law is the same viz., the Roman principle of cessio bonorum, or the surrender by the debtor of all his goods for the benefit of his creditors jn return for immunity from process. It is, therefore, not only permissible but also of great advantage to see what the English law is on a particular point which is not clarified by the provisions of the statute law in India as it is today. 1947 All 383 (Pr 14) [AIR V 34 C 144] : ILR (1947) All 624 (DB).

[16] Rulings based on S. 52 (2) (b) of the Presidency-Towns Insolvency Act can be

2. Definitions.

(1) In this Act, unless there is anything repugnant in the subject or context,—

(a) "creditor" includes a decree-holder, "debt" includes a judgment-debt, and "debtor" includes a judgment-debtor;

(b) "District Court" means the principal Civil Court of original jurisdiction in any area outside the local limits for the time being of the Presidency-towns [a][* * * *];

(c) "prescribed" means prescribed by rules made under this Act;

(d) "property" includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit;

(e) "secured creditor" means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor; and

(f) "transfer of property" includes a transfer of any interest in property and the creation of any charge upon property.

(2) Words and expressions used in this Act and defined in the Code of Civil Procedure, 1908, and not hereinbefore defined shall have the same meanings as those respectively attributed to them by the said Code.

[P. I., 1907—S. 2; P. T. I., 1909—S. 2.]

[a] The last portion of this clause was as follows —

"the town of Rangoon and the limits of the ordinary original civil jurisdiction of the Court of the Judicial Commissioner of Sind as defined in S. 2 of the Presidency-towns Insolvency Act, 1909."

The first four words were *omitted* by A. O., 1937 and the remainder as amended by Act 34 of 1926, S. 2 and Sch. was *omitted* by A. C. A. O., 1948.

Preamble — Note 1 *(contd.)*
applied. 1931 All 162 (173) [AIR V 18] : 53 All 239 (FB).

[17] Person made insolvent under Punjab Laws Act and order of discharge not obtained—Fresh application for adjudication under Provincial Insolvency Act is not barred. 1936 Lah 407 (408) [AIR V 23].

SECTION 2 — SYNOPSIS

1. Creditor.
2. Debtor.
3. Property.
4. Secured creditor.
5. Transfer of property.
6. Sub-section (2).

1. Creditor. — [1] Where sole proprietor of firm sells his business bona fide to another firm, he becomes creditor of other firm. 1936 Lah 760 (761) [AIR V 23] (DB).

[2] Word "creditor" is correlative to debtor and signifies person to whom debt, i. e., liquidated or specific sum of money is due. 1947 All 383 (Pr 12) [AIR V 34 C 144] : ILR (1947) All 624 (DB).

[3] The holder of a negotiable instrument in respect of which he obtained a decree is a creditor within the meaning of S. 2 (1)(a) though the promissory note is endorsed in his favour for collection. 1957 Andh Pra 535 (Pr 8) [AIR V 44 C 181].

2. Debtor. — [1] Under the Hindu law the heirs even if they be sons, grandsons or great grandsons, are not personally liable for the debts of the deceased. Hence sons are not debtors in respect of their deceased father's debts. ('38) ILR (1938) 1 Cal 132 (135) (DB).

[2] A debtor and an insolvent are, strictly speaking, different persons. An insolvent under the Insolvency Act means a person against whom an order of adjudication has been made and a debtor is a person who has made himself amenable to adjudication but has not yet been adjudicated. 1938 Mad 449 (453) [AIR V 25]: ILR (1938) Mad 1063 (DB).

3. Property.—[1] The definition of "property" in S. 2 (1) (d), is modelled on S. 60 (1), C. P. Code. 1950 Cal 487 (Pr 8) [AIR V 37 C 183].

[2] The definition of the words "Property" in the Act is not exhaustive. 1937 Pat 185 (187) [AIR V 24] : 16 Pat 60 (FB) ✠ 1949 All 433 (Prs 8, 10) [AIR V 36 C 164] : ILR (1949) All 746 (DB) ✠ 1947 Pat 7 (10) [AIR V 34 C 3] (DB) ✠ 1933 All 841 (842) [AIR V 20] (DB).

[3] "Property" is a generic term for all that a person has dominion over. The definition in S. 2 (d) is not exhaustive. Test to determine what is property is: whether the insolvent has a disposing power over the interest of the property or not. 1958 Andh Pra 120 (Pr 6) [AIR V 45 C 39] : 1958 Cri L Jour 159.

[4] It cannot be said that the 'property' mentioned in the Insolvency Act must be such

Section 2 — Note 3 *(contd.)*

that the insolvent has an absolute and unconditional present disposing power over the same. The word 'property' is used in the widest possible sense which includes even property which may belong to or is vested in another but over which the insolvent has a disposing power which he may exercise for his own benefit. This part of the definition of 'property' has reference obviously to powers of appointment and the power of a Hindu father who is the managing member of a joint family. The fact that on the date of the adjudication the insolvent could not transfer the property does not militate against the view that he has a vested interest in the same. 1956 S C 336 (Pr 21) [(S) AIR V 43 C 60] : 1956 S C R 100 : 35 Pat 359. (AIR 1951 Pat 488, *Reversed.*)

[5] The definition was inserted only to emphasise the fact that certain kinds of property, which, in ordinary parlance, may not be regarded as "property" of the insolvent are to be treated as 'property' for the purpose of the Insolvency Act. 1937 Pat 185 (187) [AIR V 24] : 16 Pat 60 (FB) ✣ 1934 Oudh 1 (4) [AIR V 21] : 9 Luck 304 (FB).

[6] The definition of "property" includes all kinds of properties over which a person has disposing power. 1933 All 841 (842) [AIR V 20] (DB) ✣ 1947 Pat 7 (10) [AIR V 34 C 3] (DB).

[7] Unless the insolvent has got a present disposing power over a property it will not be considered to be one coming within this definition. 1950 Cal 487 (Pr 8) [AIR V 37 C 183].

[8] Property which a person may dispose of for his own benefit includes ancestral property. 1925 Pat 127 (128) [AIR V 12] : 3 Pat 857 (DB).

[9] An interest in joint family property is property. 1933 All 841 (842) [AIR V 20] (DB) ✣ ('50) 3 Sau L R 52 (53) (DB). (The fact that the property is situated outside the jurisdiction of the Court would not affect the vesting of it.)

[10] Insolvent's undivided share in property of joint family is 'property'. 1923 Oudh 154 (154) [AIR V 10] : 26 Oudh Cas 384 (DB).

[**But see** 1918 Oudh 303 (304) [AIR V 5].]

[11] The son's share in the joint family property is property within S. 2. 1920 Lah 269 (270) [AIR V 7] : 1919 Pun Re No. 158 (DB).

[12] The word "property" is comprehensive enough to include the right which a Hindu father has of bringing to sale his sons' interest in the joint property to pay his own legitimate debts, and such power is property within S. 2 (1) (d). 1937 Pat 185 (188) [AIR V 24] : 16 Pat 60 (FB) ✣ 1935 Mad 255 (256) [AIR V 22] (DB) ✣ 1931 Bom 50 (51) [AIR V 18] : 55 Bom 110 (DB) ✣ 1930 Nag 215 (217) [AIR V 17] ✣ 1926 Mad 994 (1000) [AIR V 13] : 49 Mad 849 (FB) ✣ 1923 Sind 20 (24) [AIR V 10] : 16 Sind L R 226.

[**But see** ('47) 1947-2 Mad L Jour 507 (508) (DB). (Father in joint Hindu family composed of himself and his sons, becoming insolvent—Official Receiver selling some immovable property purporting thereby to sell the entire interest in the property — Sale does not affect the rights, title and interest of his sons—Note submitted not good law in view of S. 28A—Ed.).]

[13] A Hindu father has the power or capacity to dispose of for his own benefit the interest of his sons in the joint family property and therefore by the operation of S. 28A (which was inserted by the Amending Act 25 of 1948) such capacity may be exercised by the receiver, upon the insolvency of the father. But when the manager of a joint Hindu Family, who is not the father, exercises his power of disposing of property for the benefit of the joint family for purposes of legal necessity he does not exercise the power for his own benefit. Therefore such a capacity is not comprised in the expression "property" in S. 28A and hence it does not vest in the receiver. 1959 Bom 229 (Prs 5, 8, 9, 10, 11) [AIR V 46 C 69] : ILR (1959) Bom 13 (DB).

[*See also* 1952 Mad 27 (Pr 3) [AIR V 39] ✣ 1942 Mad 682 (683) [AIR V 29] : ILR (1943) Mad 83 (FB).]

[**But see** 1940 Sind 141 (142) [AIR V 27] : ILR (1940) Kar 375 (DB).]

[14] Right to claim damages for breach of contract is property within meaning of S. 2 (d) — Official Receiver is entitled to benefits of contract between insolvent and another — Right to sue for damages for its breach is not mere right to sue within meaning of S. 60 (e), Civil P. C. — Such right therefore vests in Official Receiver. 1949 All 433 (Prs 8, 10, 14, 18, 19) [AIR V 36 C 164] : ILR (1949) All 746 (DB). (Observations in AIR 1937 All 317 held obiter.)

[**See however** 1937 All 317 (320) [AIR V 24] (DB).]

[15] Trust property in the hands of an insolvent cannot be treated as part of his estate. 1934 Lah 683 (684) [AIR V 21].

[16] A power that can be only exercised for the joint benefit of the bankrupt and another is not a power that can be exercised for his own benefit within S. 2 (1) (d). 1942 Cal 533 (536) [A I R V 29] : I L R (1942) 2 Cal 413 (DB).

[17] A right of suit is property. 1937 Rang 165 (169) [AIR V 24] (DB).

[18] A partner's right to sue for accounts of dissolved partnership is property. 1925 Sind 72 (74) [AIR V 12].

[19] The word "property" is inclusive of claims in the nature of damages which have accrued due prior to the date of insolvency except such of them as arise from bodily or mental suffering or personal inconvenience of the bankrupt or from injury to his person or reputation. 1925 Sind 159 (162) [AIR V 12] : 19 Sind L R 286.

[20] Insolvent karnavan giving up rights in property for liquidated sum of Rs. 75/- per month and residence and Devaswam perquisites—Not only accruing allowance but also accumulated arrears given up—What is transferred by surrender deed is the property of the insolvent within meaning of S. 2 (d) and not merely right to future maintenance. 1955 NUC (Mad) 3144 [AIR V 42].

Section 2 — Note 3 *(contd.)*

[21] Money standing to the credit of insolvent in Provident Fund vests in Official Receiver even where there was a declaration about the nominee who was to receive the amount after the death of the insolvent and even though the management of the fund vested in the trustees. 1956 S C 336 (Prs 14, 15, 20, 25) [(S) AIR V 43 C 60] : 1956 S C R 100 : 35 Pat 359. (AIR 1951 Pat 488, *Reversed.*)

[22] Where the insolvent has a lease-hold interest in a certain land which he possessed, he having an absolute disposing power, it falls within the definition of the word "property". If he transfers this right after the filing of the insolvency petition and before he is adjudged an insolvent with a view to keep it away from the list of assets which has to be placed at the disposal of the receiver, he commits an offence as provided in S. 69 (a) and (c) (ii). 1958 Andh Pra 120 (Pr 6) [AIR V 45 C 39] : 1958 Cri L Jour 159.

4. Secured creditor.—[1] The word "holding" in S. 2 (1) (e) being in the present tense necessarily connotes the idea of a mortgage, charge or lien which exists and excludes that of the mortgage, charge or lien which is to come into existence at some future time. 1937 Lah 494 (495) [AIR V 24] (DB).

[2] A secured creditor is one holding a mortgage, charge, or lien upon the property of the debtor or any part thereof as security for the debt due to him. 1915 All 279 (280) [AIR V 2] : 37 All 383 (DB).

[3] Definition of "secured creditor" is to be understood as confined to his capacity qua the secured debt and not comprehending his capacity as regards debts for which there is no security. 1954 Trav Co 419 (Pr 9) [AIR V 41 C 145] : ILR (1954) Trav Co 93 (DB).

[4] Compromise instalment decree in mortgage suit—Mortgaged property to remain under attachment till payment of decree — Decree-holder is secured creditor — Interim receiver in subsequent insolvency of mortgagor cannot claim possession of mortgage property from receiver in execution. 1959 Madh Pra 420 (Prs 4, 5) [AIR V 46 C 147].

[5] A creditor to whom the insolvent debtor owes secured as well unsecured debts cannot be held to be a secured creditor qua the unsecured debts and is entitled to file a petition for insolvency without valuation of the security or its abandonment as contemplated by S. 9 (2). 1954 Trav Co 419 (Prs 8, 9) [AIR V 41 C 145] : ILR (1954) Trav Co 93 (DB).

[6] A simple mortgagee is just as much a secured creditor as mortgagee with possession. 1927 Lah 904 (904) [AIR V 14].

[7] A mortgagee who has obtained a decree on his mortgage does not thereby cease to be a secured creditor. 1931 All 224 (225) [AIR V 18] (DB).

[8] Where a person to whom the goods of a shop had been mortgaged by way of security for a loan sued for the money and obtained a decree which directed that the defendant had a right to sell the goods of the shop which had been attached, but in case of misappropriation, the plaintiff would be entitled to recover his decree amount at once — *Held*, that though the decree was not very clearly worded, the decree-holder was a secured creditor. 1932 All 550 (550) [AIR V 19] (DB).

[9-10] An attaching creditor cannot be called a secured creditor. 1933 Nag 229 (230) [AIR V 20] : 29 Nag L R 303 (DB) ✣ 1928 Nag 336 (337) [AIR V 15] ✣ 1937 Cal 517 (519) [AIR V 24] : ILR (1937) 2 Cal 675 (DB).

[11] Money deposited in bank for custody lent out at depositor's instance on pledge of ornaments—Pledge redeemed through bank at depositor's instance — Depositor is secured creditor of bank. 1927 All 598 (599) [AIR V 14] : 49 All 376.

[12] The mere fact that the receiver mentioned a certain person as secured creditor in a report submitted by him to the Court which was never approved by the Court, either expressly or by implication, does not mean that the Court approved of the Receiver's report that the person was a secured creditor. 1928 Lah 738 (739) [AIR V 15].

[13] Where a compromise on which a decree was passed contained a prohibition against alienation of the stock-in-trade of the judgment-debtor followed by a clause providing the penalty in case of alienation, namely, immediate execution of the decree on a question whether the decree-holder under such a decree was a secured creditor within the meaning of S. 2 of the Provincial Insolvency Act — *Held*, the stock-in-trade was not expressly made liable for the payment of the decretal amount and the compromise fell short of actually creating a charge on the stock-in-trade and that hence the decree-holder could not be declared a secured creditor. 1949 All 539 (Prs 3, 10, 12) [AIR V 36 C 196] : ILR (1949) All 790 (DB).

5. Transfer of property. — [1] Having regard to the definition of the expression "transfer of property" contained in S. 2 (f), there can be no real doubt that a partition of joint family property amounts to "transfer of property" which falls within the mischief contemplated by S. 53 of the Act. 1930 Lah 645 (647) [AIR V 17] (DB).

[2] The words "any transfer of property" used in S. 53 mean a transfer recognised by the general law. In order to determine what is transfer the Court must look to the substance and not to the form. 1955 N U C (Mad) 3144 [AIR V 42]. (Surrender deed executed by insolvent though clothed as relinquishment held amounted to transfer of property within S. 2 (1) (f).)

6. Sub-s. (2). — [1] In view of Ss. 2 (2) and 5 (1), in the matter of attachment and sale of insolvent's property, the provisions applicable under the Provincial Insolvency Act must be regarded as materially the same as those of the Civil P. C. 1960 Andh Pra 458 (Pr 3) [AIR V 47 C 150) (DB).

[2] *Quaere* : Whether the expression "the Court or Courts" in S. 80, Hyderabad Insolvency Act (8 of 1351F.) (corresponding to

PART I
CONSTITUTION AND POWERS OF COURT

3. Insolvency jurisdiction.

(1) The District Courts shall be the Courts having jurisdiction under this Act :

Provided that the State Government may, by notification in the Official Gazette, invest any Court subordinate to a District Court with jurisdiction in any class of cases, and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act.

(2) For the purposes of this Act, a Court of Small Causes shall be deemed to be subordinate to the District Court.

[P. I., 1907—S. 3]

Section 2 — Note 6 *(contd.)*

S. 77) bears the meaning assigned to it by S. 2 (2) or is there any repugnancy in the subject or context to give to that expression an inclusive or extended meaning. 1952 Hyd 80 (Pr 37) [A I R V 39] : I L R (1952) Hyd 196 (FB).

Section 3 — Note 1

[1] Section 3 (1) merely enacts that the ordinary jurisdiction in insolvency shall be in the District Courts. It does not exclude the extraordinary Civil Jurisdiction of the High Court. 1936 Lah 608 (609) [A I R V 23] : 17 Lah 582 (DB).

[2] Under the Insolvency Act, it is the Court of the District Judge which is the primary insolvency Court though provision is made for a subordinate judge to be made such a Court. 1937 Lah 861 (861) [AIR V 24] (DB) ✠ 1937 Mad 444 (446) [AIR V 24] : ILR (1937) Mad 565 (DB) ✠ 1924 Mad 398 (399) [A I R V 11] (DB).

[3] The object of the proviso to S. 3 (1) is to enable the Local Government, by conferring jurisdiction upon Subordinate Courts to relieve the District Court of the work arising under the Act. And in considering the section and the notification by Government the Court should give effect to that presumed object rather than put upon the words of the section a narrower construction. 1927 Bom 460 (461) [AIR V 14] : 51 Bom 809 (DB).

[4] Section is not inconsistent with S. 25, Manipur (Courts) Act—Subordinate Judge can be authorised to try insolvency cases. 1960 Manipur 53 (Pr 4) [AIR V 47 C 15]. (Manipur (Courts) Act (1955), S. 25).

[5] Under S. 24 of the General Clauses Act a notification issued under S. 3 would remain in force even under the new Act of 1920 as the section is re-enacted in the new Act. 1925 Cal 335 (335) [AIR V 12] (DB).

[6] It is the subordinate Court that is invested with jurisdiction by a notification under S. 3 and when so invested with jurisdiction it has got the same powers as the District Court, but there is no provision in S. 3 (1) which makes the Civil Judge the Court of principal civil jurisdiction when there is a District Judge for that area. No appeal therefore lies to the High Court against the orders of the Court so invested with jurisdiction. 1952 All 423 (Pr 2) [AIR V 39] (DB).

[7] Though the Assistant Judge is invested by notification under S. 3 (1) with jurisdiction under Act, he would still be Court subordinate to District Court —"Concurrent jurisdiction" in S. 3 (1) only means that both the Subordinate Judge and the District Court would possess jurisdiction under the Act—Appeal from order of Subordinate Judge so invested, does not lie to High Court but to the District Court. 1959 Bom 47 (Prs 2, 4) [A I R V 46 C 16] : ILR (1958) Bom 1115 (DB).

[8] It is permissible to the State Government under the Proviso to S. 3 (1) to restrict the jurisdiction of a Court Subordinate to the District Court by specifying the class of cases in which it will have jurisdiction. No doubt, after such investiture that Court will have jurisdiction concurrently with the District Court but this concurrent jurisdiction will only be limited to the class of cases which the notification authorised it to entertain. ('59) I L R (1959) Bom 194 (197). (Notification No. 1596-1212-XIX, dated 16-5-1938 limiting the jurisdiction of certain subordinate Court to entertain petitions in which the value of the debts alleged does not exceed Rs. 2,000 cannot be regarded as *ultra vires*.)

[9] Notification No. 37 issued under S. 3 (1) —Expression "value not exceeding fifteen thousand rupees" in notification refers to case in which debts of insolvent do not amount to over fifteen thousand rupees'— Jurisdiction of Court is to be determined according to amount of debts outstanding on date of petition and not according to amount mentioned in petition. 1936 Rang 223 (225) [AIR V 23] : 14 Rang 280 (SB).

[10] Debts in insolvency exceeding rupees 5,000 — Proceeding should proceed before District Judge and not before Deputy Commissioner—Mere fact that Rs. 1800 is doubtful debt makes no difference. 1939 Pat 73 (74) [AIR V 26] (DB).

[11] Where there is no notification by the local Government, an order of the District Judge transferring a petition to a sub-court for disposal is *ultra vires*. 1937 Mad 444 (446) [AIR V 24] : ILR (1937) Mad 565 (DB).

[12] From the words of S. 3 it is clear that the Act does not invest a subordinate court with jurisdiction to try any insolvency matter

4. Power of Court to decide all questions arising in insolvency.

(1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

(2) Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time beiing in force, every such decision shall be final and binding for all purposes as between, on the one hand, the debtor and the debtor's estate and, on the other hand, all claimants against him or it and all persons claiming through or under them or any of them.

(3) Where the Court does not deem it expedient or necessary to decide any question of the nature referred to in sub-section *(1)*, but has reason to believe that the debtor has a saleable interest in any property, the Court may without further inquiry sell such interest in such manner and subject to such conditions as it may think fit.

[P. T. I., 1909—S. 7].

Section 3 — Note 1 *(contd.)*

which originates outside the local limits of its jurisdiction. 1937 Mad 444 (445) [AIR V 24] : I L R (1937) Mad 565 (DB) ✠ 1924 Mad 398 (399) [AIR V 11] (DB).

[13] Disposal of insolvency petition by judge of Small Causes, who had no jurisdiction to try it at time of petition but on whom jurisdiction was conferred before final disposal, is right, when petition was addressed to District Judge but presented to Judge of Small Causes. ('09) 6 All L Jour 483 (486) (DB).

[14] The mere fact that there is a special Act for insolvency does not mean that the Insolvency Court is not a Civil Court. All that the Insolvency Act does in this respect is to determine the Civil Court which shall hear insolvency petitions. 1937 Lah 861 (861) [AIR V 24] (DB).

[**But see** 1949 Nag 110 (Pr 4)[AIR V 36 C 39]: ILR (1948) Nag 535. (Insolvency Court is not civil Court — Proceedings in insolvency cannot be referred to arbitrator. AIR 1937 Lah 680 and AIR 1938 Lah 195, *Dissented from.*)]

[15] As to bar against jurisdiction of courts having jurisdiction under the Provincial Insolvency Act, 1920, *see* S. 23 of the Central Provinces and Berar Relief of Indebtedness Act, 1939.

SECTION 4 — SYNOPSIS

1. Scope and applicability.
2. "Subject to the provisions of this Act."
3. Jurisdiction of insolvency Court.
4. Question of title.
5. Question of priority.
6. Question of any other nature.
7. Claims to attachment.
8. Obstruction to delivery of possession.
9. Insolvency of Hindu father or manager.
10. Power to annul transfers.
11. Transfer more than two years before insolvency.
12. Fictitious transfer.
13. Transfer by transferee.
14. Discretion of Court.
15. Inquiry.
16. Who can move.
17. Limitation.
18. Section 4 (2)—Finality of decision.
19. Section 4 (3).
20. Appeal.

1. Scope and applicability.—[1] Section 4 is new and was introduced to set at rest the conflict of decisions regarding the power of insolvency Court to deal with claims of third parties. 1922 Mad 147 (148) [AIR V 9] : 45 Mad 434 (DB).

[2] Section 4 (2) does not confer a jurisdiction which did not exist before. 1925 All 221 (222) [AIR V 12] : 47 All 263 (DB).

[3] Provisions of S. 4 being mere alterations in procedure are retrospective. 1932 Nag 109 (110) [AIR V 19] : 28 Nag L R 89.

[4] Adjudication under old Act — Claim after new Act — Decision according to new Act is final. 1929 Lah 761 (762) [AIR V 16] (DB).

[5] The terms of S. 4, are similar to terms of S. 7 of the Presidency-Towns Insolvency Act. Decisions under S. 7 of the Presidency-Towns Insolvency Act can be relied on in interpreting S. 4. 1932 Mad 66 (67, 68) [A I R V 19] (DB).

[6] Section 45B (1) of the Banking Companies Act is very similar to S. 4 (1) of the Provincial Insolvency Act except for two distinguishing features. Opening words of S. 45B (1) make it absolutely clear that even the provisions of the Provincial Insolvency Act must give way before the provisions of the Banking Companies Act. Again while S. 4 (1) of the Provincial Insolvency Act is limited to questions which may "arise in" any case of insolvency, S. 45B (1) is wider and refers to questions which may "relate to or arise" in

Section 4 — Note 1 (*contd.*)
the course of the winding up of the banking company. 1954 Orissa 139 (Pr 5) [AIR V 41 C 43] : ILR (1954) Cut 65.

[7] Section 4 confers very wide powers on Insolvency Court. 1930 Lah 122 (123) [AIR V 17] ✣ 1922 Mad 147 (148) [AIR V 9] : 45 Mad 434 (DB).

[8] Section 4 vests in the Insolvency Court the power to decide all questions which the Court deems expedient or necessary for the purpose of doing complete justice or making a complete distribution between the parties. 1926 Sind 133 (134) [AIR V 13] : 20 Sind L R 197 ✣ 1933 Cal 151 (153) [AIR V 20] (DB) ✣ 1932 Mad 66 (69) [AIR V 19] (DB).

[9] Section 4 comprises adjudication of questions which arise in bankruptcy and not outside bankruptcy. 1942 Bom 159 (161) [AIR V 29] : ILR (1942) Bom 175 (DB).

[10] In order that S. 4 may apply it is necessary that there must have been a contest between debtor's estate and the general body of creditors. 1935 Bom 80 (81) [AIR V 22] : 59 Bom 161.

[11] Section 4 comes into play only after adjudication. 1938 Lah 490 (491, 492) [AIR V 25] : I L R (1938) Lah 535 (DB). (A I R 1938 Lah 148, *Reversed.*) ✣ 1935 Cal 558 (558, 559) [AIR V 22] (DB) ✣ 1935 Mad 634 (635) [AIR V 22] ✣ 1955 Pat 413 (Pr 14) [AIR V 42 C 106] (DB).

[**But see** 1926 Lah 679 (680) [AIR V 13].]

[12] Section 4 does not empower Court to decide questions falling under S. 4 after annulment of adjudication. After annulment powers of Court are limited by S. 37. 1935 Nag 246 (249) [AIR V 22] : 31 Nag L R 36 (Sup).

[13] Order to interim receiver to enter upon property of third person is clearly not one within scope of S. 4. 1935 Cal 558 (559) [AIR V 22] (DB).

[14] Any defence which could be put forward in a suit is equally available to a party in an application by receiver under S. 4. 1950 Bom 399 (Pr 2) [AIR V 37 C 116]: ILR (1950) Bom 678 (DB).

[15] Insolvency Court cannot dismiss insolvency petition on ground of its raising questions too difficult for it to decide — Question whether relation of debtor and creditor exists must be decided by Insolvency Court —S. 4 does not apply to such a case and the Insolvency Court cannot refer the parties to regular suit by having recourse to S. 4 (3). 1941 Mad 895 (896) [AIR V 28] : I L R (1942) Mad 147 (DB).

[*See also* 1932 Lah 620 (620) [AIR V 19] ✣ 1942 Oudh 80 (81) [AIR V 29].]

[**But see** 1935 Bom 80 (83) [AIR V 22] : 59 Bom 161.]

[16] Even after a composition scheme has been approved by the Court a creditor who has not been served with notice before approval of scheme can file objections to the scheme under S. 4. 1944 Mad 327 (328) [AIR V 31].

[17] Section 4 has given Courts full power to decide merits of claims of third parties. 1921 Nag 159 (161) [AIR V 8].

[*See* 1953 Trav-Co 266 (Pr 2) [AIR V 40 C 95] (DB).]

[18] Under S. 4 (1) powers of Court of Insolvency are wide and do not militate against S. 23 (2). 1930 All 552 (555) [AIR V 17] (DB).

[19] Insolvency Court can dispose of matter between insolvent and secured creditor relating to amount of debt. 1930 Lah 98 (98) [AIR V 17].

[20] Question of title arising between insolvent and receiver — Insolvent cannot file separate suit — Question must be decided in insolvency proceeding. 1933 Lah 65 (65) [AIR V 20].

2. "Subject to the provisions of this Act." — [1] All that the words "subject to the provisions of the Act" mean is that where the Act otherwise provides, the Insolvency Court is not to act as a civil Court. 1944 Nag 44 (54) [AIR V 31] : I L R (1944) Nag 342 (FB).

[2] Where other provisions of Act authorise determination of question, S. 4 cannot be invoked. 1931 Nag 153 (154) [AIR V 18] : 27 Nag L R 179 (FB) ✣ 1942 Bom 159 (161) [AIR V 29] : ILR (1942) Bom 175 (DB) ✣ 1931 Mad 745 (747) [AIR V 18] : 54 Mad 989 (DB) ✣ 1936 Rang 26 (27) [AIR V 23] : 13 Rang 717.

[3] The expression "subject to the provisions in this Act" means that the power conferred under the section may not be exercised in such manner as would be in conflict with any other provisions of the Act. 1932 Cal 642 (646) [AIR V 19] : 59 Cal 1135 (DB).

[4] Section 59 does not control S. 4. ('35) 18 Nag L Jour 14 (16, 17).

[5] Section 4 must be read along with S. 28. Hence where the Court treats a gift by the insolvent as valid, the property not being that of the insolvent does not vest in the Court and it has no jurisdiction to sell it under S. 4. 1930 Pat 305 (306) [AIR V 17] (DB).

[6] Section 4 does not override S. 20 — Insolvency of member of joint Hindu family — Joint family property does not vest in official Receiver or Court — Ad interim receiver appointed before adjudication cannot be given possession of joint family property — He can take possession of only such property as belongs to the debtor. Ad interim Receiver cannot take physical possession of the disposing power of the karta or the manager of the joint family though such power may vest in him after adjudication. Resort cannot be had to S. 4, to vest such property before adjudication. 1954 Pat 459 (Pr 7) [AIR V 41 C 159] : 33 Pat 185 (DB).

3. Jurisdiction of insolvency Court. — [1] Existence of insolvency proceedings does not take away jurisdiction of the ordinary Civil Court. Civil Court has jurisdiction to deal with subject-matter of S. 4. 1940 Mad 564 (585) [AIR V 27].

[2] Jurisdiction of insolvency Court is not exclusive. 1924 All 40 (42) [A I R V 11] : 46 All 16 (DB)✣1959 Bom 10 (Pr 6) [AIR V 46 C 4] : ILR (1958) Bom 1367 : I L R (1959) Bom 249✣1948 Nag 367 (Pr 2) [AIR V 35 C 125] : ILR (1948) Nag 506. (Under S. 4 Insolvency

Section 4 — Note 3 *(contd.)*

Court has power to decide all questions of title. It is not exclusive jurisdiction and the question can be decided by regular civil Courts.)

[**But see** 1927 Oudh 357 (357, 358) [AIR V 14] : 2 Luck 651 (DB).]

[3] Section 4 gives, at any rate, concurrent jurisdiction to the Insolvency Court with ordinary tribunals to try questions of title which might arise between the official receiver and the assignee from the insolvent. 1934 Lah 365 (366) [AIR V 21] : 15 Lah 294 (DB).

[4] The claimant has an option either to ask the Insolvency Court to adjudicate on his claim or to file a separate suit. 1930 Lah 180 (181) [AIR V 17].

[5] Section 4 is only declaratory of the jurisdiction of the Insolvency Court. It does not in any way alter any law, nor does it deprive any party of any rights that he might have under the law. The section only empowers the Insolvency Court to try matters referred to in the section; it does not in any way oust the jurisdiction of the ordinary Courts and the Insolvency Court has always the discretion to refer the receiver to a suit instead of trying a matter under S. 4. Any defence which could be put forward by a party in a suit would be equally available to him in an application by the receiver under S. 4, and the Court is bound to consider all the defences open to the party against whom the application is made. 1950 Bom 399 (Pr 2) [AIR V 37 C 116] : ILR (1950) Bom 678 (DB).

[6] Anyone aggrieved by an order of an Insolvency Court may make an objection and invite a decision of that Court under S. 4 or he may file a suit; but he cannot pursue both remedies, and, if he obtains a decision of the insolvency Court under S 4, a suit by him with regard to the same subject-matter would be barred. Still less can a person aggrieved by an order of the Insolvency Court make an objection to the order in the Insolvency Court and get a decision of that Court under S. 4 and then file a suit on another ground with regard to the same subject-matter. 1933 Nag 373 (373) [AIR V 20] : 30 Nag L R 112.

[7] Creditors' suit for declaration that property purchased by them in execution of decree against insolvent is not liable to attachment and sale in insolvency proceedings pending against him is not barred, if the question raised in the suit is not decided by the Insolvency Court. 1959 Bom 10 (Pr 6) [A I R V 46 C 4] : ILR (1958) Bom 1367 : ILR (1959) Bom 249.

[8] Section 4 applies only to decisions of questions arising in cases of insolvency and no case of insolvency can be said to have arisen when the fact of insolvency and the right to maintain the insolvency petition is disputed and no order of adjudication has been passed. An insolvency petition can be withdrawn under S. 14 only before the order of adjudication is passed. It is only an annulment of the order of adjudication and not a withdrawal of the insolvency petition that can be made after the order of adjudication. Section 14 applies only to withdrawals before adjudication. Matters which have to be considered under S. 14 cannot therefore be said to be matters arising, in a case of insolvency. So S. 4 can have no application to them at all. 1956 Trav-Co 27 (Pr 5) [(S) AIR V 43 C 7] : ILR (1955) Trav-Co 909 (FB).

[9] The summary enquiry under S. 24 as to whether a debtor is entitled to present a petition has nothing to do with S. 4 which ordinarily comes into play after adjudication in disputes between the debtor's estate represented by a receiver and the claims of one or all of his creditors. 1955 Pat 413 (Pr 14) [A I R V 42 C 106] (DB).

[10] It is incorrect to say that prior to adjudication the Court has no jurisdiction at all to get at the properties of the insolvent and to preserve them. Special provisions in that direction are contained in Ss. 20 and 21. These powers are conferred on the Court to see that the property of the insolvent is not wasted or taken out of the reach of the Court during the pendency of the insolvency petition. (Procedure to be followed by insolvency Court pointed out.) 1953 Trav-Co 266 (Pr 2) [AIR V 40 C 95] (DB). (Third party preferring claim to property sought to be taken possession of by interim Receiver under S. 20— Insolvency Court can conduct summary inquiry even prior to adjudication — Its order however, would not be final and conclusive between parties.)

[11] After the annulment of adjudication the Insolvency Court has no jurisdiction to entertain and decide under S. 4 of the Provincial Insolvency Act an application involving question of title to property as a step towards the realization of the assets of the insolvent after the insolvency ceased to exist. Section 151, C. P. Code, cannot be invoked to give jurisdiction to the Insolvency Court to take action under S. 4 when that jurisdiction is already lost as a result of the order of annulment. 1949 Nag 39 (Prs 7, 8) [A I R V 36 C 19] : ILR (1948) Nag 284.

[12] Suit by defeated claimant to attached property against attaching decree-holder and judgment-debtor—Judgment debtor becoming insolvent—Official Receiver made party—Suit not contested by the Official Receiver — Sale deed in favour of plaintiff found to be supported by consideration and not entered into to defeat creditors by all the Courts—Application under Ss. 4 and 53 of the Provincial Insolvency Act by the Official Receiver thereafter— The Official Receiver cannot reagitate the question of the validity of the sale. 1950 Mad 184 (Pr 3) [AIR V 37 C 77].

[13] Official Receiver asking Court for permission to sell properties free of all encumbrances but Court permitting sale subject to mortgage—Official Receiver by mistake thinking that his request had been granted selling properties free of all encumbrances—Adjudication cancelled but properties remaining vested in Receiver — Application by creditor under Ss. 4 and 56 (3)—Request of creditor to cancel sale and hold fresh sale subject to mortgage declaring properties sold to belong still to estate of insolvent held could not be granted—

Section 4 — Note 3 *(contd.)*

S. 4 held not applicable to such case. 1949 Mad 834 (Pr 4) [AIR V 36 C 375].

[14] *A* claim by an official receiver that the properties covered by a sale-deed in favour of *B*, the insolvent's wife really belong to the insolvent and that *B* is only a benamidar for the insolvent cannot be said to arise out of the insolvency and if *B* expressly refuses to submit to the jurisdiction of the insolvency Court to adjudicate upon her title to the properties, the Insolvency Court cannot adjudicate upon it and the proper course would be to file a regular suit. 1951 Trav-Co 139 (Prs 2, 4) [AIR V 38 C 48] (DB). (The case is decided under the proviso to S. 4 (1) of the Travancore Insolvency Act 8 of 1106. The proviso runs : Provided that unless all the parties agree the power hereby given shall not be exercised for the purpose of adjudicating upon any claim not arising out of the insolvency"— Ed.)

4. Question of title. — [1] Insolvency Court can under S. 4 try question whether insolvent is entitled to certain property or not when there is a dispute about title to it. 1937 Mad 32 (34) [AIR V 24].

[2] The provisions of S. 4 are very wide and they confer on Insolvency Courts full power to deal with all questions of title as between the official receiver or official assignee, and a stranger with reference to property which is claimed on the one hand as being the insolvent's and on the other as the stranger's property. 1932 Cal 642 (644) [AIR V 19] : 59 Cal 1135 (DB) ✣ 1927 Cal 474 (475) [AIR V 14] (DB) ✣ 1930 Lah 122 (123) [A I R V 17].

[3] Where an interim Receiver appointed under S. 20 takes possession of the property of which the insolvent is in possession, in pursuance of the direction of the Court but a claim of title is preferred by a third party to such property, the insolvency Court has jurisdiction to conduct a summary inquiry as to the sustainability of the claim even prior to passing of adjudication order. The order passed at such inquiry is not however final and conclusive as between the parties to it. Such a final and conclusive order may still be passed under S. 4 when the receiver seeks to annul the document in favour of the third party concerned and for inclusion of the property covered by that document also among the assets or the insolvent. 1953 Trav-Co 266 (Pr 2) [AIR V 40 C 95] (DB).

[4] Question whether mortgagee's rights belong to insolvent or not must be determined finally by Insolvency Court under S. 4 (1). 1925 Oudh 109 (109) [AIR V 12].

[5] So far as questions of title against strangers are concerned, the Court should ordinarily decline to go into them where the receiver claims no higher right than the insolvent himself ; but if the Court, in its discretion, chooses to determine the question, the decision cannot be said to be bad on the ground of want of jurisdiction or to be anytheless a decision binding between the parties under sub-s. (2) to S. 4, provided that it is not in conflict with any provision of the Act itself. 1932 Cal 642 (646) [AIR V 19] : 59 Cal 1135 (DB).

[6] Disputed title between private purchaser and purchaser from official assignee — Insolvency Court can decide under S. 4. 1936 Mad 955 (955) [A I R V 23] ✣ 1934 Lah 936 (938) [AIR V 21].

[7] Summary order passed in respect of question of title without reference to S. 4 and without the Court applying its mind to the implications of the order is not proper. 1934 Lah 1006 (1008) [AIR V 21] (DB).

[8] Proceedings under S. 4 are not restricted to decision of title and property within territorial jurisdiction of Court. 1929 Sind 135 (135) [AIR V 16].

[9] Occupancy holding of insolvent held saleable and sold by insolvency Court — Sale set aside by Revenue Court—Purchaser applying for refund of purchase money—*Held* that the claim of purchaser was based on grounds of equity and no question of title was involved. 1933 Lah 628 (629) [AIR V 20].

5. Question of priority.—[1] Insolvency of Muhammadan heir—Dispute as to priority between creditors of deceased ancestor and creditors of insolvent — Question of priority has to be decided by Insolvency Court. 1930 All 552 (554) [AIR V 17] (DB).

[2] Insolvency Court can decide priority among mortgagees in disputes over proceeds of sale held with consent of secured creditors. 1930 Lah 98 (99) [AIR V 17].

[3] Mortgagee agreeing to sale by Insolvency Court — Power of Insolvency Court to adjudicate claims under S. 4 not affected. 1931 Lah 3 (4) [AIR V 18].

[4] Insolvency Court can require from creditor of insolvent claiming to be secured creditor, proof of such claim—Regular petition by receiver or enquiry under S. 53 or 54 is not necessary. 1928 Cal 609 (610) [A I R V 15] : 55 Cal 1053 (DB).

6. Question of any other nature. — [1] The words "of any nature whatsoever" in S. 4 are not to be read as ejusdem generis with the preceding words "question of title or priority". 1942 Bom 159 (160) [A I R V 29] : ILR (1942) Bom 175 (DB) ✣ 1940 Bom 51 (53) [AIR V 27] : I L R (1940) Bom 1 (DB) ✣ 1931 Mad 745 (746) [AIR V 18] : 54 Mad 989 (DB).

[**But see** 1938 All 28 (29) [AIR V 25] : ILR (1938) All 50 (DB) ✣ 1935 Bom 80 (82) [A I R V 22] : 59 Bom 161.]

[2] The words 'of any nature whatsoever, used in S. 4 of the Provincial Insolvency Act do not include or embrace within its purview the determination of the question whether the debtor has a right to present the petition for insolvency. 1942 Oudh 80 (81) [A I R V 29].

[3] The question whether the petitioning creditor has a subsisting claim against the debtor by reason of a discharge receipt which is impeached on the ground of fraud and misrepresentation does not fall under S. 4. 1935 Bom 80 (82) [AIR V 22] : 59 Bom 161.

[4] Insolvent's property sold in execution of decree—Court can pass order of refund of sale

Section 4 — Note 6 *(contd.)*

proceeds in favour of receiver under S. 4. 1939 Mad 896 (897) [AIR V 26].

[5] Transfer of debts due to insolvent during pendency of application for adjudication as insolvent—Application by receiver for refund of amounts realized by transferees and for making them personally liable for entire debts is covered not by S. 54 but by S. 4. 1937 Lah 913 (914) [AIR V 24].

[6] Fraud practised upon receiver conducting sale—Receiver applying for setting aside sale — Action of receiver falls within S. 4 — Sale can be set aside though made more than two years before order of adjudication. 1936 Lah 149 (150) [AIR V 23].

[7] Insolvency Court annulling transfer has jurisdiction to order payment of mesne profits under S. 4. 1932 Mad 66 (70) [A I R V 19] (DB).

[8] Debtor paying certain amount to creditor during pendency of insolvency and before order of adjudication—Application by receiver subsequently appointed claiming refund of amount—Court can under S. 56 (3) read with S. 4 direct creditor to refund amount. 1936 Nag 28 (29) [A I R V 23] : 31 Nag L R (Sup) 121.

[9] Pending insolvency petition creditor realising amount in execution of his decree — Receiver applying for refund of amount — Insolvency Court can decide application under S. 4. 1933 Lah 477 (478) [A I R V 20] : 14 Lah 724 (DB).

[10] Sale of insolvent's property by Collector under S. 68 Civil P. C. — Application by insolvent challenging sale and restoration of property—Insolvency Judge has ample power to decide the question under S. 4 for purpose of doing complete justice between the parties. 1952 Punj 222 (Pr 14) [AIR V 39] (DB).

[11] An Insolvency Court has power to set aside an auction-sale on grounds not falling within O. 21, C. P. Code. Section 4 of the Provincial Insolvency Act empowers the Court to set aside an auction sale before it is confirmed if the Court deems it expedient or necessary for the purpose of doing complete justice. Section 4 of the Act gives ample powers to the Insolvency Judge to decide all questions whether involving matters of law or of fact which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice. 1952 Punj 222 (Prs 16, 17) [AIR V 39] (DB).

[12] Though an insolvency Court will not restrain a mortgagee or other secured creditor in the exercise of his legal remedies under S. 28 of the Act it has jurisdiction in proper cases to restrain him under O. 39 R. 1, Civil P. C., from proceeding with the sale of the insolvent's property, pending application by Official Receiver under S. 53, if there are substantial grounds for impeaching his title with a view to safeguard the interests of the general body of creditors. 1954 Mad 12 (Prs. 11, 14, 15) [A I R V 41 C 5] : ILR (1954) Mad 360 (DB). (Observations to the contrary in AIR 1925 Mad 1051 held to be too widely stated.)

[13] Sale of property—Mistake as to encumbrance in proclamation due to error committed by Official Receiver — Property fetching low price—Sale can be set aside by Insolvency Court at instance of Official Receiver under Court's inherent powers. 1950 Mad 311 (Pr 6) [AIR V 37 C 142].

7. Claims to attachment.—[1] It is open to a person claiming property attached by Insolvency Court to bring regular suit for adjudication on merits of his claim, but if he places matter before Insolvency Court and that Court proceeds to determine question, its decision is final and binding for all purposes as between the debtor and the debtor's estate and all claimants against him or the estate on the other. 1932 Nag 109 (110) [AIR V 19] : 28 Nag L R 89 ✠ 1924 All 40 (42) [AIR V 11]: 46 All 16 (DB)✠1923 All 293 (293) [AIR V 10].

[2] Objection to attachment of property attached in execution by creditor of judgment-debtor—Judgment-debtor adjudged insolvent and objection case transferred to District Judge who was also Insolvency Court — Objection dismissed — Order is not final. 1928 All 158 (159) [AIR V 15] (DB).

[3] Property attached by receiver in which third party claims interest—The onus of proof that it is insolvent's property is on the receiver and he cannot take advantage of the weakness of his adversary but must succeed by the strength of his own title. 1921 All 164 (164) [AIR V 8] (DB).

8. Obstruction to delivery of possession. — [1] Sections 4, 5 and 56 are very widely worded and empower the Insolvency Court to give possession to the purchaser of a property sold in insolvency proceedings at the instance of an official receiver. 1944 Mad 481 (483) [AIR V 31] : ILR (1945) Mad 10 (FB).

[2] Section 4 is subject to S. 56 (3). 1924 Mad 387 (387) [AIR V 11] (DB).

[3] Court has no power under S. 56 summarily to direct a third person to deliver up possession of property of which he is in possession, if he sets up a title, however flimsy, to it. The only power the Court has in such circumstances is to try the issue whether the insolvent is entitled to the property or not under S. 4. 1939 Nag 10 (12) [AIR V 26] : ILR (1941) Nag 696 ✠ 1940 Nag 233 (234) [AIR V:27] : ILR (1941) Nag 757 (DB) ✠ 1926 Mad 363 (364) [AIR V 13] : 49 Mad 762 (DB).

[*See also* 1946 Mad 141 (143) [A I R V 33 C 80].]

[4] Application under S. 56 (3) can be made by purchaser from Receiver—Stranger in possession claiming title in himself — Insolvency Court has power to consider whether such person in possession is one whom insolvent has present right to remove — Applicant need not be referred to separate suit. 1948 Cal 343 (Pr 11) [AIR V 35 C 139].

[5] Sale by receiver — Objector claiming title to property sold and objecting to sale — Objection should be under S. 4 and not under S. 68. 1937 Lah 2 (3, 4) [AIR V 24] ✠ 1937 Lah 297 (298) [AIR V 24].

[6] Where the official receiver takes possession of the property as one belonging to insol-

Section 4 — Note 8 *(contd.)*

vent and a certain person takes objection under S. 68 on the ground that the property belongs to him and not to insolvent, and the Insolvency Court frames issues, records evidence and then disposes of the objection in favour of the person objecting and releases the property, an appeal lies against the order releasing the property as the Court must be deemed to have investigated the claim of the objector under S. 4. 1937 Lah 757 (757) [AIR V 24].

[7] Application to the Insolvency Court to remove obstruction after the possession of the property need not be presented by or through the official receiver. Auction purchaser is competent to present the application. ('33) 1933 Mad W N 1487 (1488) (DB).

[8] Interim receiver taking possession of Insolvent's property under S. 20 under orders of Insolvency Court — Third party preferring claim — Insolvency Court can conduct summary inquiry even before adjudication — Order, however, would not be final and conclusive between parties. 1953 Trav-Co 266 (Pr 2) [AIR V 40 C 95] (DB).

9. Insolvency of Hindu father or manager. — [1] Order adjudicating *karta* of a joint Hindu family as insolvent and appointing a receiver falls under S. 4. 1937 Cal 517 (520) [AIR V 24] : ILR (1937) 2 Cal 675.

[2] Where only the father is adjudicated an insolvent and the sons are never made parties of the proceedings if the receiver intends to sell the sons' interest also, he ought to proceed under S. 4 and seize their share after giving them full notice. 1935 Nag 193 (194) [AIR V 22].

[3] Father insolvent—Son's share sold prior to adjudication — Receiver alone has right to annul sale — Remedy lies under S. 4 and not under Transfer of Property Act, S. 53. 1934 Nag 271 (272) [AIR V 21].

[4] When on the insolvency of a Hindu father the family property including the son's shares is sold by the official receiver, the Insolvency Court can give possession to the purchaser. 1944 Mad 481 (483) [AIR V 31] : ILR (1945) Mad 10 (FB). (AIR 1928 Mad 531, *Overruled.*)

[5] Hindu father's insolvency—Suit by sons for partition — Decree for partition subject to mortgage — Sale by receiver of father's property free from mortgage — Purchaser obstructed by sons for delivery of property — *Held*, that Insolvency Court was not executing Court and could not give delivery. 1933 Mad 475 (480) [AIR V 20].

[6] Hindu father adjudged insolvent—Subsequent suit, without leave of Court, by creditor against insolvent and his sons — Decree obtained — Insolvency Court can under S. 4 declare the decree nullity against official receiver but not against sons. 1942 Mad 360 (361) [AIR V 29] (DB).

[7] Sale of property of insolvent objected to by sons on ground of previous partition — Question of title should be decided under S. 4 before sale. 1926 Mad 360 (360) [AIR V 13] (DB).

[8] Joint Hindu family—Sale by insolvent-manager on behalf of himself and minor members — Official receiver cannot ask for annulment of transfer under S. 53 or 54 so far as interest of minors is concerned — Court has jurisdiction under S. 4 to determine whether transaction was fictitious or not. 1943 Mad 303 (310, 311) [AIR V 30].

[9] It is not obligatory on the Court in every case where, on the insolvency of a Hindu Mitakshara father, the Official Receiver purports to exercise the power vested in the father to sell the son's shares for satisfying his debts, to hold an enquiry under S. 4. If proceeding under S. 4 are initiated by the sons or by the creditors, and the matter is decided one way or the other, the adjudication would be binding on the parties and the Official Receiver should, in administering and selling the property of the insolvent, give effect to that decision. If no proceeding under S. 4 had been taken, all that the sons could claim is an opportunity to show that the sale by the Official Receiver was not binding on their interest in the property by reason of the debts of the father not being binding upon them under the rule of pious obligation. 1957 Andh Pra 609 (Pr 4) [AIR V 44 C 203] (DB).

[10] Coparcener of joint Hindu family representing one branch of family becoming insolvent — His interest vesting in Official Receiver—Suit by Official Receiver for partition — Sons of insolvent are not necessary parties, though they are proper parties — Suit cannot be dismissed for non-impleading the sons. 1953 Nag 351 (Pr 26) [A I R V 40 C 150].

[11] Where a Hindu father, for himself and as guardian for his minor sons, along with his major sons executes a sale deed of the family property for payment of a family debt borrowed for a family purpose and the father alone is subsequently adjudicated as insolvent, the transfer cannot be impugned so far as the shares of the major and minor sons are concerned, on an application made by a creditor of the insolvent under Ss. 53 and 54 of the Act and to which the sons are not made parties. A finding of the Insolvency Court that the sale is bogus and without consideration would only affect the father's interest. 1949 Nag 223 (Prs 16, 19, 21)[AIR V 36 C 90]: ILR (1949) Nag 155 (DB).

10. Power to annul transfers.—[1] Section 53 empowers the Court to annul certain transfers which take place within two years of insolvency and S. 54 to annul others which occur within three months before, but either section does not take away the general and wide jurisdiction and powers conferred by S. 4. These are matters relating to property which the Court can deal with apart from Ss. 53 and 54. 1944 Nag 44 (53 54) [A I R V 31] : ILR (1944) Nag 342 (FB). (A I R 1938 Nag 546, *Overruled.*) ✣ 1937 Mad 32 (34) [AIR V 24].

See also Note 11.

[2] The provisions contained in Ss. 53 and 54 and those in S. 4 are not mutually exclusive. Questions arising under Ss. 53 and 54 might

Section 4 — Note 10 *(contd.)*
well fall within the ambit of S. 4. 1939 All 431 (433) [AIR V 26].

[3] Insolvency Court has same jurisdiction under S. 4 as English Bankruptcy Court under S. 102 of English Bankruptcy Act. 1927 Sind 66 (71) [AIR V 14].

[4] Decision of question whether the sale by an insolvent was benami falls under S. 4. 1937 Lah 441 (441) [AIR V 24]✣1935 All 982 (984) [AIR V 22].

[5] Limitation of two years' period prescribed under S. 53 does not apply to benami transactions — Court has jurisdiction to set aside such transter under S. 4. 1932 Pat 129 (132) [AIR V 19] : 11 Pat 9 (DB).

[6] Court can under S. 4 set aside sale challenged by official receiver although it is not specifically alleged that the sale was benami on behalf of insolvent. 1939 All 431 (432) [A I R V 26].

[7] Void transfer—Limitation of 2 years period prescribed under S. 53 does not apply —Court can declare transfer void under S. 4. 1926 All 470 (472) [A I R V 13] : 48 All 414 (DB)✣1933 Pesh 46 (47) [AIR V 20] (DB).

[8] A Court exercising insolvency jurisdiction has to decide all questions of general law such as the questions raised by S. 53, T. P. Act, just as it has to decide questions arising in insolvency which are covered by special provisions of the insolvency Act while administering the law underits own procedure. 1922 All 196 (196) [AIR V 9] : 44 All 71 (DB).

[9] Question of fraudulent transfer of property by insolvent is question of title. 1922 All 196 (196) [AIR V 9] : 44 All 71 (DB).

[10] The mere fact that name of the alleged transferee is entered in schedule of creditors as a secured-creditor does not disentitle other creditors from moving Court under S. 4 to set aside alienation made in his favour by insolvent. 1937 Lah 242 (243) [AIR V 24].

[11] A Court sale of an insolvent's properperties at the instance of an unsecured creditor is void if the sale has been conducted after the order of adjudication. In such a case, it is open to the Official Receiver to request the Court for an order dirccting the auction purchaser to put the Official Receiver in possession of the property sold under S. 4 and it is open to the Court to grant such relief under S. 56 (3). 1951 Trav-Co 193 (Pr 6) [AIR V 38 C 78]: 1950 Trav-Co L R 125 (DB).

11. Transfer more than two years before insolvency.—[1] Section 4 deals with jurisdiction of Insolvency Court. Ss. 53 and 54 do not deal with jurisdiction of insolvency Court but only lay down rules as to the manner in which evidence should be considered in certain cases arising in that Court. These sections do not, therefore, control the provisions of S. 4, and the insolvency Court has power under S. 4 to annul a transfer made more than two years prior to the insolvency. 1929 All 105 (107, 113) [AIR V 16] : 51 All 550 (FB) ✣ 1939 All 431 (432) [AIR V 26]✣1932 Cal 642 (644) [AIR V 19] : 59 Cal 1135 (DB) ✣ 1938 Lah 73 (75) [AIR V 25] : ILR (1938) Lah 439 ✣ 1934 Lah 365 (366) [AIR V 21] : 15 Lah 294 (DB)✣1933 Mad 527 (528) [AIR V 20]✣1944 Nag 44 (54) [AIR V 31] : ILR (1944) Nag 342 (FB) (A I R 1938 Nag 546, *Overruled*)✣1932 Nag 109 (110) [AIR V 19]: 28 Nag L R 89✣1927 Sind 66 (70) [AIR V 14].

[But see 1926 All 470 (472) [AIR V 13] : 48 All 414 (DB) (Per Mukherji J.)✣1935 Bom 316 (319) [A I R V 22] (DB) (Per Barlee J.) ✣ 1931 Oudh 124 (125) [AIR V 18] : 6 Luck 614 (DB) ✣1930 Oudh 314 (315, 316) [AIR V 17]: 5 Luck 742 (DB) ✣ ('36) 1936 Oudh W N 960 (964, 965, 966) (DB)✣1934 Pesh 30 (33) [AIR V 21] (DB).]

[2] Insolvency Court has power to go into the question whether a transfer is voidable under S. 53, T. P. Act even though the transfer is beyond 2 years of adjudication—Even if the transaction is only regarded as voidable, the insolvency Court has jurisdiction to entertain the application. 1933 Mad 527 (528) [AIR V 20].

[3] Transfer made more than two years before adjudication—Insolvency Court can deal with the question according to the same principles which would govern a suit for avoidance of a transfer under the ordinary law. 1938 Lah 73 (75) [AIR V 25] : ILR (1938) Lah 439.

[4] Official receiver can challenge transfer even though it does not fall within Ss. 53 and 54. 1939 All 431 (432, 433) [AIR V 26].

[5] Under S. 53 the insolvency Court has no power to annul a transfer made beyond two years of the date of the insolvency application. Under S. 4 of the Act, the insolvency Court has only power to make a declaration but not to give a consequential relief. The relief by way of annulment of the transfer can be granted by the Civil Court in such circumstances in a suit under S. 53, Transfer of Property Act. But the Insolvency Court has not all the powers of a Civil Court. Hence, it cannot consider the question from the aspect of S. 53, T. P. Act. The proper course for the insolvency Court in such circumstances is first to satisfy itself whether the transfer is really one liable to be annulled under S. 53, T. P. Act, and if it decides that it is so, then to instruct the Receiver to file a suit for that purpose in the Civil Court. 1947 Pat 471 (Prs 14 to 16) [A I R V 34 C 153] : 26 Pat 253 (DB).

[6] Section 53 applies where the existence of the transfer is admitted; on the other hand S. 4 applies if the transfer or the existence of the right claimed by the objector is denied by the receiver. 1930 Lah 180 (181) [AIR V 17].

12. Fictitious transfer. — [1] It is open to an Insolvency Court to try a question under S. 4 of the Provincial Insolvency Act relating to the fictitious character of the transfer even though it does not fall under S. 53 of the Act. 1941 Oudh 403 (405) [AIR V 28] (DB) ✣ 1935 Bom 316 (317, 318) [AIR V 22] (DB).

[2] Under S. 4 of the Provincial Insolvency Act, the Insolvency Court has jurisdiction, in cases not covered by S. 53 of the Act, to determine whether a transaction by the insolvent which is impeached is nominal and fictitious. 1949 Bom 129 (Pr 7) [AIR V 36 C 39]:

Section 4 — Note 12 *(contd.)*
ILR (1949) Bom 129 (FB). (A I R 1930 Oudh 314, *Not Foll.*)

[3] Neither S. 53 nor S. 54 deal with sham transfers. 1944 Nag 44 (54) [AIR V 31]: ILR (1944) Nag 342 (FB).

[4] Nominal and fictitious transfers do not fall under S. 53. Such transfers are void at inception and are not voidable. Where, therefore, the Receiver alleges that certain transfers made by the insolvent beyond two years prior to the date of the insolvency petition were nominal and fictitious, the Insolvency Court has jurisdiction under S. 4 to decide whether the transactions were nominal and fictitious. 1949 Bom 129 (Pr 6) [A I R V 36 C 39]: ILR (1949) Bom 129 (FB). (A I R 1930 Oudh 314, *Not foll.*; A I R 1935 Bom 316, *Approved.*)

[5] Section 53 of the Provincial Insolvency Act is not exhaustive, and an application may be made under S. 4 of the Provincial Insolvency Act where the applicant asserts that the transaction sought to be set aside is a sham and nominal one. The fact that transaction was beyond two years of insolvency is no bar to reception of application. 1943 Mad 252 (252) [AIR V 30] ✣ 1935 Bom 316 (317, 318) [AIR V 22] (DB) ✣ 1937 Mad 32 (33, 34) [AIR V 24] ✣ 1934 Nag 47 (48) [AIR V 21] ✣ 1932 Nag 109 (110) [AIR V 19]: 28 Nag L R 89 ✣ 1931 Oudh 124 (125) [AIR V 18]: 6 Luck 614 (DB) ✣ 1936 Rang 54 (55) [A I R V 23] (DB).

[6] Restriction as regards transfers more than two years old contained in S. 53 applies only to real transfers and has no application to mere sham transactions. 1933 Lah 197 (197) [AIR V 20] ✣ 1935 Bom 316 (319) [AIR V 22] (DB). (*Per Barlee J.*) ✣ 1934 Nag 47 (48) [AIR V 21] ✣ 1932 Pat 129 (130) [AIR V 19]: 11 Pat 9 (DB).

[7] Section 56 does not vest the insolvency court with jurisdiction to decide the question whether a transfer by the insolvent is sham or not. S. 4 does that. 1944 Nag 44 (54) [AIR V 31]: ILR (1944) Nag 342 (FB).

13. Transfer by transferee. —[1] Remedy in respect of transfer from transferee of insolvent can only be obtained from Insolvency Court under S. 4 and not under S. 53 or S. 54. 1941 Cal 298 (302) [AIR V 28] (DB).

[2] An alienation in favour of a transferee from the transferee of an insolvent cannot be challenged by the Official Receiver under S. 53. It can be challenged, if at all, only under S. 4 and in order to make the decision binding, the transferee from the transferee must be made a party to those proceedings. If the transferee from the transferee establishes that he is a bona fide purchaser for value without notice of the insolvency proceedings, the transaction in his favour will have to be upheld. ('59) ILR (1959) Ker 803 (818).

[3] Even where a transfer falls within the mischief of S. 53, a purchase from the transferee made in good faith and for valuable consideration before the presentation of the insolvency petition cannot be avoided under the section. Such a transfer can be considered in proceedings under S. 4. ('50) 1950 All W R 267 (269).

[4] If the transfer to a transferee from the insolvent is declared invalid and not binding on the official Receiver and if the later transfer by the transferee from the insolvent is held to form only a link in the chain of a fraudulent scheme to defraud the other creditors of the insolvent, the insolvency court has clearly the power to annul the second transfer as not binding on the Official Receiver not only under S. 53 of the Act but also if necessary by the exercise of its powers under S. 4. 1958 Mys 35 (Pr 12) [A I R V 45 C 11]: ILR (1957) Mys 147 (DB).

[5] Transfer by insolvent declared void — Transfer by transferee of insolvent also cannot stand and can be annulled under S. 4. 1935 Lah 368 (369) [AIR V 22] : 16 Lah 1013 (DB) ✣ 1937 Lah 323 (324) [AIR V 24] ✣ 1934 Lah 101 (102) [AIR V 21]: 15 Lah 349 ✣ 1933 Mad 271 (274) [AIR V 20] (DB).

[6] Transfer of property by insolvent to wife before insolvency — Wife transferring property to another — Court setting aside transfer — Transferee from wife not party to the proceedings — *Held* that the decision of Court was a decision *in rem* and the transferee from wife was bound by it. 1937 Rang 369 (370) [AIR V 24].

[**But see** 1935 All 671 (673, 674) [A I R V 22]: 57 All 900 (DB) ✣ ('59) ILR (1959) Ker 803 (818). (Decision does not bind those who are not parties.)]

14. Discretion of Court. — [1] Exercise of jurisdiction under S. 4 is discretionary. 1947 Pat 7 (10) [A I R V 34 C 3] (DB) ✣ 1934 Cal 122 (123) [A I R V 21] (DB) ✣ 1938 Lah 73 (75) [AIR V 25] : ILR (1938) Lah 439 ✣ 1932 Mad 513 (516) [A I R V 19] ✣ 1930 Mad 782 (784) [AIR V 17] ✣ 1933 Nag 373 (374) [AIR V 20]: 30 Nag L R 112 ✣ 1938 Nag 50 (50) [AIR V 25]: ILR (1940) Nag 486.

[2] Whether in any particular case an Insolvency Court should refuse to exercise its jurisdiction must necessarily depend upon the facts of such case and no hard and fast rule can be laid down in that behalf. 1933 Sind 185 (186) [AIR V 20].

[3] Before Insolvency Court exercises its discretion to entertain application for declaration of title, it should be satisfied that it is expedient to withdraw case from jurisdiction of ordinary tribunals and to decide it in summary way. 1930 Sind 97 (97) [AIR V 17].

[4] In cases involving determination of difficult questions of title the Insolvency Court would be well-advised in declining to exercise jurisdiction under S. 4 and referring the parties to ordinary civil suit. 1932 Mad 66 (69) [AIR V 19] (DB) ✣ 1935 Mad 720 (720) [AIR V 22] ✣ 1938 Nag 247 (248) [AIR V 25]: ILR (1939) Nag 484 ✣ 1933 Sind 185 (187) [AIR V 20].

[5] Where the Insolvency Court even if it adjudicated the question of title would have no power to recover the property from the claimant it would be justified in not deciding the question of title. 1924 Mad 387 (387) [AIR V 11] (DB).

Section 4 — Note 14 *(contd.)*

[6] Where the question arises directly out of the insolvency proceeding and a decision of the question is necessary, the Insolvency Court will decide it under S. 4. 1947 Pat 7 (11) [AIR V 34 C 3] (DB).

[7] Attachment of insolvent's property in execution of money decree — Claim by purchaser from insolvent dismissed for default — Execution under money decree dismissed and attachment withdrawn — Purchaser claiming property in insolvency —*Held* that it was not only expedient but necessary that the question of title should be decided in proceedings under S. 4. 1938 Cal 373 (373) [AIR V 25] (DB).

[8] Regular suit barred by limitation — Insolvency Court would ordinarily refuse to exercise jurisdiction under S. 4. 1929 Sind 94 (96) [AIR V 16] ✣ 1943 Mad 252 (252) [AIR V 30].

[9] It is left to the discretion of the Court to entertain a petition under S. 4. The party who is bound by a decree or order of a Civil Court is not entitled to re-agitate the same question by another suit and what cannot be done by another suit cannot be achieved by means of proceedings under S. 4. 1940 Mad 733 (736) [AIR V 27] ✣ 1942 Mad 423 (424) [AIR V 29]: ILR (1942) Mad 691 (DB).

[*See also* 1933 Sind 185 (187) [AIR V 20].]

[10] Refusal by a Judge to decide question of title under S. 4 does not preclude his successor from going into the question and deciding it. 1934 Lah 936 (937, 938) [AIR V 21].

[11] Where the Insolvency Court exercises its discretion under S. 4, the High Court will not interfere with the exercise of the discretion in appeal or revision. 1940 Lah 124 (124) [AIR V 27] ✣ 1949 Bom 129 (Pr 9) [AIR V 36 C 39]: ILR (1949) Bom 129 (FB).

15. Inquiry.—[1] Proceedings under S. 4 need not necessarily be initiated by plaint or regular application. 1933 Lah 789 (790) [AIR V 20] (DB).

[2] A question of title under S. 4 (1), must be tried like regular suit. 1928 Lah 556 (556) [AIR V 15].

[3] A thorough inquiry is necessary under the section as the order passed is final. 1934 Lah 1006 (1008) [AIR V 21] (DB)✣ 1928 Lah 423 (424) [AIR V 15].

[4] The Insolvency Court has to act with the procedure and with the judicial caution of Civil Court and the claimants have a right to be heard judicially. 1934 Lah 1006 (1008) [AIR V 21] (DB)✣ 1926 Pat 291 (292) [AIR V 13] (DB).

[5] Ex parte order without giving any notice to the claimant and without giving him a hearing is without jurisdiction and void. 1933 Mad 345 (346) [AIR V 20].

[6] There is nothing in S. 4, as to the stage up to which the Court is competent to take proceedings under S. 4, but under Sub-s. (2), the intention of the Legislature is perhaps that the Insolvency Judge should not take action under S. 4 after the property has been sold. 1936 Lah 376 (376) [AIR V 23].

[7] Official receiver passing order on claim petition — Order is without jurisdiction — Application under S. 4 is not barred. 1933 Mad 471 (473) [AIR V 20]✣ 1924 Mad 529 (530) [AIR V 11] : 47 Mad 446 (DB).

[8] An application under S. 4 is not a suit within the meaning of O. 21, R. 63, Civil P. C. ('37) 1937 Mad W N 1046 (1047).

[9] Application by creditor with leave of Insolvency Court to annul transfer dismissed— Appeal by creditor—During appeal adjudication annulled -- *Held* that the proceedings being under S. 4 could be continued and disposed by Court of appeal notwithstanding annulment of adjudication. 1944 Mad 49 (50) [AIR V 31].

[10] District Court of Amherst in Burma requesting District Court at Ramnad under S. 77 to sell insolvent's property in that district — Person claiming title to that property filing application under S. 4 to Amherst Court—Application returned for presentation to Ramnad Court—*Held*, that the proper Court to decide the question was the Ramnad Court. 1941 Mad 580 (581) [AIR V 28] (DB).

16. Who can move.—[1] Court cannot initiate proceedings under S. 4, suo motu. 1942 Cal 584 (585) [AIR V 29] (DB).

[But see 1933 Lah 789 (790) [AIR V 20] (DB).]

[2] A proceeding under S. 4 can be conducted by the receiver alone, and not by a creditor. 1942 Cal 584 (585) [AIR V 29] (DB)✣ 1941 Cal 298 (301) [AIR V 28] (DB).

[3] The procedure to be followed in such cases is for the creditor to apply to the Court to direct the receiver to institute proceedings under S. 4, and the Court can pass a conditional order making it a condition precedent that the creditor so applying should put the receiver in funds and properly indemnify him against the costs of the action. 1942 Cal 584 (585) [AIR V 29] (DB).

[4] Creditor's application under S. 4 to declare that certain transaction was benami, heard and decided by Insolvency Court—The fair inference to draw is that leave of Court should be deemed to have been granted. 1935 Mad 46 (46) [AIR V 22] (DB).

[5] Question of title may arise at a stage earlier than the order of adjudication but, such case can only be very rare. A third party is not forced to make an application under S. 4 but there are decisions in which the claim of a third party has been considered under S. 4. 1955 Pat 413 (Pr 13) [AIR V 42 C 106] [DB).

17. Limitation. — [1] Even on the view that proceedings under S. 4 of the Provincial Insolvency Act should be held to be tantamount to a suit under S. 53 of the Transfer of Property Act, it would follow that the suit would have to be within time when the insolvency proceedings began. This would be six years under Art. 120 of the Limitation Act from the date of accrual of the cause of action. 1938 Nag 546 (548) [AIR V 25] : ILR (1940) Nag 293 (DB).

[2] Although an Insolvency Court may not entertain an application under S. 4 to set aside a transfer by an insolvent, which, if filed

Section 4 — Note 17 *(contd.)*

as a suit under S. 53, Transfer of Property Act, would be liable to be dismissed as barred by limitation under Art. 120 of the Limitation Act where there are a number of creditors, limitation for an application by the official receiver under S. 4 to set aside the transfer may be computed from the date on which the last of the creditors became aware of the transaction. 1943 Mad 252 (252, 253) [AIR V 30].

[3] Even application under S. 4 should be made within 21 days, if it is one to set aside order of official receiver. 1935 Lah 60 (61) [AIR V 22] (DB)✣ 1934 Rang 97 (98) [AIR V 21] (DB).

[4] Where property is attached by a receiver under orders from the Court it is not an independent act of the receiver and the limitation period of 21 days under S. 68 does not apply, to set aside the order of attachment, as it is a claim setting up independent title under S. 4. 1932 All 408 (408) [AIR V 19] (DB).

[5] Receiver holding sale of property under instructions of Court — Application to set aside sale falls under S. 4 — Limitation of 21 days does not apply. 1938 Nag 320 (320, 321) [AIR V 25].

[6] When an application for recovery of mesne profits is made under S. 4, by the receiver, the Court is bound to consider all the defences (including the defence of limitation) that are open to the party against whom the application is made. 1950 Bom 399 (Pr 2) [AIR V 37 C 116] : ILR (1950) Bom 678 (DB).

[7] An order for payment of money on an application under S. 4 is tantamount to a decree and if after annulment of adjudication the insolvent failed to apply for execution and three years had elapsed the Official Receiver cannot on the setting aside of the annulment seek to execute such decree. 1951 Mad 879 (2) (Pr 3) [AIR V 38 C 307] (DB).

[8] The question of limitation does not depend on whether the title is decided in the insolvency Court or by the regular civil Courts. If the title has not been extinguished by adverse possession, then the insolvency Court has power to decide the question of title, and Art. 181, Limitation Act, will not prevent it from so deciding. 1948 Nag 367 (Pr 2) [AIR V 35 C 125] : ILR (1948) Nag 506.

18. Section 4 (2) — Finality of decision. — [1] Decision under S. 4 is final and conclusive between the parties and operates as res judicata. 1946 Mad 141 (143) [AIR V 33 C 80] ✣ 1936 Nag 112 (112) [AIR V 23] : ILR (1936) Nag 28.

[2] Section 11, Civil P. C., with all its explanations will apply to decision of Insolvency Court under S. 4, Provincial Insolvency Act. 1933 Nag 373 (373) [AIR V 20] : 30 Nag L R 112.

[3] Incidental determination of a question for deciding adjudication application does not operate as res judicata when such question is raised in subsequent suit. 1935 Mad 634 (636) [AIR V 22].

[4] Per *Dalal* and *King JJ.* — If the matter is once decided even as against a stranger by the Insolvency Court the jurisdiction of the civil Court would be barred under S. 11, C. P. C. 1929 All 105 (106) [AIR V 16] : 51 All 550 (FB) ✣ 1935 All 546 (548) [AIR V 22] ✣ 1922 All 128 (128) [AIR V 9] (DB) ✣ 1940 Cal 578 (578) [AIR V 27] ✣ 1933 Lah 789 (790) [AIR V 20] (DB) ✣ 1929 Lah 761 (762) [AIR V 16] (DB) ✣ 1946 Mad 519 (525) [AIR V 33 C 261] : I L R (1946) Mad 429 (DB) ✣ 1946 Mad 141 (143) [AIR V 33 C 80] ✣ 1925 Nag 363 (364, 365) [AIR V 12].

[5] A mere direction by the Insolvency Court in its decision that another proceeding might be taken for having the point more adequately considered and decided is of no avail in considering the plea of res judicata. 1946 Mad 141 (143) [AIR V 33 C 80].

[6] Ex parte decision under S. 4 bars subsequent suit. 1927 All 66 (68) [AIR V 14] : 49 All 71 (DB).

[7] Section 4 comes into play after adjudication as insolvent — Decision in summary inquiry under S. 24 as to whether debtor is entitled to present petition for adjudication is not covered by S. 4 and does not operate as res judicata. 1938 Lah 490 (491, 492) [AIR V 25] : I L R (1938) Lah 535 (DB). (AIR 1938 Lah 148, *Reversed.*)

[8] Decision under S. 4 is a decision in rem and is valid against all persons. 1937 Rang 369 (370) [AIR V 24].

[But see 1939 Lah 87 (88) [AIR V 26]✣ ('59) I L R (1959) Ker 803 (818). (Decision does not bind those who are not parties.)]

[9] Sub-section (2) of S. 4 shows that a decision under that section is binding only as against the debtor and the debtor's estate on the one hand and all claimants against him or it on the other. It cannot apply to a matter which arises between two creditors inter se and not between either of them and the insolvent. 1942 Mad 345 (346) [AIR V 29] (DB).

[10] Cross-suits or applications — Suit on mortgage executed by insolvent and application to set it aside, by official receiver heard together and disposed by one judgment holding mortgage to be valid — Official receiver filing no appeal from mortgage decree but only from order of dismissal of his application — Appeal is not barred by res judicata. 1942 Mad 226 (227) [AIR V 29] (DB). (A I R 1940 Mad 584, *Reversed.*)

[11] Where the claimant has not preferred any claim before the Insolvency Court or where the Insolvency Court has refused to entertain or adjudicate on the claim preferred, there is no bar to a separate suit. 1925 Nag 363 (364, 365) [AIR V 12] ✣ 1935 Mad 297 (298) [AIR V 22] (DB) ✣ 1924 Mad 387 (387) [AIR V 11] (DB).

[12] Claim petition under S. 4 dismissed for default—Separate suit is not barred. 1943 Mad 230 (230, 231) [AIR V 30].

[13] If a matter has been once decided, a subsequent application reagitating the same matter is barred. 1935 Pat 273 (274) [AIR V 22] (DB).

Section 4 — Note 18 *(contd.)*

[14] Section 4 does not confer exclusive jurisdiction on the Court to deal with such questions. Hence a suit by the creditors for a declaration that the property purchased by them in execution of a decree against the insolvent is not liable to attachment and sale in insolvency proceedings pending against him will not be barred if the question raised in the suit has not been decided by the insolvency Court. 1959 Bom 10 (Pr 6) [AIR V 46 C 4] : I L R (1958) Bom 1367 : ILR (1959) Bom 249.

[15] An insolvency petition was withdrawn under S. 14 by leave of Court prior to adjudication as a result of compromise among the creditors. Neither the guardian for the minor creditors nor any counsel had certified to the Court that the compromise was beneficial to the minors. Nor had the insolvency Court considered the question whether the compromise was beneficial to minors. The minors subsequently sued for full recovery of their dues on ground that the compromise was not binding on them—*Held*, that the order granting leave to withdraw the insolvency petitions did not constitute res judicata so far as the question whether the compromise was beneficial to the minors and was binding on them was concerned. 1956 Trav-Co 27 (Pr 6) [(S) AIR V 43 C 7] : ILR (1955) Trav-Co 909 (FB).

[16] Interim receiver appointed under S. 20 taking possession of insolvent's property—Third party preferring claim — Insolvency Court can conduct summary inquiry even before adjudication — Order passed, however, would not be final and conclusive between parties—Final and conclusive order may still be passed under S. 4 when receiver seeks to annul document in favour of the third party and for inclusion of property covered by the document amongst the assets of the insolvent. 1953 Trav-Co 266 (Pr 2) [AIR V 40 C 95] (DB).

19. Section 4 (3).—[1] Under S. 4 (3) the Court must apply its mind to determine the question whether the debtor has a saleable interest in the property. 1925 Cal 932 (933) [AIR V 12] : 52 Cal 662 (DB).

[2] An order under S. 4 (3) can be passed without recording evidence. It is enough if the Court is satisfied on the receiver's report and statement of the claimant that the debtor has some saleable interest in the property. 1924 Cal 533 (534) [AIR V 11] (DB).

[3] Where an order under S. 4 (3) for sale of certain properties was passed by the Insolvency Judge, and he, not considering it necessary to decide the question of title left it to be decided by a competent civil Court, in a suit brought by plaintiff for declaration of his title to the properties:— *Held*, that Art. 13 of the Limitation Act would not stand as a bar to the suit. 1933 Cal 263 (264) [AIR V 20] (DB).

[4] Sale of debtor's interest in such manner and subject to such conditions as the Court thinks fit should be directed only when the Court does not deem it "expedient or necessary" to decide the question of the nature referred to in S. 4 (1). ('53) 1953 A M L J 76 (77).

[5] Where the insolvent opposes an order for sale of properties alleged to be belonging to him, on the ground that the properties were sold or belong to his co-sharers but does not specify the date of sale nor the names of purchasers his opposition is frivolous and the order for sale must be deemed to be one under S. 4 (3) in which no enquiry was expedient or necessary. 1955 Pat 503 (Pr 4) [AIR V 42 C 137] (DB).

[6] Under that sub-section the Court can sell the interest of the debtor, leaving the parties to fight out the extent of their interest in a regular suit before the ordinary Courts. But it may be that in an appropriate case the question of title may arise at a stage earlier than the order of adjudication, but such cases can only be very rare. A third party is not forced to make an application under S. 4, but there are decisions in which the claim of a third party has been considered under S. 4. 1955 Pat 413 (Pr 13) [AIR V 42 C 106] (DB).

20. Appeal. — [1] Whether formal order should be prepared in insolvency proceedings is matter governed not by S. 75 but by Civil P. C.— Order by District Court is case within S. 75 — Hence, order under S. 4 passed by District Court is miscellaneous case within O. 43, R. 3, Civil P. C., and formal order should be prepared — Rules 336 to 338, Oudh Civil Rules are not proper guide for construing expression "miscellaneous case" — Order under S. 4 — Appeal — Copy of formal order not filed along with memorandum of appeal within limitation — Appeal must be rejected. 1946 Oudh 242 (243, 244) [AIR V 33 C 76].

[2] In the case of a claim sought to be made under S. 4, a finding, which does not dispose of the claim amounts to a decision come to or an order made within the meaning of S. 75 (1). 1946 Nag 42 (42, 43) [AIR V 33 C 11] : ILR (1945) Nag 719 (DB).

[3] Appeal contemplated by the further proviso to S. 75 (1) is appeal from decision of District Court and not a subordinate Court invested under S. 3 with powers of Insolvency Court and the decision must be one under S. 4. 1959 Bom 47 (Prs 3, 4) [AIR V 46 C 16] : ILR (1958) Bom 1115 (DB).

[4] Insolvency Judge professing to dispose of number of proceedings before him by a single order—Every one of questions in those proceedings expressly arising in insolvency within meaning of those words in S 4 — Insolvency Judge held did purport to pass, while disposing of the matter raised before him, an order under S. 4—Second appeal from that order held was maintainable. 1949 All 464 (Pr 6) [AIR V 36 C 174] (DB).

[5] Sale of insolvent's property by collector under S. 68, Civil P. C. — Sale challenged by insolvent — Application by him for restoration of property—Insolvency Court has power to decide question under S. 4 — Decision of Insolvency Court — Order in appeal falls within second proviso to S. 75 (1) — Second

5. General powers of Courts.

(1) Subject to the provisions of this Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction.

(2) Subject as aforesaid, High Courts and District Courts, in regard to proceedings under this Act in Courts subordinate to them, shall have the same powers and shall follow the same procedure as they respectively have and follow in regard to civil suits.

[P. I., 1907—S. 47; P. T. I., 1909—S. 90 (1)].

Section 4 — Note 20 *(contd.)*

appeal to High Court is competent — Further appeal under Cl. 10 of Letters Patent (Lah) is also competent, if case is certified to be fit one. 1952 Punj 222 (Pr 14) [AIR V 39] (DB).

[6] See also notes under S. 75.

SECTION 5 — SYNOPSIS

1. Scope.
2. Applicability of O. 9, Civil P. C.
3. Power to order restitution.
4. Review.
5. Injunction.
6. Joinder of parties.
7. Applicability of O. 21, Civil P. C.
8. Abatement.
9. Amendment.
10. Reference to arbitration.
11. Inherent powers.
12. Sub-section (2).
13. Appeal.

1. Scope. — [1] Under S. 5 Court has general powers under Civil P. C. and can carry out its own order. ('35) 18 Nag L Jour 14 (17).

[2] By reason of S. 5, it is manifest that unless there is any express provision in the Act to the contrary, the procedure followed in the exercise of original jurisdiction applies to the proceeding under the Insolvency Act. ('55) 1955 Andh W R 322 (323, 324).

[3] Provincial Insolvency Act making adequate provision as to procedure—Civil P. C. will not apply. 1957 Andh Pra 603 (Pr. 3) [AIR V 44 C 199].

[4] Provisions of Civil P. C. are applicable subject to provisions of Act. When application under S. 53 is dismissed, subsequent application under S. 54 is not barred. 1937 Lah 668 (668, 669) [AIR V 24].

[5] Powers under S. 5 are subject to provisions of S. 43 (1) which are mandatory and therefore must to that extent be limited. 1930 Rang 166 (168) (AIR V 17] : 8 Rang 187 (DB).

[6] Firm adjudicated insolvent — No rules framed under S. 79 and private creditor not proving his debts—Failure to frame rules does not override provisions of law exempting insolvent of his liability to pay debts on discharge—In absence of such rules provisions of Civil P C. apply in view of S. 5. 1932 Sind 39 (40) [AIR V 19] : 25 Sind L R 422 (DB).

[7] A proceeding to set aside a sale of insolvent's property should be as in suits in view of S. 5 (1) and therefore it should not be started except on a verified petition and evidence should also be taken. 1927 Cal 834 (835) [AIR V 14] (DB).

[8] All provisions of Civil P. C. relating to suit are not attracted to insolvency proceedings even by the combined effect of S. 5 and S. 141, Civil P. C. Rule relating to protection of Sovereign Princes and Ruling Chiefs in S. 86 has no application to insolvency proceedings. 1940 Cal 244 (246) [A I R V 27] : ILR (1940) 1 Cal 344 (DB).

[9] Section 5 of Limitation Act did not apply to petitions made under Act III of 1907 but under new Act S. 5 has been specifically declared to be applicable. 1925 Lah 436 (437) [AIR V 12] (DB) ✣ 1916 Lah 307 (308) [A I R V 3]. (Case under old Act—Section applies).

[10] A proceeding initiated against a stranger to the bankruptcy for recovery of money due from him for breach of obligation to the insolvent is not a proceeding under the Act and S. 47 of Act III of 1907 (Now S. 5) cannot be invoked to confer jurisdiction on Court to pass a decree against such person. 1930 All 622 (624) [AIR V 17] (DB).

[11] Powers referred to under S. 47 of Act III of 1907 are powers to be exercised in proceedings which insolvency Court has jurisdiction or authority to entertain under other provisions of the Act. 1919 Cal 965 (968) [A I R V 6] (DB).

[12] Section 21, Civil P. C. is not applicable to proceedings under the Act—Objection to jurisdiction of Insolvency Court can be taken on appeal. 1914 Cal 350 (352) [AIR V 1] (DB).

2. Applicability of O. 9, Civil P. C.—[1] Application for setting aside an ex parte order passed by Insolvency Court is permissible in view of O. 9 R. 13, Civil P.C. read with S. 141 Civil P. C. and S. 5 of Provincial Insolvency Act. There is no provision in the Provincial Insolvency Act, to avoid ex parte orders. ('58) ILR (1958) Andh Pra 822 (825) (DB).

[2] The provisions of O. 9, Civil P. C. are applicable to proceedings under the Act except where they are in conflict with any of its provisions — Hence an application for setting aside an ex parte order of adjudication can be entertained under O. 9, R. 13 and should be inquired into. 1930 Lah 996 (997) [A I R V 17] ✣ 1940 Pat 623 (624) [A I R V 27] (DB) ✣ 1932 Lah 522 (523) [A I R V 19] ✣ 1932 Mad 63 (65) [AIR V 19].

[3] An alienee from the insolvent having been made a party to the insolvency petition which attacks his alienation is entitled to

Section 5 — Note 2 *(contd.)*

apply to set aside an ex parte order of adjudication by which he is adversely affected 1936 Mad 660 (661) [A I R V 23] : 59 Mad 1049 ✠ ('58) ILR (1958) Andh Pra 822 (825) (DB).

[4] Sale by insolvent set aside ex parte against transferee—Application by transferee under O. 9, R. 13 — Case can be reheard if sufficient cause for non-appearance is shown. 1927 Mad 897 (898) [AIR V 14] (DB).

[5] Section 5 applies the procedure of Civil Procedure Code to applications under the Act. Consequently when a claim petition under S. 4 by a third party is dismissed not on merits but for default under O. 9, R. 8, Civil P. C. a separate suit by the claimant to establish his claim is not barred under O. 9, R 9 which bars only a fresh petition for the same relief. 1943 Mad 230 (231) [AIR V 30].

[6] Order of annulment under S. 43 (1) cannot be set aside under O. 9, Civil P. C.— S. 10 2) governs the case—Civil P. C. applies subject to the provisions of the Act. 1926 Mad 942 (943) [AIR V 13]: 49 Mad 935 (DB). (AIR 1924 Mad 635, *Foll*).

3. Power to order restitution. — [1] An Insolvency Court has power to order restitution similar to that conferred by S. 144, Civil P. C. on ordinary Civil Courts, in the exercise of their original civil jurisdiction. Thus, where an order directing receiver to distribute assets has been set aside by High Court but the receiver has already distributed the assets, the Insolvency Court can order the persons to refund the amounts received by them. 1933 All 117 (118) [AIR V 20] (DB).

[2] Before his application for adjudication as insolvent, execution proceedings were pending against the applicant. No notice to the executing Court by the official receiver under S. 52 was given. The attached property having been sold decree-holder obtained payment —*Held* that though the sale proceeds had been realized by the executing Court after admission of petition for adjudication, there being no provision in the Insolvency Act directing a refund of the amount obtained by the decree-holder the proper course was an application under S. 52 and that S. 144, Civil P. C. was obviously inapplicable. 1930 Lah 39 (40) [AIR V 17].

4. Review.—[1] An insolvency court has power to review its orders by virtue of S. 5 (1) read with O. 47. R. 1 Civil P. C. 1933 Nag 39 (40) [A I R V 20] : 28 Nag L R 295 ✠ 1948 Mad 233 (Pr 3) [AIR V 35 C 118] : ILR (1948) Mad 659 (DB) ✠ 1932 Mad 63 (65) [AIR V 19] ✠ 1927 Mad 175 (176) [A I R V 14] (DB). (Order of annulment.) ✠ 1923 Mad 355 (356) [AIR V 10] : 46 Mad 405 (DB).

[2] The result of the absence of a provision for review in the Act is only that before the Court can review its own order, the power so exercised should have been conferred on it by some provision of the Civil P. C. In other words, unless the case falls under O. 47, R. 1, the Court will have no power of review. 1955 Trav Co 49 (Pr 5) [(S) AIR V 42 C 22] : I L R (1954) Trav Co 1042 (DB).

[3] An insolvency court possesses the same powers as other Civil Courts to correct its own errors committed inadvertently or by an oversight. Thus an order passed without notice to the insolvent and vitally affecting his interests can be vacated by the Insolvency Court. 1943 Pat 142 (142, 143) [AIR V 30] : 22 Pat 74 (DB).

[4] Where the Insolvency Court strikes off the insolvency petition without adverting to S. 14. this is an error apparent on the face of the record and attracts the application of O. 47, R. 1. 1955 Trav Co 49 (Pr 6) [(S) AIR V 42 C 22] : ILR (1954) Trav Co 1042 (DB).

[5] District Judge can grant review as an Appellate Court — High Court will not interfere with order granting review by District Judge unless objection could be taken under O. 47, R. 7, Civil P. C. 1922 All 206 (207) [AIR V 9] : 44 All 605 (DB).

[6] Official receiver cannot be delegated with the power to review his orders under S. 5. If the receiver thinks that a debt has been improperly entered in the schedule, he may apply to the Court to expunge such entry or reduce the amount of the debt. 1928 Sind 40 (42) [AIR V 15].

[7] Where matters of which the Court should have been apprised by the Official Receiver are not brought to its notice and the Court annuls the insolvency under S. 43 of the Provincial Insolvency Act, the Court would have jurisdiction to entertain an application for review of such an order when its attention is drawn to the facts which were not placed before it by the Official Receiver and which justify a re-consideration of the previous order. 1948 Mad 233 (Pr 2) [AIR V 35 C 118] : ILR (1948) Mad 659 (DB).

5. Injunction. — [1] Under S. 5 the Insolvency Court, since it has the same powers as a civil Court, could, under justifiable circumstances, grant an injunction preventing a creditor from selling the insolvent's property which right is disputed by the other creditors in the Insolvency Court. 1954 Mad 12 (Prs 11, 14) [A I R V 41 C 5] : I L R (1954) Mad 360 (DB). (The observation in A I R 1925 Mad 1051, held to be too wide and Mulla's "Insolvency", paragraph 74 held to state the principle correctly.)

[2] The insolvency Court has jurisdiction to issue such processes as prohibition and injunction to prevent alienation of his property by the debtor. 1936 Nag 237 (239) [AIR V 23] : ILR (1937) Nag 185 : 38 Cri L Jour 230.

[3] Insolvency Court is justified in granting an injunction to prevent creditor who claims lien over certain of the debtor's assets and which is disputed by other creditors from bringing property to sale pending decision of dispute. 1928 Rang 241 (241) [AIR V 15] : 6 Rang 352 (DB).

[4] Order of adjudication and subsequent absolute discharge of insolvent — Property continuing in hands of receiver for payment of dividend—Petition by insolvent under S. 5 to stay disbursement of dividend in order to allow him to claim benefit of S. 21, Madras Agriculturist Relief Act, 1938 — *Held* that the application was not maintainable. 1947 Mad 95 (95) [AIR V 34 C 43].

Section 5 — Note 5 *(contd.)*

[5] Insolvency Court cannot stay every pending litigation but can only issue injunction, it circumstances enumerated in O. 39, R. 1, C. P. C., are proved to exist. An injunction against a person not party before it cannot be issued. 1918 Pat 214 (215) [A I R V 5] : 3 Pat L Jour 456 (DB).

[6] A Court has no power to stay an execution sale going on in other Court either under S. 151, Civil P. C., or under this section. 1917 Mad 945 (946) [AIR V 4] (DB).

6. Joinder of parties. — [1] It cannot be contended that O. 1, R. 10, Civil Procedure Code is not a rule governing the procedure of the Courts in exercise of original civil jurisdiction. As there is no express provision in the Act prescribing a procedure different from that laid down in the Civil Procedure Code, or expressly excluding the application of that procedure to proceedings under S. 68 of the Act, S. 5 attracts the provisions of the Civil Procedure Code. A new party may be added to an application under section 68 of the Act if the conditions laid down in O. 1, R. 10 are complied with. ('55) 1955 Andh W R 322 (323, 324).

[2] As under the provisions of the Provincial Insolvency Act (Ss. 24 and 19 (2)), it is open to the creditor to whom notice has been issued to prove that the applicant creditor is not a creditor of the debtor and that the insolvency petition is engineered by the debtor only with a view to defeat and delay his rights, it is not necessary to add him as a party under O. 1, R. 10 of the Civil P. C. When the Provincial Insolvency Act itself has made adequate provision, the provisions of the Civil P. C., will not apply. 1957 Andh Pra 603 (Prs 2, 3) [AIR V 44 C 199].

[3] A creditor filed an application for adjudging the petitioner an insolvent. Pending disposal of this petition the respondent herein came by way of an application under O. 1, R. 10, Civil Procedure Code, to be added as an additional party to the petition. On the question whether the petition could be ordered—*Held*, that while a definite provision for substitution of a party has been made under S. 16 of the Provincial Insolvency Act a creditor aggrieved by the conduct of the petitioning creditor can come only by way of the substitution petition under S. 16 of the Act and not under O. 1, R. 10 of the Civil Procedure Code to be added as a party. 1951 Mad 665 (Prs 4, 7) [A I R V 38 C 201] : ILR (1951) Mad 463.

[4] Single application for adjudication can be made by creditor against two or more persons if they are jointly liable on debt or have committed joint act of insolvency. The test to see whether such application can be jointly tried is to treat it as a suit under S. 5 and to see whether it is bad for multifariousness. 1930 Lah 592 (594) [AIR V 17] ✣ 1925 Rang 36 (37) [AIR V 12] : 2 Rang 309 (DB) ✣ 1921 Mad 294 (297) [A I R V 8] : 44 Mad 810 (DB) ✣ 1927 Mad 124 (125) [AIR V 14] : 50 Mad 256 (DB).

7. Applicability of O. 21, Civil P. C.— [1] The execution of any order made under S. 56 or S. 4 will be regulated by the terms of S. 5; therefore a purchaser from official receiver of a property of insolvent whom receiver represents, can obtain an order from Insolvency Court for delivery of possession of property, where his application is resisted by third party. 1922 Mad 147 (148) [AIR V 9] : 45 Mad 434 (DB) ✣ 1944 Mad 481 (483) [AIR V 31] : I L R (1945) Mad 10 (FB). (AIR 1928 Mad 531, *Overruled.*)

[2] Section 47 of Act III of 1907 lays down no procedure for effecting an attachment; Court must follow same procedure as it would do in exercise of its original civil jurisdiction. 1914 All 264 (265) [AIR V 1] : 36 All 65 (DB).

[3] Order 21, R. 98 being a special rule limited to the case of a decree-holder trying to obtain possession under his decree cannot be applied under S. 5 to the case of a person resisting official assignee in taking possession of insolvent's property as the Act has its own rules in this behalf. 1940 Nag 233 (234, 235) [AIR V 27] : ILR (1941) Nag 757 (DB).

[4] The word 'proceeding' in this section means a proceeding in Court. A receiver's sale is not a 'proceeding under the Act.' Consequently sale by a receiver in bankruptcy is not governed by O. 21, Civil P. C. 1928 Rang 60 (61) [AIR V 15] : 5 Rang 768 (DB) ✣ 1917 All 74 (75) [AIR V 4] : 39 All 267 (DB). (Order 21, R. 71 not applicable — Case under old Act.)

[5] Sale and action taken by Insolvency Court for realization of insolvent's property are proceedings in Court under the Insolvency Act and the provisions of O. 21, C. P. C., are applicable to them. 1921 Nag 25 (26) [AIR V 8] : 17 Nag L R 49 ✣ 1927 Nag 262 (263) [AIR V 14].

[6] In view of Ss. 2 (2) and 5 (1), in the matter of attachment and sale of insolvent's property, the provisions applicable under the Provincial Insolvency Act must be regarded as materially the same as those of the Civil P C. The exemptions contained in S. 60, Civil P. C. are based on reasonable and equitable grounds and considerations, and they are applicable to the proceedings by way of attachment and sale taken out by the Official Receiver in exercise of the powers vested in him under the Provincial Insolvency Act. 1960 Andh Pra 458 (Pr 5) [AIR V 47 C 150] (DB).

8. Abatement.—[1] Death of debtor during pendency of insolvency proceedings — Proceedings can continue for realisation and distribution of property — Provisions of S. 17, of the Provincial Insolvency Act should be given preference over the provisions of O. 22 of the Civil P. C. — Same rule applies if death of debtor takes place after adjudication. 1952 Hyd 80 (Prs 6, 20) [AIR V 39] : ILR (1952) Hyd 196 (FB).

9. Amendment. – [1] Section renders provisions of O. 6, R. 17, Civil P. C., relating to amendment of pleading applicable to petitions made under Act. 1935 Mad 202 (203) [AIR V 22].

Section 5 *(contd.)*

10. Reference to arbitration.—[1] Court cannot refer to arbitrators proceedings in insolvency as Sch. II, of C. P. C. (now Arbitration Act) does not apply to proceedings under Act. 1916 Lah 170 (171) [AIR V 3] : 1916 Pun Re No. 50.

11. Inherent powers.—[1] An Insolvency Court has inherent powers to make necessary orders for the ends of justice and to prevent the abuse of the process of the Court. 1934 Lah 468 (470) [AIR V 21] : 15 Lah 698 (DB).

[2] By virtue of the provisions of S. 5 (1), an Insolvency Court may exercise all the powers which are conferred upon it as a Civil Court of original jurisdiction unless such powers are contrary to the provisions of the Provincial Insolvency Act, but S. 151, Civil P. C., does not confer upon a Court authority to do that which is prohibited by law. A Court has no inherent power to alter or vacate its own order and cannot invoke its inherent powers for this purpose. Consequently, a Provincial Insolvency Court has no power to alter or revoke its orders. 1940 Rang 156 (156) [AIR V 27] : 1940 Rang L R 392.

[3] An Insolvency Court has no inherent jurisdiction under S. 5 apart from the provisions of Ss. 23 and 31 to pass a protection order or that the warrant of arrest issued against the insolvent should not be executed. 1934 Lah 113 (114) [AIR V 21].

[But see 1925 Mad 170 (171) [AIR V 12] (DB). (A District Judge has inherent powers under S. 5 to grant an interim protection to an applicant for insolvency. But the High Court will not interfere unless the discretion has been wrongly exercised.)]

[4] Court is competent to pass order in exercise of its inherent jurisdiction on analogy of somewhat similar provisions contained in S. 94 of Presidency Towns Insolvency Act. 1931 Sind 65 (67) [AIR V 18] (DB).

[5] Insolvency Court has inherent power to dismiss insolvency petition if it is presented not for bona fide obtaining adjudication but for collateral or inequitable purpose or if it is abuse of process of Courts. ('10) 32 All 645 (650) (DB). (Case under Act of 1907).

[6] The Official Receiver can invoke the inherent jurisdiction of the Insolvency Court to rectify any error or mistake committed by him and the Court has ample power to prevent an injury to the estate resulting from any act or decision of the receiver. 1950 Mad 311 (Prs 6, 9) [AIR V 37 C 142]. (Proclamation of sale wrongly stating greater value of incumbrance — Property fetching very much less price — Upon discovery of mistake, Official Receiver can move Insolvency Court to set aside auction sale and rectify error committed by him.)

12. Sub-section (2). — [1] In Insolvency cases the High Court has power to act under the Civil P. C. only subject to the provisions of the Provincial Insolvency Act. Where therefore the Insolvency Act specifically provides for appeals and revisions in particular manner any action taken in appeal or revision under the Civil P. C. will not be subject to the provisions of the Insolvency Act but will be in contravention of those provisions. The Provincial Insolvency Act is a special law and in the absence of any specific provision to the contrary the Civil P. C. cannot limit or otherwise affect the provisions of the Insolvency Act. 1936 All 80 (82) [AIR V 23] : 58 All 639 (DB).

[2] By virtue of S. 5 the general procedure applicable to insolvency cases is that laid down in the Civil P. C. There being no specific procedure for dismissal of appeal in default or for restoration laid down in the Act the provisions of O. 41 would govern the procedure in such cases. Thus an order refusing to set aside dismissal of appeal for default is appealable. 1930 Lah 112 (112) [AIR V 17].

[3] Under S. 5 (2) procedure relating to cross-objections in O. 41, R. 22, Civil P. C. would apply to appeals under Act. 1940 Nag 292 (293) [AIR V 27] : ILR (1942) Nag 156.

[4] The words 'subject as aforesaid' in S. 5 (2) means subject to the original civil jurisdiction of the District Court in insolvency matters. The High Court has therefore power under its extraordinary civil jurisdiction to transfer a proceeding in insolvency from the lower Court to itself for disposal. 1936 Lah 608 (609, 610) [AIR V 23] : 17 Lah 582 (DB).

[5] Original side of High Court is not competent to transfer insolvency proceedings from one Court to other as the Act excludes the original side of the High Court from exercising jurisdiction under the Act. 1927 Rang 105 (107) [AIR V 14] : 4 Rang 554.

[6] An application to withdraw an insolvency petition from a Subordinate Judge and transfer it for trial and disposal to original side of High Court is not maintainable. 1928 Mad 1091 (1092) [AIR V 15] : 52 Mad 57.

[7] A High Court has power to set aside an interlocutory order by virtue of S. 5 (2). Thus an order by District Judge in appeal for taking additional evidence can be set aside by the High Court. 1921 Nag 159 (160) [AIR V 8].

13. Appeal. — [1] Section 5 cannot override the provisions of S. 75 of the same Act in so far as the latter section confers a right of appeal in any instance. It is not permissible to read the provisions of S. 75 with a further modification that the provisions are subject to the provisions of the C. P. Code. 1948 Mad 520 (Pr 3) [AIR V 35 C 258] : ILR (1949) Mad 106 (DB).

[2] Under the Insolvency Act an appeal is entertainable even against an order rejecting an application for review. The provisions of the Civil P. C. are made applicable to insolvency proceedings subject to the provisions of the Insolvency Act. Consequently when the right of appeal is expressly regulated by the Insolvency Act it should not be taken to be governed by the provisions of O. 47, R. 7, Civil P. C. 1955 Trav Co 49 (Pr 10) [(S) AIR V 42 C 22] : ILR (1954) Trav Co 1042 (DB). (AIR 1935 Pat 177, *Not foll.*)

[3] Merely because certain powers are conferred on the Insolvency Court by S. 5 and it

PART II

PROCEEDINGS FROM ACT OF INSOLVENCY TO DISCHARGE

Acts of insolvency

6. Acts of Insolvency.

A debtor commits an act of insolvency in each of the following cases, namely :—

(a) if, in [a][India] or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally ;

(b) if, in [a][India] or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors ;

(c) if, in [a][India] or elsewhere, he makes any transfer of his property, or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent ;

(d) if, with intent to defeat or delay his creditor,—

(i) he departs or remains out of [b][the territories to which this Act extends],

(ii) he departs from his dwelling-house or usual place of business or otherwise absents himself,

(iii) he secludes himself so as to deprive his creditors of the means of communicating with him ;

(e) if any of his property has been sold in execution of the decree of any Court for the payment of money ;

(f) if he petitions to be adjudged an insolvent under the provisions of this Act ;

(g) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts ; or

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Section 5 — Note 13 *(contd.)*

can adopt the procedure followed by civil Courts, it does not mean that every order of that Court becomes a decree. An order passed under Ss. 53 & 54, does not come within the definition of 'decree' in Civil P.C. Decision can only be an order but, since it is only decrees that can be amended under S. 19, Madras Agriculturists Relief Act an order falling outside it cannot come under S. 25A (1) (b) of the Madras Agriculturists Relief Act and does not therefore become appealable. ('58) 1958 Andh L T 896 (898, 899).

SECTION 6 — SYNOPSIS

1. Scope.
2. Sub-section (a).
3. Sub-section (b).
4. Sub-section (c).
5. Sub-section (d).
6. Sub-section (e).
7. Sub-section (f).
8. Sub-section (g).
9. Sub-section (h).
10. Sub-section (i) (Bom).
11. Explanation.

1. Scope. — [1] The words "Act of insolvency" in S. 6 contemplates those acts which in the public eye shake the credit of a debtor and are likely to cause a scramble amongst the creditors for his assets. 1942 Mad 306 (307) [AIR V 29] (DB).

[2] When the debtor was not personally liable for the debt due to the petitioning creditor and when there is no evidence of any other debt being in existence when the sale deed (alleged to be an act of insolvency) in favour of the vendee was executed, it can on no account be treated as an act of insolvency. 1952 Trav-Co 234 (236) [AIR V 39] (DB).

[3] Even if a debtor has enough property by the sale of which his debts could be liquidated, that circumstance would not render the petition for his insolvency unsustainable or make it liable to be dismissed. Insolvency need not be and most often is not pauperism. If a person is not able to meet his liabilities as and when they became due, out of his funds, he is not solvent though he may have enough assets by converting which into cash he may be able to liquidate his liabilities. 1954 Trav-Co 419 (423, 424) [AIR V 41 C 145] : ILR (1954) Trav-Co 93.

[4] Section 6 sets out the conduct or acts of a debtor which may be regarded as acts of insolvency. But the section does not purport to state at which point of time an act of insolvency shall be deemed to be committed. In each case, at what point of time an act of insolvency shall be deemed to be committed is a question to be decided on evidence. 1958 Bom 164 (166 & 167) [AIR V 45 C 48] : ILR (1957) Bom 295.

(h) if he is imprisoned in execution of the decree of any Court for the payment of money.

Explanation.—For the purposes of this section the act of an agent may be the act of the principal.

[P. I., 1907—S. 4; P. T. I., 1909—S. 9.]

[a] *Substituted* for "the Provinces" by A.L.O., 1950 [26-1-1950]. [b] *Substituted* for "Part A States and Part C States" by 3 A L.O., 1956 [1-11-1956].

STATE AMENDMENT

MAHARASHTRA

In its application to the State of Bombay, in section 6 for cl. *(i)* as newly *inserted* by Bom. Act XXV of 1939 *substitute* the following, namely,—

"*(i)* if, after a creditor has served an insolvency notice on him under this Act in respect of a decree or an order for the payment of any amount due to such creditor, the execution of which is not stayed, he does not, within the period specified in the notice which shall not be less than one month, either comply with the requirements of the notice or satisfy the Court that he has a counter-claim or set off which equals or exceeds the decretal amount or the amount ordered to be paid by him and which he could not lawfully set up in the suit or proceeding in which the decree or order was made against him." —Bom. Act LXVIII of 1948, S. 2 [w.r.e.f. 19-6-1939].

Section 6-A—MAHARASHTRA

In its application to the State of Bombay after section 6, the following new section shall be *inserted*, namely :—

"6-A. *Insolvency notice.—(1)* An insolvency notice under this Act shall be in the prescribed form and shall be served in the prescribed manner. It shall require the debtor to pay the amount due under the decree or order, or to furnish security for the payment of such amount to the satisfaction of the creditor or his agent, or to satisfy the Court that he has a counter-claim or set off which equals or exceeds the decretal amount or the amount ordered to be paid by him and which he could not lawfully set up in the suit or proceeding in which the decree or order was made against him and shall state the consequences of non-compliance with the notice.

(2) Such notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due, unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mis-statement; but if the debtor does not give such notice, he shall be deemed to have complied with the insolvency notice if within the time allowed he takes such steps as would have constituted a compliance with the notice had the actual amount due been correctly specified therein."

— Bom. Acts XV of 1939, S. 3 (b) [19-6-1939] as amended by LXVIII of 1948, S. 2 [w.r.e.f. 19-6-1939].

Section 6 — Note 1 *(contd.)*

[*See* 1957 Andh Pra 535 (536) [AIR V 44 C 181]. (Date of registration should be regarded as date of transfer for purpose of S. 54 of Insolvency Act.)]

[5] Travancore Debt Relief Act (II and III of 1116) was intended as an ameliorative measure in favour of debtors. It cannot be said that the invoking of the relief afforded by such a statute is an act of insolvency. Special provision to that effect has also been made in sub-s. (2) of S. 22 of the Debt Relief Act. ('57) 1957 Ker L J 620 (621).

2. Sub-section (a). — [1] The assignment by a debtor of all his property for the benefit of all his creditors is in itself an act of insolvency as the necessary consequence of the debtor's act is to delay his creditors. ('02) 26 Bom 476 (485) (DB).

[2] Deed of assignment to trustees for the benefit of creditors can be revoked before the assent of some creditors at least is received thereto. ('12) 6 Sind L R 183 (184, 185) (DB).

[3] A creditor who is not a party to the trust deed and to whom the trust has not yet been communicated can avail himself of the act of the debtor when he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally. Hence his right will be against the trustee as owner of trust property. 1938 Cal 818 (822) [AIR V 25] (DB).

[4] The words "third person" do not exclude conveyance to some of the creditors as trustees for the whole body of creditors. 1917 Mad 102 (104) [AIR V 4] (DB).

[5] Execution of a composition deed by a debtor amounts to act of insolvency. 1927 Sind 78 (81) [AIR V 14] : 22 Sind L R 1.

3. Sub-section (b).—[1] The transfer must be one made with the intention of defeating the creditors. 1934 Rang 242 (242) [AIR V 21] (DB).

[2] The transfer contemplated by S. 6 (b) must be one made with the intent to defeat the whole body of creditors. 1934 Rang 242 (242) [AIR V 21] (DB) ✣ 1958 Cal 319 (320) [AIR V 45 C 80] ✣ 1955 N U C (Ajmer) 774 [AIR V 42]. (Transfer substantially for benefit of creditors or some of them—Transfer is not made with intent to defeat or delay creditors.) ✣ 1940 Oudh 205 (207) [AIR V 27]. (Transfer having the effect of preferring some creditors — S. 6 (b) will not apply.) ✣ 1937 Lah 495 (496) [A I R V 24]. (Sale proceeds utilised in paying of some creditors—Transfer

Section 6 — Note 3 *(contd.)*

does not amount to act of insolvency as contemplated by S. 2 (b).)

[3] It is not impossible to peep into the mind of man and ascertain his intention. The subjective state of mind of the transferor is what is material and that has to be inferred from the attendant circumstances. Where the circumstances of a case leave no room for doubt that the transactions were resorted to by the debtor with a view to defeat his creditors that would be an act of insolvency. 1954 Trav-Co 419 (423) [AIR V 41 C 145] : I L R (1954) Trav-Co 93.

[4] Word "creditor" in S. 6 (b) does not include person who becomes creditor of debtor after date of transfer or other act of insolvency — Word "creditors" in aforesaid section cannot be interpreted in same sense as word "creditors" in S. 53, T. P. Act. 1947 All 383 (387) [AIR V 34 C 144] : ILR (1947) All 624.

[5] The presumption under English Law as to the intent when the whole property of the insolvent is transferred is not applicable under the Provincial Insolvency Act, which specifically sets forth that a certain intent is necessary to bring the act within the meaning of the statute. 1933 Rang 216 (217)[AIR V 20] (DB).

[6] Question whether person transferred his property with intent to defeat or delay his creditors under S. 4 (b) of Act, is one of fact. 1916 Lah 60 (61) [AIR V 3] : 1916 Pun Re No. 102 (DB).

[7] The true test that ought to apply in order to determine intention of the person who is alleged to be insolvent is to see whether he is in a position to pay his debt and whether the property transferred bears such a proportion to the whole of the property that the remaining residue is still sufficient as from the view point of an ordinary businessman to meet the debts of remaining creditors. 1940 Pat 187 (189, 190) [AIR V 27] (DB) ✠ 1939 Lah 349 (352, 354) [AIR V 26] : ILR (1939) Lah 408 (DB). (Transfer effected substantially reducing the area available to creditors — Transfer itself not bringing in sufficient money to discharge the debts—*Held*, that the transfer should be deemed to have been made with intent to defraud though primary motive of debtor may be different.) ✠ 1936 Rang 129 (131) [AIR V 23] (DB). (Assets still in the hands of debtor sufficient to meet his other engagements and trade — *Held* transfer was with no intent to defraud or delay.) ✠ 1933 Lah 582 (583) [AIR V 20]. (Remaining assets exceeding in value the total liabilities—Transfer of property does not amount to act of insolvency even though he is unable to pay the debts.)

[8] Transfer of property to a relation does not *per se* amount to an intention to defeat or delay creditors unless the transferor owes large sums of money and is financially embarrassed so as to make it likely for him to take the property out of the reach of creditors. 1935 Pesh 168 (170) [AIR V 22] ✠ 1936 Rang 498 (499) [AIR V 23]. (Transfer by the debtor of all properties in favour of his children — *Held* that presumption of fraud arises.)

[9] That the transferor was in embarrassed circumstances and that the transferee was a close relation and that the transfer was of all the properties of the transferor are factors showing that the dominant motive or sole object of the transaction was to defraud creditors and the inadequacy of consideration is considered as a circumstance evidencing fraud. 1955 NUC (Mad) 3169 [AIR V 42].

[10] Under S. 6 (b), question of inability of debtor to pay debts is not directly relevant, though it would be relevant in considering application of S. 6(c) which depends on S. 54. 1940 Pat 411 (414) [AIR V 27] (DB).

[11] In order to determine whether a transfer amounts to an act of insolvency, the question of inadequacy or otherwise of the consideration is not a necessary element which should be taken into account. 1937 Pat 134 (135, 136) [AIR V 24] (DB).

[12] The following transfers were held not to be acts of Insolvency :

(a) Sham transfer not intended to be effective and not affecting any right of property. 1919 Mad 467 (467) [A I R V 6] (DB).

(b) Transfer of certain property which is protected under special enactment from attachment and sale by a Civil Court or in insolvency proceeding. 1934 Lah 507 (507, 508) [AIR V 21].

(c) Transfer of property which has vested in a third person by order of Court. 1934 Lah 394 (395) [AIR V 21].

(d) Debts incurred by some brothers only for a new business started by them — Partition of family houses amongst brothers. 1940 Oudh 205 (206) [A I R V 27].

[13] The following transfers were held to be acts of insolvency :

(a) Partition by a father who was in debts of the joint family property without making provision for his debts. 1930 Nag 215 (216) [A I R V 17] ✠ 1936 Lah 336 (337) [AIR V 23].

(b) Debtor effecting partition with his undivided brother—All property given to brother and only small amount of money taken by him—No provisions made for payment of his debts — Transfer held constituted an act of insolvency. 1936 Lah 336 (337) [AIR V 23].

(c) Collusive suit and subsequent withdrawal from or compromising the suit having the effect of putting another party in possession of immovable property. 1915 All 225 (225) [A I R V 2] (DB).

(d) Mortgage by debtor who was very heavily involved, of properties to his son-in-law within a short time before application for adjudication was filed. 1931 Lah 667 (668) [AIR V 18].

[14] Where a debtor raised money by mortgage of property for purposes of his business without any intention of defeating or delaying creditors it was held that the subsequent loss

Section 6 — Note 3 *(contd.)*

of the money raised could not convert the transaction into an act of insolvency when it was not so at the time when it took place. 1940 Lah 496 (496) [AIR V 27].

[15] Fraudulent transfer coming under S. 6 (b) is one voidable under S. 53, T. P. Act independently ot insolvency of transferor and one that is voidable under S. 53, Provincial Insolvency Act. 1955 NUC (Mad) 3169 [AIR V 42].

[16] Per *Shiv Dayal, J.* — If a transfer of property with intent to defeat or delay the creditors is alleged as constituting an act of insolvency the Court is competent to determine the alleged nature of the transfer in the order of adjudication and cannot postpone its decision to the stage when the same is sought to be annulled under S. 53. The scope of inquiry under S. 6 (b) is quite different from that under S. 53. It is the intention and conduct of the debtor, in making the transfer, which determines whether it constitutes or not an act of insolvency. But on an application for avoidance of a transfer under S. 53 what is to be established is want of good faith of the transferee. 1961 Madh-Pra 15 (19) [AIR V 48 C 11]. (Court is not concerned as to the effect of the order of adjudication on any subsequent proceedings.)

4. Sub-section (c). — [1] Concealment of property to defeat creditors does not constitute act of insolvency. 1933 Lah 725 (725) [AIR V 20].

[2] The use of the word "preference" implies an act of free will so that there can be no preference where the act is the result of pressure. 1915 Cal 460 (462) [AIR V 2] (DB)✣ 1935 Lah 278 (279) [AIR V 22] (DB)✣('13) 11 All L Jour 545 (548) (DB).

[3] To decide whether a transfer constitutes fraudulent preference the dominant motive of the debtor in satisfying particular creditors should be looked into. 1942 Lah 121 (122) [AIR V 29]. (Person who was authorised to sell or mortgage joint family firm's property to liquidate its debts alienating three items in payment of debts due to his relations — *Held* the dominant motive was to prefer the particular creditors and therefore the transactions were fraudulent.) ✣ 1937 Nag 226 (227) [AIR V 24]: ILR (1939) Nag 463. (Sale of house to two creditors by debtor for a consideration which was very small when compared with his debts — No evidence of pressure — *Held* his dominant motive was to prefer certain creditors.) ✣ 1928 Mad 480 (483) [AIR V 15]: 51 Mad 495 (DB). (Consideration for a transfer Rs. 48,000 — Present advance of Rs. 439 only obtained — Transferee near relative of debtor who was in embarrassed circumstances—*Held* there was fraudulent preference.)

[4] The plea of fraudulent preference is negatived by the fact that, at the time that some of the creditors were paid off by disposing of part of the property, there was ample property still left with the debtor sufficient to pay off his debts. 1935 Lah 278 (278) [AIR V 22] (DB) ✣ 1930 All 282 (283) [A I R V 17]: 52 All 476 (DB). (Transfer of all property to one creditor — *Held* was fraudulent preference.)

[5] Transfer — What constitutes —Release —Release is a sort of surrender of rights in favour of another person and for all intents and purposes it is a transfer of the rights. 1961 Madh-Pra 15 (17) [AIR V 48 C 11].

[6] Per *(A. H. Khan J.)* — If fraudulent preference is alleged as an act of insolvency, the Court is competent to determine the question under S. 6. The determination of the question cannot be postponed till the proceedings have reached the stage under S. 54. At the time of determining whether any transfer amounts to a fraudulent preference under S. 6 (c), the Court does not declare the transfer as void nor does it annul the transfer. The stage of annulment comes later on when a receiver is appointed. 1961 Madh Pra 15 (17) [AIR V 48 C 11].

[7] Per *Shiv Dayal J.* — The very word 'preference' envisages at least two creditors and a preference to one of them. If 'the very act of the impugned transfer such as a mortgage creates a debt, the transferee no doubt becomes a creditor by virtue thereof but it cannot be said to be a fraudulent preference for the transferee (as a creditor) to others. 1961 Madh Pra 15 (19) [AIR V 48 C 11].

5. Sub-section (d). — [1] The act of insolvency contemplated by S. 6 (d) should be an act done with the intent to defeat or delay the creditors generally. An attempt by a debtor to deprive any one creditor of the fruits of a decree against him does not amount to an act of insolvency. 1935 Rang 281 (282) [A I R V 22] (DB). (Avoidance of service in one particular execution proceeding is not an act of insolvency.)

[2] Departure of debtor from dwelling house is not act of insolvency. His intention of departure must be considered. 1919 Sind l (3) [AIR V 6]: 13 Sind L R 187.

[3] Temporary absence from village is not an act of insolvency. 1925 All 564 (565] [AIR V 12] (DB).

[4] Debtors who at one time were carrying on an extensive business closing business and leaving the locality in an unaccountable manner — Residence taken up in a native State— *Held* the debtors clearly had intention to defeat or delay creditors. 1936 Lah 176 (177) [AIR V 23.]

[5] Judgment-debtor concealing himself in order to avoid arrest in execution of a decree commits an act of insolvency. 1932 Lah 28 (29) [AIR V 19].

[6] Debtors stopping business and not found at usual place of business — Servants not aware of their whereabouts — *Held* that there was sufficient departure from usual place of business with intent to delay or defeat creditors. 1949 East Punj 359 (361) [AIR V 36 C 90].

6. Sub-section (e). — [1] Sub-section (e) refers to the property of the person against whom the application is made. 1926 Mad 976 (976) [AIR V 13] (DB). (Under decree against the partnership the property of one partner was attached and sold. *Held* that the other

Section 6 — Note 6 *(contd.)*

partner does not become liable for an act of insolvency by reason of his being a partner with the other,)✣1938 All 59 (60) [AIR V 25]: ILR (1938) All 84 (DB). (Sale in execution of decree passed against legal representative—It will not amount to an act of insolvency by him.)

[2] Sale contemplated by S. 6 (e) is of the same nature as contemplated by O. 21, Rr. 89 and 90 viz. a sale which has been actually held though may be liable to be set aside in subsequent proceedings. 1942 Mad 306 (307) [AIR V 29] (DB)✣1961 Andh Pra 97 (98) [AIR V 48 C 26]✣1954 Nag 286 (289) [AIR V 41 C 103] : ILR (1954) Nag 720.

[3] A sale in execution is complete when the property is knocked down to the highest bidder and it becomes not possible for the Court to offer it to any other higher bidder. Therefore an act of insolvency is complete when the property is sold and not when the sale is confirmed. 1938 Lah 819 (820) [AIR V 25]✣1961 Andh Pra 97 (98) [AIR V 48 C 26] ✣1959 Bom 289 (291) [AIR V 46 C 90] : I L R (1959) Bom 822. (Case under corresponding S. 9 (1) (e), Presidency Towns Insolvency Act.)✣1919 Sind 1 (3) [AIR V 6] : 13 Sind L R 187. (Mere putting up debtor's property for sale but not actually sold — *Held* no act of insolvency was committed by debtor.)

[4] The expression "in execution of the decree for the payment of money" contemplates a decree capable of execution by the arrest of the person or against the general estate of the person against whom it is passed. 1937 Mad 433 (434) [AIR V 24]. (Decree based on mortgage or a charge antecedent to suit is not a decree for money.)✣1944 Sind 217 (219) [AIR V 31] (DB). (Award for payment of money — Decree-holder's right to enforce decree as a personal decree reserved — *Held* decree was money decree.) ✣ 1943 Sind 176 (177) [AIR V 30] : I L R (1943) Kar 203 (DB). (Decree passed in suit for partition and possession — Decree also granting mesne profits —*Held* so far as that portion was concerned it was a decree for money and the fact that it was one amongst many other reliefs did not alter its character.)✣1938 All 59 (60) [A I R V 25] : I L R (1938) All 84 (DB)✣1935 Oudh 406 (408) [AIR V 22]: 11 Luck 61. (Clauses (e) and (h) should be construed to have the same meaning.)

[5] Sale of property for arrears of rent under Madras Estates Land Act operates as an act of insolvency. 1941 Mad 99 (99) [AIR V 28].

[6] The distinction between the provision of S. 9 (e), Presidency Towns Insolvency Act and of S. 6 (e), Provincial Insolvency Act, is one which can be traced to a just, rational and reasonable classification. Section 9 (e) Presidency Towns Insolvency Act is not ultra vires on the ground that it is hit by Art. 14. 1957 Mad 403 (405) [(S) AIR V 44 C 122].

[7] A decree obtained by a Municipal Council against a person for recovery of arrears of tax was as follows :—"It is ordered and decreed that the plaintiff do recover from the defendant with a charge on the schedule immovables a sum of Rs. 32-8-6 with costs, and current interest thereon at 6 per cent. per annum from the date of the suit. . . ." In execution of the decree, one of the properties of the judgment-debtor was sold; *Held*, upon the construction of the language of the decree and the plaint, that the decree was a decree for payment of money with a declaration of charge on the property mentioned in the schedule annexed to the decree and that it was not a decree for sale in enforcement of a mortgage or charge. It was a personal decree against the defendant. The declaration of charge was an enabling and not a disabling provision. The sale therefore was in execution of money decree within the meaning of S. 6 (e). *Held further*, that the fact of a sale of debtor's property in execution of a decree for payment of money was enough for purposes of S. 6 (e) and the subsequent cancellation of the sale would not alter the fact that the property was sold in execution of the decree. ('47) 52 Mys H C R 373 (381, 385) (DB).

7. Sub-section (f).—[1] The presentation of the petition by the debtor is in itself an act of insolvency. He does not cease to be so even if the petition is dismissed and any creditor may present an insolvency petition against a debtor founded on this act of insolvency. 1933 Cal 564 (565) [A I R V 20] (DB)✣1929 Lah 72 (72) [AIR V 16].

8. Sub-section (g).—[1] Notice of suspension must be for the entire indebtedness and must amount to an expression of general intention to stop payment to every creditor. 1944 Cal 370 (371) [AIR V 31] (DB)✣1934 Pat 526 (527) [AIR V 21] (DB).

[2] The notice contemplated by S. 6 (g) must be by the debtor or his agent. 1946 Mad 232 (234) [AIR V 33 C 126]. (Presentation of petition to Debt Conciliation Board or statements contained in it does not amount to notice.)✣1939 Cal 313 (314, 315) [AIR V 26] : ILR (1939) 1 Cal 425 (DB). (Service of notice by Insolvency Court intimating the date of hearing of insolvency petition is not notice of suspension of payment.)✣1934 Rang 87 (89) [AIR V 21] : 12 Rang 150 (DB). (Mere suspension of payment not an act of insolvency.)✣ 1933 Lah 725 (725) [AIR V 20] ✣ 1931 Rang 317 (317) [AIR V 18] (DB). (Mere suspension of payment not sufficient—Notice that payment has been suspended or is about to be suspended necessary.)

[3] Debtor sending registered card to creditor stating therein that he was unable to pay because of his very heavy indebtedness and that the creditor could do whatever he liked instead of sending him demands—*Held* it was an act of insolvency. 1937 All 435 (438) [AIR V 24] : ILR (1937) All 616 (DB).

[4] Oral notice under sub-s. 6 (g) is sufficient but it should be unambiguous, decisive and addressed in a definite form of words to a particular creditor at a particular time. 1927 All 266 (266) [A I R V 14] : 49 All 321 (DB)✣ 1933 Lah 113 (114) [AIR V 20]✣1932 Lah 643 (647) [AIR V 19] : 14 Lah 117 (DB).

[5] A communication of his inability to pay his debts made by a debtor to his creditor may be oral or in writing. In order to decide the

Section 6 — Note 8 *(contd.)*

question whether such a communication amounts to an act of insolvency. the test is what effect would the statement of the debtor produce on the mind of the creditor receiving it as to the intention of the debtor with regard to the creditor taking into account the circumstances disclosed at the time. If the effect is that the debtor has suspended or is about to suspend payment it will amount to an act of insolvency. 1955 Punj 193 (195) [AIR V 42 C 78]. (Joint family firm—Creditors demanding payment—One of sons in presence of father saying that they have no money and creditors might do what they liked — It was held act of insolvency.)

[6] Notice of suspension of payment must contain a declaration that the debtor does not intend to pay any of his debts and not merely that of a particular creditor. The notice should contain an admission of the debt and the refusal to pay must be a deliberate act. 1935 Rang 340 (341) [A I R V 22] (DB). (False denial of one single debt is not a notice of suspension of payment.)

[7] A mere statement by a debtor that he is unable to pay his debts, however insolvent he may be, is not necessarily a notice within the meaning of this Act unless it has created an impression in the minds of the creditors that the debtor is not only not going to pay a particular creditor but also that he intended to deal with the creditors collectively, and the words used by him were such that they would bear that construction when interpreted reasonably and ordinarily. 1933 Pat 461 (463) [AIR V 20] : 13 Pat 78 (DB) ✣ 1935 Mad 589 (590 [A I R V 22] (DB) ✣ 1933 Lah 113 (114) [A I R V 20] ✣ 1932 Lah 643 (647) [AIR V 19] : 14 Lah 117 (DB). (Debtor of bank on being pressed for payment writing to bank to raise some money on shares pledged by him and expressing his inability to pay—Debtor on being still pressed for payment expressing his willingness to create a trust for liquidation of his debts — *Held* that neither the letter nor his willingness to create trust amounted to notice of suspension of payment.) ✣1928 Mad 903 (905) [A I R V 15] (DB)✣1928 Mad 393 (394) [AIR V 15].

[*See also* 1955 N U C (Ajmer) 774 [AIR V 42]. (Notice of suspension of payment of debts may be given to any one of creditors.)]

[8] A mere statement by a debtor that he has suspended or that he intends to suspend payment of his debts temporarily amounts to a notice of suspension. But an admission of insolvency is not enough where there is doubt as to whether the statement is a notice or a mere admission of insolvency ; the question has to be decided with reference to facts of the particular case and the effect of the statement upon the minds of the hearers. 1930 Sind 83 (84) [AIR V 17] (DB).

[9] Whether the acts of the debtor relied upon by the creditors in support of their petition constitute an act of insolvency within the meaning of S. 6 of the Insolvency Act or not, is to be decided in the light of the following principles :

1. That a mere statement of the debtors that they are unable to pay their debts however insolvent they may be, is not necessarily a notice within the meaning of the Act, that they are suspending or about to suspend payment.
2. Whether the effect of the words used by the debtors would reasonably and ordinarily mean to the creditors that the former intend suspending payment or about to suspend payment as they are unable to discharge their liabilities immediately.
3. Construing the statement of the debtors it has to be seen whether they intend to deal with their creditors collectively. 1960 Mys 267 (270) [AIR V 47 C 95].

[10] In the following cases the debtor's act was held to amount to a notice of suspension of payment :

(a) Request by debtor to creditors not to press for payment for some time or in the alternative to accept a percentage of debts is a notice falling under S. 6 (g). 1926 Sind 246 (249) [AIR V 13] : 22 Sind L R 32.

(b) A declaration of intention to close business unless the offer made by him to the debtor is accepted amounts to suspension of payment. 1930 Sind 83 (85) [AIR V 17] (DB).

(c) Declaration of inability to pay debts and intention to deal with creditors collectively—Amounts to notice within cl. (g). 1929 Lah 136 (136, 137) [AIR V 16].

(d) Debtor giving notice to his creditors that he has suspended payments. 1925 Oudh 222 (222) [AIR V 12].

(e) Notice to all creditors intimating inability to meet liabilities immediately and proposing to make arrangements for realisation of assets and discharge of liabilities — Agreement by creditors accepting six annas in a rupee in full satisfaction — Agreement to stand cancelled if payment not made within prescribed time— Notice as well as agreement read as a whole amounted to notices of suspension of payment of debts and each constituted an act of insolvency. 1960 Mys 267 (271) [AIR V 47 C 95].

[11] In the following case it was held that there was no notice of suspension :

(a) Debtor calling creditors together and informing them that if they did not want him to sell the property and pay them individually, they could themselves take the property and realise their debts by selling them—*Held* there was no notice of suspension of payment. 1933 Lah 319 (320) [AIR V 20].

[12] Notice of suspension of payment affords cause of action and provides starting point of limitation. 1928 Sind 177 (177) [AIR V 15] (DB).

[13] The Provincial Insolvency Act is nothing more than a copy of the Bankruptcy Act of England regarding notice of suspension

Petition

7. Petition and adjudication.

Subject to the conditions specified in this Act, if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may on such petition make an order (hereinafter called an order of adjudication) adjudging him an insolvent.

Explanation. — The presentation of a petition by the debtor shall be deemed an act of insolvency within the meaning of this section, and on such petition the Court may make an order of adjudication.

[P. I., 1907—S. 5; P. T. I., 1909—S. 10.]

Section 6 — Note 8 *(contd.)*

of payment and that being so the authorities which have been decided from time to time on this provision in the English Act are necessarily authorities for the Court. 1933 Pat 461 (463) [AIR V 20] : 13 Pat 78 (DB).

[14] A statement by the debtor in a prior insolvency proceeding that he had issued a notice to the creditors suspending payments of debts does not itself amount to any notice to the creditors that on the date of the statement the debtor has suspended or is about to suspend payment of his debts. 1953 Trav-Co 356 (357) [AIR V 40 C 133].

9. Sub-section (h).—[1] The phrase "for the payment of money" means a decree which has been passed personally against the individual concerned. 1935 Oudh 406 (408) [AIR V 22] : 11 Luck 61✠ 1938 All 59 (60) [AIR V 25] : ILR (1938) All 84 (DB).

[2] Where a person is arrested and imprisoned in execution of a decree there is a continuing act of insolvency throughout the period of his imprisonment. 1931 Lah 112 (112) [AIR V 18].

10. Sub-section (i) (Bom). — [1] The notice must be in respect of a decree or order for payment of any amount due to such creditor. 1943 Bom 257 (257) [AIR V 30] (DB).

[2] Section 6 (i) which has been added by the Bombay Act 15 of 1939 does not purport to set out the point of time at which the act of insolvency may be committed by reason of non-compliance with the insolvency notice. There being no provision in the Act which relates expressly to the point of time at which an act of insolvency may be deemed to be committed, the Bombay High Court was competent to frame rules under S. 79 to prescribe a point of time at which an act of insolvency may be deemed to be committed by failure to comply with the notice. By cl. (10) of R. III-A framed by the High Court that point of time is the disposal of the application where an application for setting aside the insolvency notice has been made. In framing cls. 9 (c) and 10 of R. III-A, the Bombay High Court did not purport to extend the time prescribed by S. 9 (1) (c) of the Provincial Insolvency Act. 1958 Bom 164 (166, 167) [AIR V 45 C 48] : ILR (1957) Bom 295.

11. Explanation. — [1] The acts of an agent may be the act of the principal for the purpose of committing acts of insolvency. 1916 Mad 144 (147) [AIR V 3] : 39 Mad 693 (DB). (Departure of agent from place of business becomes act of insolvency of principal.)✠ 1927 Sind 18 (19) [AIR V 14]:21 Sind LR 280. (Managing firm closing business and asking creditors to communicate with his pleader—*Held* act sufficient to constitute act of bankruptcy.)

[2] An act of insolvency may be committed by a mere agent and his authority need not be special or explicit in order to bind the principal. 1927 Sind 155 (158) [AIR V 14] : 22 Sind L R 273.

[3] Act of partner giving notice that firm has suspended business or is about to do so is prima facie a joint act on behalf of all partners—Other partners can prove their solvency and ability to pay debts of the firm for which they were liable — In such case petitioning creditor should prove express authority in the partner who gave notice in order to bind the others. 1927 Sind 155 (158) [AIR V 14] : 22 Sind L R 273.

[See however 1920 Cal 189 (190) [AIR V 7] (DB). (Notice of suspension of payment by one partner cannot be relied upon to get the firm declared insolvent. But it can be used for considering whether transfers made shortly before the petition of insolvency were made with intent to delay or defraud creditors.)]

[4] Ex partner who cannot plead that he is not a partner cannot also raise the plea of want of authority in another partner who has committed the act of insolvency so as to prejudice the petitioning creditor. 1930 Sind 83 (87) [AIR V 17] (DB).

[5] A partner can be adjudicated insolvent if firm commits act of insolvency. 1926 Sind 90 (93) [AIR V 13] (DB).

[6] Business belonging to three brothers carried on by the eldest — Eldest committing acts of insolvency by secluding himself and also stating to creditors that he could not pay their debts—*Held* that the act of seclusion of the eldest brother did not bind the younger ones but the declaration of inability to pay bound them. 1937 Mad 13 (14) [AIR V 24] (DB).

SECTION 7 — SYNOPSIS

1. Scope.
2. Joint Hindu Family Firm.
3. Joint application — Maintainability of.

1. Scope. — [1] Bankruptcy is essentially a proceeding 'in personam' and only a personal debt due by the insolvent can form the foundation of a petition for adjudication — Such a debt must have come into existence before the act of insolvency. A debt on which the Insolvency Petition can be based must be one provable in insolvency or in other words

Section 7 — Note 1 *(contd.)*

it must be a subsisting debt due from the debtor on the date of the presentation of the petition. It must also be a liquidated sum payable either immediately or at some future time. 1956 Trav-Co 88 (88) [AIR V 43 C 32]: ILR (1955) Trav-Co 1238 (DB).

[2] The petitioner and the person sought to be adjudged insolvent must be in the position of creditor and debtor in order to entitle him to maintain the petition. 1914 Sind 128 (129) [AIR V 1]: 8 Sind L R 93. (Creditor of deceased cannot have the heir adjudged insolvent) ✣ 1931 Mad 788 (789) [AIR V 18]. (Son cannot be adjudged for father's debts unless he is himself personally liable.) ✣ 1927 Mad 922 (923) [AIR V 14]: 50 Mad 981 (DB). (Decree against son as representative of deceased father — Son cannot be adjudged.) ✣ 1934 Rang 162 (163) [AIR V 21]: 12 Rang 602 (DB).

[**See however** 1926 Mad 133 (133) [A I R V 13]: 49 Mad 217 (DB). (A Hindu son can be adjudicated insolvent in respect of his father's debts.)]

[3] The test to determine whether a debtor is entitled to make an insolvency application is to see whether his property on his adjudication vests under S. 28 in the Insolvency Court. If it does not the Court has no jurisdiction to entertain the application. The vesting of the debtor's property in the Insolvency Court is impossible so long as the scheme framed under S. 11 (1) C. P. and Berar Relief of Indebtedness Act remains in force. Consequently a debtor bound by the scheme is not entitled to file an insolvency application so long as the scheme remains in force and the Insolvency Court has no jurisdiction to adjudge him an insolvent. 1946 Nag 315 (316) [AIR V 33 C 88]: ILR (1946) Nag 490.

[4] Persons ought not to be adjudicated on acts of insolvency which have not been relied on by petitioning creditors. 1929 Mad 910 (910) [A I R V 16] (DB).

[5] Adjudication of one of several debtors who were jointly and severally liable is legal. 1926 Cal 234 (234, 235) [A I R V 13] (DB) ✣ 1928 Lah 354 (355) [AIR V 15].

[6] A person cannot be adjudicated an insolvent on the mere ground that his assets are less than his liabilities. 1930 Rang 147 (147) [AIR V 17] (DB).

[7] Under Hindu Law the heir is not personally liable for his father's debts and in respect of such debts he is not entitled to present a petition in insolvency. ('38) ILR (1938) 1 Cal 132 (135) (DB).

[8] The secured creditor, who has obtained a decree on the basis of a mortgage, charge or lien on the property of the judgment-debtor is not thereby precluded from making an application under S. 7 or S. 9. 1931 All 224 (225) [AIR V 18] (DB).

[9] A pending suit to enforce a bond is no bar to a petition for adjudication based on that debt. 1926 Cal 234 (235) [A I R V 13] (DB).

[10] Order of adjudication follows as matter of course when essentials under Act are satisfied. Whether debtor has committed acts of bad faith is to be determined at time of discharge and not at time of adjudication. 1920 Cal 674 (675) [AIR V 7] (DB).

[11] Debtor committing act of insolvency— The Court has to adjudge him to be insolvent — The Court has no jurisdiction to decide whether he has property sufficient to pay the creditors. 1937 Lah 618 (619) [A I R V 24].

[12] Original application dismissed for default — Fresh application can be made upon the same facts. 1921 Pat 472 (472) [AIR V 8] (DB).

[13] A petition to set aside the Ex parte order of adjudication passed under S. 7 of the Provincial Insolvency Act is maintainable under Order 9 R. 13 of the Code of Civil Procedure read with S. 141, Civil P. C. and S. 5 of the Provincial Insolvency Act. ('58) I L R (1958) Andh Pra 822 (825) (DB). (For purposes of limitation for such applications Article 181, Limitation Act applies.)

[14] First application by debtor for adjudication dismissed— No bar by way of *res judicata* arises against a second petition alleging change of circumstances. 1935 Pesh 25 (25) [AIR V 22].

[15] Debtor adjudicated insolvent under Punjab Laws Act and undischarged yet — Property outside Province immune from attachment by the Insolvency Court—Neither Provincial Insolvency Act nor any other law bars a creditor or debtor from proceeding by a fresh application under this Act. 1936 Lah 407 (408) [AIR V 23].

2. Joint Hindu Family Firm.— [1] There is no legal impediment to the adjudication of a joint family firm, provided that no minor member is adjudged an insolvent and the other members as are alleged to have participated in the business of the firm had an opportunity to put forward their objections. 1960 Mys 267 (272) [AIR V 47 C 95] (DB).

[**But see** 1940 Lah 462 (465) [A I R V 27]: ILR (1941) Lah 55 (DB).]

[2] An order adjudicating a joint Hindu family as insolvent, is in effect an order adjudicating as insolvents those adult members of the family who had participated in the business of the firm. 1960 Mys 267 (272) [AIR V 47 C 95] (DB).

[3] Minor cannot be declared bankrupt or made party to a petition for insolvency. ('13) 16 Oudh Cas 68 (68) ✣ 1919 Mad 690 (693) [AIR V 6]: 41 Mad 824 (SB). (Minor Hindu is not liable personally for debts incurred during his minority even though he takes active part in business after majority.) ✣ 1935 Rang 327 (327) [AIR V 22] (DB). (Adjudication petition against firm containing minor partners—Adult partners alone will be adjudicated and not the firm.)

[4] Joint family business — Act of insolvency by manager cannot be imputed to other coparceners and they cannot be adjudicated, insolvents. 1940 Mad 241 (245, 246) [AIR V 27] (DB) ✣ 1936 Mad 64 (65) [AIR V 23].

[5] A creditor applying for the adjudication of a joint Hindu family firm as insolvent should in his petition specifically name as respondents all those members of the joint

8. Exemption of corporation, etc., from insolvency proceedings.

No insolvency petition shall be presented against any corporation or against any association or company registered under any enactment for the time being in force.

[P. I., 1907—S. 6 (6); P. T. I., 1909—S. 107.]

9. Conditions on which creditor may petition.

(1) A creditor shall not be entitled to present an insolvency petition against a debtor unless—

(a) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees, and

(b) the debt is a liquidated sum payable either immediately or at some certain future time, and

(c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition :

[a][Provided that where the said period of three months referred to in clause *(c)* expires on a day when the Court is closed, the insolvency petition may be presented on the day on which the Court re-opens.]

(2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent, or give an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor.

[P. I., 1907—S. 6 (4), (5); P. T. I., 1909—S. 12.]

[a] *Added* by the Insolvency Law (Amendment) Act, 1950 (III of 1950), S. 6 [18-2-1950].

Section 7 — Note 2 *(contd.)*

family who have participated in the business of the firm and are connected with the act of insolvency. Where the creditor's petition named only the manager of the firm in the cause title and no notices were issued to the other members, the order of adjudication so far as it affected the other members is liable to be set aside. 1960 Mys 267 (272) [AIR V 47 C 95] (DB).

3. Joint application — Maintainability of. — [1] Joint application by creditor for adjudication of the debtors is maintainable if there was a joint debt or a joint act of insolvency. 1937 Nag 127 (128) [AIR V 24] ✣ 1928 Lah 354 (355) [AIR V 15]. (Members of joint Hindu family can be adjudicated insolvents in single petition.)✣1927 Mad; 124 (125) [AIR V 14]: 50 Mad 256 (DB). (Partners liable for a joint debt — Each alleged to have committed acts of bankruptcy — Single petition for adjudicating both maintainable.) ✣ 1921 Mad 294 (297) [AIR V 8]: 44 Mad 810 (DB). (Separate applications not only unnecessary but undesirable.)✣ 1925 Rang 36 (37) [AIR V 12]: 2 Rang 309 (DB).

[2] Joint petition for adjudication by several joint debtors is legal. 1937 Rang 276 (277) [AIR V 24] : 14 Rang 704 (DB).

[3] Members of joint Hindu family desirous of getting declared insolvent, must apply separately. 1920 Cal 964 (965) [AIR V 7](DB).

[4] Application for insolvency by some of the members of joint Hindu family does not ipso facto result in the insolvency of all members of the family. 1931 Lah 125 (126) [A I R V 18].

[5] Test to decide whether a joint petition for adjudication is valid is to see whether the application if treated as a suit would be bad for multifariousness. 1927 Mad 124 (125) [A I R V 14] : 50 Mad 256 (DB). (Mere fact that the debtors have not committed joint act of insolvency does not make the petition invalid.) ✣ 1937 Pat 665 (667) [A I R V 24] : 16 Pat 724 (DB).

SECTION 9 — SYNOPSIS

1. Conditions for petition.
2. Petitioning creditor.
3. "Debt owing by the debtor to the creditor."—Cl. (a).
4. Liquidated sum—Cl. (b).
5. "Act of insolvency.....within three months"—Cl. (c).
6. Petition by secured creditors — Subs. (2).
7. Amendment of petition.
8. Effect of section 16, Provincial Insolvency Act.
9. Parties—Appeal.
10. Procedure—Notice.
11. Res judicata.

1. Conditions for petition. — [1] Before petition for insolvency can lie there must be

Section 9 — Note 1 *(contd.)*

debt of Rs. 500 or more and act of insolvency by debtor. 1935 All 416 (417) [AIR V 22].

[2] Petition should state acts of insolvency clearly and precisely or else be dismissed. Amendment should not be allowed, except on very strong grounds. 1932 Lah 643 (647) [AIR V 19] : 14 Lah 117 (DB).

[3] Assets less than liabilities — No ground for adjudication. 1930 Rang 147 (147) [AIR V 17] (DB).

[4] Creditor has right to have debtor adjudicated if he presents proper petition for same : his motive is immaterial. 1935 Mad 589 (591) [AIR V 22] ✠ 1930 Lah 602 (602) [AIR V 17].

[*See* 1934 Rang 292 (296) [A I R V 21] : 12 Rang 355 (DB). (Insolvency proceeding not bona fide — Court should not entertain it.)]

[5] Decree-holder is entitled under S. 9 to present insolvency petition against an agriculturist judgment-debtor notwithstanding S. 82 (b). 1945 Bom 374 (377) [A I R V 32] : ILR (1945) Bom 518 (DB).

[6] The creditor of a deceased insolvent cannot present a petition in insolvency against a deceased insolvent's representative and a representative of a deceased insolvent cannot present a petition against himself. ('38) ILR (1938) 1 Cal 132 (137) (DB).

[7] Single petition for adjudication against two or more is maintainable where they are liable on joint debt and each is guilty of acts of insolvency during continuance of joint debt. 1931 Lah 384 (384) [AIR V 18].

[8] Hindu joint family firm can be adjudicated insolvent. 1940 Sind 141 (141) [A I R V 27] : ILR (1940) Kar 375 (DB).

[9] Son not personally liable cannot be adjudicated for father's debts. 1940 Mad 30 (31) [AIR V 27] : ILR (1940) Mad 191 (DB) ✠ 1937 Nag 60 (60, 61) [AIR V 24] : ILR (1937) Nag 485.

[10] An application for re-adjudication after the annulment of the original adjudication need not satisfy the requirements of this section. 1953 Mad 375 (375) [A I R V 40 C 133].

2. Petitioning creditor. — [1] Creditor consenting to composition cannot apply for adjudication on the ground of the composition. 1924 Mad 839 (840) [A I R V 11] : 48 Mad 294 (DB).

[2] Creditor who is a party to deed of assignment to creditors cannot rely upon execution of that deed as act of bankruptcy. Creditors who after hearing a statement of inability to pay debts do not press their bankruptcy rights but accept a portion of their just dues and do not interfere with the carrying of the debtor's business are not in the same position as creditors who by a written document, which is at best a technical fraud deliberately plan to administer the debtor's estate not in bankruptcy plan but by a special private arrangement all the assets being put into pool. The former are not estopped from relying on the act of insolvency of the debtor. 1936 Mad 27 (30, 31) [AIR V 23].

[3] Right to apply—Contract by debtor — Creditor not party to — Creditor has no right to take benefit of and to apply for adjudication of debtor on basis of such contract. 1943 Sind 190 (192) [A I R V 30]: I L R (1943) Kar 238 (DB) ✠ 1932 Mad 112 (114) [AIR V 19].

[4] All that S. 9 requires is that the applicants should be creditors to whom a debt of Rs. 500 or more is due from the debtor. Where three Hindu brothers applying under S. 9 claim to own a debt of more than Rs. 1500/- and one of them dies and his legal representatives are not brought on record, the remaining two brothers although separate are competent to maintain the application under S. 9, and the application cannot be said to have abated as a whole. 1954 All 449 (450) [AIR V 41 C 186] (DB).

[5] The fact that in the application under S. 9, the manager of the joint Hindu family had included his younger brothers also as applicants does not show that the application was not made on behalf of a joint Hindu family, especially when a mention of the fact was made in the application itself. 1954 All 449 (450) [AIR V 41 C 186] (DB).

3. "Debt owing by the debtor to the creditor"—Cl. (a). — [1] Insolvency Court at this stage is not required to adjudge the amount due by the debtors to the petitioning creditors ; all that is to be seen is whether the debt owed by the debtors exceeds Rs. 500. 1961 Madh Pra 15 (19) [AIR V 48 C 11] (DB).

(a) Existence of debt

[2] Application to adjudge person, formerly in service of petitioner, insolvent on ground of having embezzled money collected from debtors is not competent. There is no "debt" and there is no relationship of debtor and creditor. 1932 Oudh 107 (108) [A I R V 19] (DB).

(b) Joint liability

[3] A bond upon which the debtor is jointly and severally liable with the other persons by whom it was given is sufficient to support a petition for adjudication against the debtor. It is immaterial that the petitioning creditor may not be absolutely entitled to all the money secured by the bond; it is enough that the bond is in his favour. 1926 Cal 234 (234, 235) [AIR V 13] (DB).

[4] Joint family debt — A person liable for debts merely on the ground that he is a member of a joint family and that the debts are payable by the joint family cannot be adjudicated insolvent for those debts. But there are also undoubtedly circumstances which will make such a person personally liable for the debts, such as his being a member of a trading firm and holding himself out as a partner, and the debts being contracted for that trade. There is no need to wait then for a partition suit for allowing such debts which can be proved in the insolvency of the person who had made himself personally liable for the debts in addition to being liable for them from out of his share in the joint family properties. 1952 Mad 504 (2) (508) [AIR V 39] (DB).

[5] See also under S. 34.

Section 9 — Note 3 *(contd.)*

(c) Relevant date of debt

[6] The debt should have been in existence on the date of the alleged act of insolvency. 1958 Mad 379 (381) [AIR V 45 C 121] : I L R (1958) Mad 404 ✣ 1936 Lah 800 (800, 801) [AIR V 23] : 17 Lah 580 ✣ 1921 Mad 62 (62) [AIR V 8] (DB). (A person becoming creditor after transfer is not entitled to plead the transfer as act of insolvency.)

[*See also* 1947 All 383 (388) [A I R V 34 C 144] : ILR (1947) All 624 (DB).]

[7] Petitioners should be creditors when petition is filed and need not be when adjudication is passed. 1927 Mad 153 (153) [AIR V 14] : 50 Mad 396 (DB).

[*See* 1939 Cal 35 (36) [AIR V 26] : I L R (1938) 1 Cal 13 (DB). (There must be a debt for Rs. 500 or more at time of presenting petition for insolvency or hearing it and immediately before making order of adjudication.)]

(d) Evidence and proof

[8] Court cannot refuse creditor's right to prove debts when denied. 1923 Rang 21 (21) [AIR V 10] : 11 Low Bur Rul 354 (DB).

[9] Creditor's petition on pro-note — Pro-note admitted — Burden is on debtor to prove that he did not receive full consideration. Mere admission that actual consideration was different from one described in contract does not shift onus. 1936 Nag 130 (131, 132) [AIR V 23] : ILR (1936) Nag 142.

[10] Insolvency proceedings by creditor — Court is entitled to implement creditor's case with evidence furnished by debtor himself. 1935 Rang 343 (348) [AIR V 22] : 13 Rang 192.

[11] Where fraudulent transfer of property by debtor is alleged by creditor, creditor should produce enough evidence to support his allegation and not merely ask Court to infer fraud from fact of transfer. 1935 Rang 343 (347) [AIR V 22] : 13 Rang 192.

[12] Inability to pay—Proof by petitioning creditor not necessary. 1929 Lah 72 (72) [AIR V 16].

[13] Insolvent himself pleading that he is unable to pay his debts — Unnecessary to scrutinise acts of insolvency closely. 1960 Andh Pra 600 (602) [AIR V 47 C 192]. (A I R 1925 Mad 483, *Foll.*)

(e) Enquiry

[14] Registered mortgage deed in favour of creditor — Court is bound to adjudicate upon right of creditor to make application for insolvency. 1930 Lah 602 (602) [AIR V 17].

[15] Debtor denying debt—Court has power to decide existence of debt. 1925 Lah 436 (436) [AIR V 12] (DB) ✣ 1926 Lah 638 (639) [AIR V 13]. (Court to find whether amount owed is Rs. 500 or more — Procedure in S. 24 to be followed.)

[16] Dismissal of an insolvency petition on the ground that it cannot be granted until the petitioning creditor had proved his claims in a regular suit was wrong in law — No enquiry into existence of a debt is contemplated by the Act. 1927 Lah 111 (111) [AIR V 14] ✣ 1941 Mad 895 (896) [AIR V 28] : ILR (1942) Mad 147 (DB). (Insolvency Court cannot dismiss an insolvency petition on the ground of its raising questions too difficult for the Court to decide. The question whether relation of creditor and debtor exists is a question expressly and explicitly for the decision of the Court. The parties cannot be referred to regular suit.)

[*See* 1935 Bom 80 (82) [AIR V 22] : 59 Bom 161. (Exercise by Insolvency Court of its power to refer question as to the existence of the debt for decision in regular suit under Ss. 9 and 24 is discretionary.)]

[17] Debt denied by debtor—It is the duty of the Insolvency Court to hold an enquiry regarding the existence of the debt. 1954 Nag 33 (34) [AIR V 41 C 10] : I L R (1953) Nag 625 (DB).

[18] It is the duty of the Insolvency Court to ascertain whether each and every item specified in the petition was a debt within the meaning of S. 9. ('59) I L R (1959) Bom 194 (199).

4. Liquidated sum—Cl. (b). — [1] 'Debt' must be liquidated sum—Post office employee embezzling certain amount—Amount claimed by Government is not 'debt' within S. 9. 1940 Lah 273 (274) [AIR V 27].

[2] Sum is 'liquidated' if can be computed with certainty. Debt is "liquidated" if it can be ascertained on enquiry — Rents and mesne profits of paddy fields are not liquidated debts according to S. 9 (1) (b). 1935 Rang 435 (436) [AIR V 22] (DB).

[3] At the time of petition value of crops had not been ascertained—Debt could not be relied on by petitioning creditor. 1937 Nag 60 (61) [AIR V 24] : I L R (1937) Nag 485.

[4] Where there are contracts of sale and of purchase between two merchants, difference between contract rates gives liquidated sum due by one party to another. 1919 Sind 1 (1) [AIR V 6] : 13 Sind L R 187.

[5] Husband's liability under Muhammadan Law for deferred dower of his wife is "debt" within meaning of S. 9 (1) (b); it is vested and not contingent. 1941 Nag 167 (169) [AIR V 28] : ILR (1942) Nag 518.

[6] It is only when the account is of a simple nature that it can form the basis of insolvency proceedings. If there are entries in the accounts which are open to serious disputes and the account is subject to counter-claims and an enquiry is necessary to ascertain which items and which counter-claims are true, then it is not a claim for a liquidated sum and the insolvency Court cannot accept such a claim as the basis for adjudicating a person insolvent. 1943 Mad 766 (766) [AIR V 30].

[7] Joint business carried on by two persons, one contributing capital and the other labour — Relationship between two partners in business could not be said to be that of creditor and debtor and the amount which may be found due on account of profits earned cannot be said to be a liquidated sum within the meaning of S. 9 (1) (b). 1955 All 352 (353) [(S) AIR V 42 C 99] (DB).

Section 9 — Note 4 *(contd.)*

[8] A claim for unliquidated damages is not a "debt" within the meaning of S. 9. ('59) ILR (1959) Bom 194 (198).

[9] A claim for damages for non-performance of a contract of sale cannot ordinarily be within the meaning of a "liquidated sum." 1951 Madh B 115 (115) [AIR V 38 C 54].

[10] Unless the buyer has established a breach of contract, the claim for refund of earnest money for alleged breach of contract could not be regarded as a "debt" within the meaning of S. 9. ('59) I L R (1959) Bom 194 (199).

[11] A debt owing to a party on breach of a contract on account of the sum given as advance under it is a liquidated sum within the meaning of that expression in S. 9 (1) (b). The fact that the cause of action which enabled the creditor to recover the debt was the same as the cause of action on which he could claim damages for breach of contract does not disentitle him from maintaining the petition for insolvency. 1958 Mad 379 (380, 381) [AIR V 45 C 121] : ILR (1958) Mad 404.

[12] Where the secretary of a co-operative Bank retained a certain amount with him without depositing it in the Bank and became liable under the bye-laws of the Bank to make good that amount together with interest at a particular rate, the liability of the secretary arising under the bye-law can be enforced as a debt and can form the foundation of an application to adjudge the secretary as insolvent. 1954 Trav-Co 419 (421) [AIR V 41 C 145] : I L R (1954) Trav-Co 93 (DB). (Case under Travancore Insolvency Act (8 of 1108).)

[13] Where a person appointed to administer the fund fails to pay it to the beneficiary, the liability, if any, is one in the nature of damages for breach of trust. It cannot be a debt for a liquidated sum. 1956 Trav-Co 88 (89) [AIR V 43 C 32] : I L R (1955) Trav-Co 1238 (DB).

5. "Act of insolvency .... within three months" — Cl. (c).— [1] Mortgage by debtor in favour of his son-in-law when heavily indebted and within three months of application for adjudication by creditor — Fraud is presumed. 1931 Lah 667 (668) [AIR V 18].

[2] Adjudication on acts of insolvency not relied on in application is bad in law. 1929 Mad 910 (910) [AIR V 16] (DB) ✠ 1935 Pesh 168 (170) [AIR V 22].

Extension of period

[3] Cases decided prior to amendment by Act 3 of 1950 — The existence of an act of insolvency within 3 months before is a condition precedent for the filing of the petition and not a period of limitation, and if the petition was filed on the re-opening date of the Court, and if the 3 months' period had expired during the vacation, the act of insolvency would no longer be available to the petitioning creditor and therefore the petition would not be maintainable. 1948 Nag 385 (387) [AIR V 35 C 132] : ILR (1948) Nag 523 ✠ 1939 Cal 313 (314) [AIR V 26] : ILR (1939) 1 Cal 425 (DB) ✠ 1938 Mad 898 (899) [AIR V 25] : ILR (1939) Mad 24 (DB) ✠ 1935 Mad 857 (858) [AIR V 22] : 58 Mad 794 (FB).

[But see 1942 All 429 (434) [AIR V 29] : ILR (1943) All 84 (FB). (Section 10, General Clauses Act, applies.) ✠ 1955 Trav Co 2 (3) [(S) AIR V 42 C 2] (FB). (Case under Travancore Insolvency Act (8 of 1108). The period prescribed in S. 9 (1) (c) is a period of limitation to which S. 4 of the Limitation Act as well as S. 10 of the General Clauses Act should be made to apply.)✠1934 Mad 294 (296) [AIR V 21].]

[4] Since the above decisions, the Legislature intervened and added a Proviso to S. 9 by Act 3 of 1950, which obviates the difficulty felt in those decisions.

[5] Case decided after the amendment in 1950 — The language used in cl. (c) in form prescribes a condition precedent and not a period of limitation for presentation of a petition for adjudication and except as expressly provided, the fulfilment of that condition cannot be dispensed with. That view is supported by the Proviso enacted by Parliament by Act III of 1950. 1956 Bom 650 (651, 652) [AIR V 43 C 260] : ILR (1956) Bom 748.

[6] After the amendment of S. 9 (1) (c) by Act 3 of 1950, an alleged act of insolvency committed before the coming into operation of the amendment, on 21-2-1950, but with reference to which a petition was not filed within 3 months, as the last day of the 3 months' period happened to be a holiday and so the petition was presented on the next working day, will not be an 'act of insolvency' for the purpose of that petition, which is pending after 21-2-1950, and cannot be relied on for adjudicating a person an insolvent. 1956 Mad 257 (258) [AIR V 43 C 81]. (AIR 1935 Mad 857 (FB), *Foll.*)

[7] Provincial Insolvency Act is a "special law" within the meaning of S. 29, Limitation Act. But Provincial Insolvency Act is self-contained Act in matter of limitation with respect to proceedings contemplated by Act, Hence S. 29 (2) Limitation Act has no application to petitions in Insolvency. 1942 All 429 (431, 432, 433) [AIR V 29] : ILR (1943) All 84 (FB). (*Dar J., Contra.*)

[8] Delay in filing petition for adjudication cannot be excused under S. 5, Limitation Act. 1932 Mad 352 (356) [AIR V 19] : 55 Mad 766 (DB) ✠ 1948 Nag 385 (387) [AIR V 35 C 132]: ILR (1948) Nag 523 ✠ 1933 Lah 821 (822) [AIR V 20]✠1932 Mad 112 (114) [AIR V 19].

[9] Time during which insolvency petition was pending in Court not having jurisdiction cannot be deducted under S. 14, Limitation Act. 1956 Bom 650 (652) [AIR V 43 C 260] : ILR (1956) Bom 748 ✠ 1948 Nag 385 (387) [AIR V 35 C 132] : ILR (1948) Nag 523 ✠ 1915 Mad 1053 (1054) [AIR V 2] : 39 Mad 74 (DB). (Before amendment in 1922 of S. 29, Limitation Act.)

[10] Bombay High Court Rules, R. III-A, Cls. 9 (c) & 10—In framing the clauses (which prescribe a point of time at which an act of insolvency may be deemed to be committed by failure to comply with the insolvency notice), the Bombay High Court did not purport to extend the time prescribed by S. 9 (1)

Section 9 — Note 5 *(contd.)*

(c). It enacted a provision for ascertaining the point of time from which the period for the fulfilment of the condition prescribed in the section is to be calculated and in this view the clauses are intra vires the High Court, as no provision of the Act is violated. 1958 Bom 164 (167) [AIR V 45 C 48] : ILR (1957) Bom 295 (DB).

[11] Insolvency petition filed on act of insolvency — Period of three months within which it is to be filed must be calculated from date of commission of act of insolvency. 1937 Mad 433 (433) [AIR V 24].

[12] Act of Insolvency must occur within 3 months before date of presentation of petition for adjudication and creditor is not entitled to present petition after 3 months. Three months' period is not a period of limitation. 1939 Cal 313 (314) [AIR V 26] : ILR (1939) 1 Cal 425 (DB).

[13] Date of transfer by deed and not date when debtor applied for mutation of names is starting point of 3 months. 1936 Lah 923(924) [AIR V 23] ✠ 1925 Lah 436 (437) [AIR V 12] (DB).

[14] Date of sale in execution and not date of its confirmation is the starting point. 1933 Cal 564 (566) [AIR V 20] (DB) ✠ 1938 Lah 819 (820) [AIR V 25].

[15] Act of insolvency occurs on the day of delivery of possession to donee and not before. 1939 Lah 35 (35) [AIR V 26].

[16] Creditors petition within time—Court returning it to file necessary copies within specified time — Creditor doing so — Court should not dismiss, petitions on ground that on date of representation it was more than 3 months. 1936 Lah 591 (593) [AIR V 23].

[17] Judgment-debtor being arrested in execution of a decree and sent to prison—Application for insolvency—Limitation commences not from the date of arrest and commencement of imprisonment but enures for the whole period of imprisonment. The act of Insolvency continued throughout the period that judgment-debtor remained in prison — Imprisonment does not necessarily mean the first act of putting a person in prison but includes detention in prison. 1931 Lah 112 (112) [AIR V 18].

[18] Limitation begins to run from the date of registration and not from the date of execution of the deed of transfer. 1937 Nag 197 (198) [AIR V 24] : ILR (1937) Nag 403 ✠ ('61) 1961-2 Andh W R 271 (278) (DB). (AIR 1953 Mad 682, *Dissented from*; AIR 1938 Mad 801, *Relied on.*) ✠ 1957 Andh Pra 535 (536) [AIR V 44 C 181] ✠ 1954 Mys 189 (191) [AIR V 41 C 82] : ILR (1955) Mys 98 ✠ 1947 All 383 (385, 386) [AIR V 34 C 144] : ILR (1947) All 624 (DB) ✠ 1944 Cal 370 (373) [AIR V 31] (DB). (Where registered instrument is necessary.) ✠ ('35) 158 Ind Cas 413 (414) (DB) (Lah). (This is so even in Punjab where T. P. Act does not apply). ✠ 1935 Lah 565 (566) [AIR V 22] : 16 Lah 735 (FB). (Do.) ✠ 1935 Lah 55 (56) [AIR V 22]. (Do.) ✠ ('39) 41 Pun L R 655 (656). (Do.) ✠ 1934 Mad 637 (638) [AIR V 21] : 58 Mad 166 (DB) ✠ 1934 Nag 171 (172) [AIR V 21].

[*See* 1921 Mad 62 (62) [AIR V 8] (DB). (Period of three months runs from date of execution of document of release and not from date of its registration.)]

[But see 1933 Lah 821 (822) [AIR V 20]. (Case from Punjab — Time runs from date of execution and not from that of registration.)]

6. Petition by secured creditors — Sub-s. (2). — [1] A secured creditor, who has obtained a decree on the basis of his mortgage, charge or lien on the property of the judgment-debtor is not thereby precluded from applying under Ss. 7 and 9. 1931 All 224 (225) [AIR V 18] (DB).

[2] Mortgagee-creditor can bring petition for adjudication of mortgagor by valuing his security and deducting its value from total amount of debt and treating balance as unsecured debt. 1937 Rang 189 (191) [AIR V 24].

[3] A creditor to whom the insolvent debtor owes secured as well as unsecured debts cannot be held to be a secured creditor qua the unsecured debts and is entitled to file a petition for insolvency without valuation of the security or its abandonment as contemplated by S. 9 (2). 1954 Trav-Co 419 (421, 422) [AIR V 41 C 145] : ILR (1954) Trav-Co 93 (DB).

7. Amendment of petition.—[1] It is not competent to Court to allow petition to be amended after expiry of 3 months from act of Insolvency. 1932 Mad 112 (114) [AIR V 19].

[2] In appropriate cases leave to amend can be granted even after expiry of limitation prescribed for main proceedings. 1933 Mad 608 (608) [AIR V 20].

[3] Original application by creditor made by the creditor in time but defective because of misdescription of property — Amendment made three months after the alleged act of insolvency with the permission of the Court — *Held* the amendment neither altered the character of the claim nor introduced a new cause of action and therefore took effect from the original date of the petition. 1937 Lah 895 (896) [AIR V 24].

[4] Insolvency petition based on sale by debtor to his wife alleged to be nominal and collusive—Amendment of petition to the effect that, even if sale is found valid, it should be held fraudulent preference, is permissible. 1938 Mad 608 (608) [AIR V 20].

[5] Where the words "with intent to defeat and delay his creditors" were omitted, but the act of insolvency was clearly set out — *Held* that there being only a formal defect on account of omission the amendment to include those words should be allowed. 1935 Mad 202 (203) [AIR V 22].

[6] Petition for adjudication of joint Hindu family firm — Names of proprietors given in heading and body of petition — Amendment of petition should be allowed. 1940 Lah 462 (465, 466) [AIR V 27]: ILR (1941) Lah 55 (DB).

[7] Where petitioning creditor was not aware of acts of insolvency similar to one relied on by him and came to Court as soon as he learnt of it and when he sought to add former acts also in petition, he should be allowed to do so. 1934 Sind 33 (33, 34) [AIR V 21].

10. Conditions on which debtor may petition.

(1) A debtor shall not be entitled to present an insolvency petition, unless he is unable to pay his debts and—

(a) his debts amount to five hundred rupees; or

(b) he is under arrest or imprisonment in execution of the decree of any Court for the payment of money ; or

(c) an order of attachment in execution of such a decree has been made, and is subsisting, against his property.

(2) A debtor in respect of whom an order of adjudication [a][whether made under the Presidency-towns Insolvency Act, 1909, or under this Act] has been annulled, owing to his failure to apply, or to prosecute an application for his discharge, shall not be entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled. Such Court shall not grant leave unless it is satisfied either that the debtor was prevented by any reasonable cause from presenting or prosecuting his application, as the case may be, or that the petition is founded on facts substantially

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Section 9 — Note 7 *(contd.)*

[8] Where amendment sought does not go to root of petition but merely brings it in conformity with rules of practice, amendment can be allowed; but not when it affects petition in substance if the effect of so doing would be that the amended petition should be represented more than 3 months of alleged act of Insolvency. 1934 Rang 87 (88, 89)[AIR V 21]: 12 Rang 150 (DB) ✠ 1938 Mad 53 (55) [AIR V 25].

[9] If effect of amendment is to add creditors who could not themselves have presented the petition or introduce debt on which petition could not be based for lapse of three months amendment should not be allowed. 1938 Mad 884 (886) [AIR V 25] : ILR (1939) Mad 144 (DB).

[10] If within three months from the act of insolvency a debt has been made ground of the petition, and it afterwards becomes desirable to add another party to the petition in respect of that debt, leave may be given to join that other party as a petitioner where it will not lead to any injustice. 1951 Mad 456 (457, 458) [AIR V 38 C 134] (DB). (Original petition by *A* in individual capacity—Amendment to describe petitioner as firm of which *A* was managing partner allowed even more than three months after act of insolvency.)

8. Effect of section 16, Provincial Insolvency Act. — [1] Petition under S. 9 (1) (c) dismissed for default—Application under S. 16 by another creditor for substitution—Original petition can be revived. 1946 Bom 20 (23, 24) [A I R V 33 C 5] : I L R (1945) Bom 734. (Necessity for waiting for sometime before dismissing petition under S. 9 (1) (c), for default pointed.)

[2] Insolvency Court can substitute another creditor for original petitioning creditor. 1932 All 147 (149) [A I R V 19] : 54 All 72 (DB).

9. Parties—Appeal.—[1] Insolvent necessary party in appeal by creditor. 1924 Bom 472 (472) [AIR V 11] (DB).

[2] Death of one creditor—Procedure is to bring his legal representatives on record. 1933 Lah 642 (644) [AIR V 20].

[3] Appellant need not make other creditors parties to appeal if debt more than Rs. 500. 1929 Lah 72 (72) [AIR V 16].

10. Procedure—Notice.—[1] Amendment of Madras High Court Rule 21 (3) prescribing notices of date fixed for hearing insolvency petition also on the transferee when that act of transfer is alleged to be an act of Insolvency is not retrospective and does not apply to pending petitions. 1946 Mad 262 (263, 264) [AIR V 33 C 142].

11. Res judicata.—[1] Decision of Insolvency Court in petition for adjudication that certain alienations made by debtor are not fraudulent, is not *res judicata*. 1935 Mad 634 (636) [AIR V 22].

[2] Several applications — Dismissal of application of one creditor does not operate as *res judicata* on a similar application by another creditor. 1928 Pat 116 (117) [AIR V 15] (DB).

SECTION 10 — SYNOPSIS

1. **Conditions for maintainability of petition.**
2. **"Unable to pay his debts."**
3. **Debts.**
4. **Arrest and imprisonment of debtor in execution.**
5. **Subsequent petition.**
6. **Appeal.**

1. Conditions for maintainability of petition.—[1] Where the debtor applies for adjudication as insolvent under the Provincial Insolvency Act, he is only required to furnish such proof as would satisfy the Court that there are prima facie grounds for believing that the conditions laid down in S. 10 of the Act existed and if he makes out a prima facie case he should be adjudicated as an insolvent. 1932 Cal 817 (817) [AIR V 19] : 59 Cal 1279 (DB)✠ 1961 Orissa 91 (91) [AIR V 48 C 39]✠ ('10) 13 Oudh Cas 94 (95).

[2] Where debtor's petition alleges facts entitling him to present petition under S. 6(3) Court is bound after enquiry to come to decision as to matters spoken of in S. 15 and to dismiss petition under that Section or to make

different from those contained in the petition on which the order of adjudication was made.

[P. I., 1907—S. 6 (3); P. T. I., 1909—S. 14.]

[a] *Substituted* for the words "made under this Act" by the Insolvency (Amendment) Act, 1927 (XI of 1927), S. 4.

STATE AMENDMENTS

MADHYA PRADESH

In its application to the whole of the State of Madhya Pradesh, in clause (a) of sub-s. (1) of S. 10, for the words "five hundred rupees," the words "two hundred rupees" shall be *substituted*.—C. P. Act II of 1936, S. 2 read with M. P. Act XXIII of 1958, S. 3 (1).

PUNJAB

In its application to the whole of the State of Punjab, after clause (a) in sub-section (1) of S. 10, the following new clause shall be *inserted* :—

"*(aa)* his debts amount to two hundred and fifty rupees, and he satisfies the Court that he is entitled to summary administration of his estate under S. 74 of this Act; or" — Punjab Acts VII of 1934, S. 3 [19-4-1935] read with XXX of 1958, S. 4 (1).

Section 10 — Note 1 (*contd.*)

order of adjudication under S. 16 (1). (Case under old Act of 1907). 1918 All 308 (308) [AIR V 5] : 40 All 665 (DB).

[3] Contingencies mentioned in sub-s. (3) of S. 6 of Act of 1907 are to be taken in alternative and if any one of them happens, debtor can present insolvency petition. ('10) 12 Cal L Jour 445 (451) (DB).

[4] The Act of 1907 entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend on the Court's discretion but is a statutory right and a debtor who brings himself within the terms of the Act is not to be deprived of that right on so treacherous a ground as an abuse of the process of the Court. Any misconduct of the debtor is to be visited with its due consequence at the time of the debtor's application for discharge and not on the initial proceedings. 1916 P C 64 (65) [AIR V 3] : 44 Cal 535 : 44 Ind App 11. (Case under Act of 1907 — Cases holding the contrary view overruled—Present Act of 1920 is in conformity with this view).

[5] The onus of proving all essential conditions required by S. 10 lies on the debtor ; otherwise his application is liable to dismissal. 1933 All 841 (842) [AIR V 20] (DB).

[6] Petitioner's prayer to be adjudicated an insolvent cannot be acceded to if he uses it for the purpose of getting the Court to realize his share of his family property as it will be an abuse of the process of the bankruptcy law. ('13) 25 Mad L Jour 545 (549) (DB).

[7] In respect of deceased father's debts his sons are not debtors entitled to present a petition in insolvency under Ss. 7 and 10. ('38) ILR (1938) 1 Cal 132 (135) (DB).

[8] Petitioner liable personally though not so stated in decrees obtained by creditors — Sufficient for adjudication. 1929 Mad 573 (574) [AIR V 16] (DB).

[9] Joint petition by three brothers is not bad in law if it fulfils conditions of S. 10 and is not bad considered as plaint, for misjoinder. 1935 Cal 174 (175) [AIR V 22] (DB).

[10] Under S. 10 (1) (a) the two conditions which must co-exist are : first, that the debtor is unable to pay his debts, and, secondly his debts amount to Rs. 500. These two conditions, which are pre-requisite for presentation of an application for insolvency by a debtor, must be established in every case. On the failure of either, the debtor's application for insolvency must fail, if his case is governed by S. 10 (1) (a). 1958 Pat 528 (529) [AIR V 45 C 168].

[11] Where the facts disclosed that the debtor-petitioner satisfied the requirements of S. 10 by being unable to pay his debts amounting to more than Rs. 500, it was held that the application could not be dismissed on the ground that it was not a bona fide one. 1957 Andh Pra 375 (376) [AIR V 44 C 119]. (AIR 1916 P C 64, *Rel. on.*)

[12] Where on notice being issued to the creditors one of them comes forward and objects to the application and is able to satisfy the Court that there was at least one bond outstanding in favour of the applicant which the applicant had kept back, the Court is justified in dismissing the application. ('46) 1946 Oudh W N (H C) 97 (98).

[13] The reason that the petitioner was being harassed by the creditors may not by itself warrant his being adjudicated an insolvent but the Court is bound to adjudicate him so when he satisfies the provisions of S. 10. 1957 Andh Pra 375 (376) [AIR V 44 C 119].

2. "Unable to pay his debts."—[1] The expression "unable to pay his debts" means that the market-value of realization of assets is less than the total amount of debts. 1933 All 841 (842) [AIR V 20] (DB).

[2] If debtor gives prima facie proof of his inability to pay his debts and satisfies one of the conditions of S. 10 (1) Court should make order of adjudication. ('30) 31 Pun L R 1016 (1016, 1017)✣ 1933 All 841 (841, 842) [AIR V 20] (DB). (Court has discretion as to the amount of protection to be given to petitioner-debtor, the debtor being required to show that he is in fact unable to pay his debt.)✣ 1924 Lah 724 (724) [AIR V 11] (DB). (Assets less than liabilities.)✣ 1924 Pat 166 (167, 168) [AIR V 11] (DB). (Debtor must establish his inability to pay debts — Under old act this was unnecessary.)

[3] Case under old Act of 1907 — Application could not be dismissed on ground that petitioner's assets are more than he has in his

Section 10 — Note 2 *(contd.)*
application admitted. ('10) 6 Nag L R 145 (146).

[4] Fictitious transfer shortly before application for adjudication not ground for rejecting if debts amount to more than Rs. 500 and in fact there is inability to pay debts. 1926 Cal 955 (955) [AIR V 13] (DB).

[5] The debtor must declare all his realisable assets in the petition. 1933 All 841 (842) [AIR V 20] (DB).

[6] Property includes all kinds of property over which he has disposing power. Hence an interest in joint family estate is also property, the value of which must be taken into account. 1933 All 841 (842) [AIR V 20] (DB).

[7] Alienation of some property — Remainder exceeding total value of debts—Debtor cannot be declared insolvent. 1933 Lah 582 (583) [AIR V 20].

[8] Although a debtor may have assets which, if liquidated, would provide sufficient money to discharge his debts, yet if he has no liquidated assets with which to pay his debts at present he must be held not to be able to pay his debts and therefore liable to adjudication as an insolvent. 1960 Raj 242 (243) [AIR V 47 C 61] ✠ ('55) ILR (1955) Trav-Co 497 (499) ✠ 1934 Lah 63 (63) [AIR V 21] (DB).

[9] The existence of assets may not be the criterion to determine whether one is able to pay the debts or unable to pay the debts. Even though a man may own several assets, still he can be said to be unable to pay his debts if he cannot raise money by sale of those properties. The fact that the assets exceed the liabilities is colourless and will not disentitle the debtor to an order of adjudication. 1958 Orissa 117 (118) [AIR V 45 C 31] : ILR (1958) Cut 126.

[10] In judging value of insolvent's property, market-value of property is test. 1935 Pesh 168 (170) [AIR V 22].

[11] The facts that the relations of the petitioner are rich and that he would one day succeed to them and be able to pay off his debts are not grounds for rejection of petition. 1927 Lah 136 (136) [A I R V 14] ✠ 1928 Lah 237 (237) [AIR V 15]. (Father of insolvent rich is no evidence of ability to pay. Insolvency Court to take evidence of existence of debt and ability to pay.)

[12] Licenses which are personal and not transferable cannot form assets in insolvency. 1934 P C 1 (2) [AIR V 21].

[13] The possession of assets is not a necessary condition for a debtor to prove before he is adjudicated insolvent. The conditions which should be complied with are mentioned in S. 10. The debtor has a statutory right of getting himself adjudicated an insolvent if he satisfies the provisions of S. 10. 1932 Mad 237 (237) [A I R V 19] (DB).

[See 1957 Andh Pra 375 (376) [A I R V 44 C 119]. (AIR 1932 Mad 237, *Rel. on.*)]

[14] The fact that the debtor's power of alienation is in certain respects restricted by statute is a wholly immaterial circumstance in considering the debtor's inability to pay his debts. 1929 Lah 573 (573) [AIR V 16] ✠ 1934 Lah 985 (985) [AIR V 21]. (One of landlords willing to purchase land of occupancy tenant.) ✠ 1934 Lah 133 (134) [AIR V 21]. (Occupancy rights which can be sold to landlord.) ✠ 1928 Lah 202 (208) [A I R V 15]. (Restriction on power of alienation, as under Punjab Alienation of Land Act.)

[*See* 1935 Lah 183 (184) [AIR V 22]. (Occupancy rights are assets of insolvent unless landlord refuses to consent to their transfer.) ✠ 1929 Lah 392 (393) [AIR V 16]. (Do.) ✠ ('26) 27 Pun L R 422 (423). (Do.)

[15] Section should not be so strictly construed as to provide means of defeating provisions of Punjab Land Alienation Act — Agriculturist in Punjab himself showing property worth five times his debts — There is no inability to pay. 1925 Lah 630 (630, 631) [AIR V 12].

[16] Finding by Judge about inability to pay is a question of fact and must not be vague. 1924 All 800 (801) [AIR V 11] (DB).

[17] Inquiry into genuineness of debts—Proper stage is when debtor presents application for discharge. 1934 Cal 27 (28) [A I R V 21] (DB).

[18] Case under old Act, 1907 — Where debtor fulfulling either of the conditions laid down in S. 6 (3) of 1907 Act presents petition to be adjudged insolvent, Court cannot dismiss petition on ground that debtor will be able to pay his debts and that application was made to defraud creditors. 1918 Lah 360 (361) [AIR V 5] : 1918 Pun Re No. 27.

[19] Prima facie case as to his inability to pay debts must be made out, otherwise the debtor has no locus standi. But the Court is not entitled to make out a detailed enquiry into the alleged inability — Debtor showing that assets exceed liabilities — He must show that his assets are locked up in investments for which there is no market or that they are otherwise incapable of realization. 1928 Lah 202 (207) [AIR V 15].

[20] Existence of assets other than those disclosed must be proved by creditor. 1927 Lah 354 (354) [AIR V 14].

[21] Failure to keep accounts cannot ipso facto disqualify a person from being declared insolvent. 1927 Lah 27 (27) [AIR V 14].

3. Debts. — [1] Money due under rent decree is "debt" within S. 10 (1) (a). 1921 All 74 (74) [AIR V 8].

[2] Person is entitled to present an application for insolvency, if he can show debts payable, whether alone or jointly with others amounting to more than Rs. 500. 1927 Lah 108 (108) [A I R V 14] ✠ 1926 Lah 235 (235) [A I R V 13]. (Each of joint and several debtors can rely on debt.) ✠ ('13) 9 Nag L R 91 (94).

4. Arrest and imprisonment of debtor in execution.—[1] Subsequent arrest of petitioner does not give him right to continue application which did not lie when it was presented, petitioner not being under arrest at that date. 1927 Lah 38 (38) [AIR V 14].

[2] Right of debtor arrested in execution of decree to present petition of insolvency arises not under S. 6 (3) (a) but under S. 6 (3) (b) of

11. Court to which petition shall be presented.

Every insolvency petition shall be presented to a Court having jurisdiction under this Act in any local area in which the debtor ordinarily resides or carries on business, or personally works for gain, or if he has been arrested or imprisoned, where he is in custody :

Provided that no objection as to the place of presentment shall be allowed by any Court in the exercise of appellate or revisional jurisdiction unless such objection was taken in the Court by which the petition was heard at the earliest possible opportunity, and unless there has been a consequent failure of justice.

[P. I., 1907—S. 6 (2); P. T. I., 1909—S. 11.]

OBJECTS AND REASONS

"Section 6 (2) of the Act of 1907 lays down where an insolvency petition is to be presented, but does not contain any saving in the event of the petition being presented in the wrong Court. The point was raised in *Madho Pershaud* v. *Walton* (18 C. W. N. 1050), where the insolvent successfully presented an appeal on the ground that the petition had been presented in the wrong Court. The proposed proviso is intended to stop this loophole in the existing law."

—S. O. R.

Section 10 — Note 4 *(contd.)*

Act of 1907 (Present S. 10 (1)(b)). ('11) 9 Ind Cas 632 (632) (Sind).

[3] Debtor should be under arrest or imprisonment on the date of the petition. The applicant had been arrested in execution of a decree but was released soon due to failure of the creditor to supply the necessary funds for subsistence—Judgment-debtor then applied in insolvency—*Held* that the application was not tenable as S. 344, Civil Procedure Code did not apply in such a case. ('03) 25 All 204 (206) (DB).

5. Subsequent petition. — [1] Order of discharge not obtained nor adjudication annulled—Insolvent cannot apply for second adjudication. 1929 Oudh 149 (150) [AIR V 16] (DB).

[2] Insolvent making fresh application on annulment of his adjudication — Insolvent merely stating fact of such annulment but not asking for permission to file a second application—Insolvency Court again adjudging him to be insolvent, merely makes reference to annulment in the order—Permission to file a second application cannot be inferred from such reference—There must be express finding of Court to the effect. 1937 Pesh 85 (85) [A I R V 24].

[3] Creditors not taking steps to receive rateable distribution out of the sale proceeds —Insolvent also not applying for discharge— Order annulling adjudication—Leave must be granted to present fresh insolvency petition. 1928 Lah 452 (453) [AIR V 15].

[4] Insolvent applying for discharge—Court directing him to renew application "six months hence" — Failure to apply — Court annulling adjudication — Fresh application under S. 10 (2) refused — *Held* in appeal that Court's order was obscure and misleading and offered reasonable excuse to insolvent to file fresh petition. 1929 Pat 184 (185) [AIR V 16] (DB).

[5] Section 10 (2) implies that, apart from annulment, a second petition lies. 1927 Mad 579 (580) [AIR V 14] (DB).

[6] First application for adjudication dismissed for failure to produce evidence — Second application is not barred. 1928 Lah 374 (375) [AIR V 15].

[7] Debtor's inability to prove his inability to pay his debts in first application does not estop him from so doing in subsequent applications for adjudication. 1934 Oudh 94 (94) [AIR V 21] (DB).

6. Appeal.— [1] Leave to appeal from an order under S. 10 is in the discretion of the District Court. 1928 Pat 23 (23) [AIR V 15] (DB).

Section 11 — Note 1

[1] 'Or' in the section has been used in the sense of giving debtor an alternative choice as to the place of presentation of petition. ('12) 5 Sind L R 259 (259) (DB).

"Ordinarily resides"

[2] Temporary residence of petitioner for insolvency for a time and for particular purpose within jurisdiction of Court will give Court jurisdiction to deal with application for insolvency (Case under S. 6 (2) of Act of 1907). ('12) 15 Cal L Jour 457 (457) (DB).

[*See* 1914 Cal 350 (351, 352) [AIR V 1] (DB). (Mere temporary residence with relative does not give jurisdiction.)]

[3] Where the insolvent has his ancestral land and house within the territorial jurisdiction of the Court, presentation of petition there is not presentation to wrong Court, even if the insolvent has been residing in different places. 1926 Mad 228 (229) [AIR V 13] (DB).

[4] Occasional absence from district does not affect the question of residence — Debtor alleging particular residence at time of petition — Debtor not cross-examined nor allegation denied — Residence as given by debtor must be accepted. 1923 Mad 585 (586, 587) [AIR V 10] (DB).

[5] Applicant in insolvency case before District Judge of Lucknow was at the time residing at Lucknow with relative but had, sometimes, previous to his application, been residing in Central Provinces — *Held*, District

12. Verification of petition.

Every insolvency petition shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying plaints.

[P. I., 1907—S. 6 (1); P. T. I., 1909—S. 13 (1).]

13. Contents of petition.

(1) Every insolvency petition presented by a debtor shall contain the following particulars, namely :—

(a) a statement that the debtor is unable to pay his debts;

(b) the place where he ordinarily resides or carries on business or personally works for gain, or, if he has been arrested or imprisoned, the place where he is in custody;

(c) the Court (if any) by whose order he has been arrested or imprisoned, or by which an order has been made for the attachment of his property, together with particulars of the decree in respect of which any such order has been made;

Section 11 — Note 1 *(contd.)*

Judge of Lucknow was wrong in refusing to entertain application. 1917 Oudh 176 (176) [AIR V 4].

"Carries on business"

[6] Landed proprietor letting land to tenants, etc. is carrying on business. 1937 Rang 128 (130) [AIR V 24] : 14 Rang 758 (DB).

[7] Where a person who was a sole proprietor of a firm doing leather business at Vaniyambadi (outside Madras) came to Madras now and then in connection with his business and was purchasing and selling goods at Madras, he must be deemed to be carrying on business at Madras so long as the liabilities he incurred in the course of the business remain undischarged, even though he closed down his business at Madras earlier. 1957 Mad 403 (404) [(S) AIR V 44 C 122].

[8] Firm carrying on business through agents at particular place — Principal centre of business elsewhere — Court at former place has jurisdiction. 1925 Sind 153 (154, 155) [AIR V 12] (DB).

[9] A person carrying on leather business at Vaniyambadi and at Madras could be adjudicated insolvent in Madras and also at Vaniyambadi. The Courts at both places have jurisdiction to adjudge him insolvent. 1957 Mad 403 (404) [(S) AIR V 44 C 122].

Non-resident foreigner

[10] Insolvency Court has no jurisdiction over alien merely because he was carrying on business through agent in British India. 1936 Sind 175 (178) [AIR V 23] : 29 Sind L R 410.

"Personally works for gain"

[11] Court can entertain insolvency petition of person working as domestic servant within its jurisdiction though he has got property beyond its jurisdiction. 1914 Oudh 313 (314) [AIR V 1].

"Where he is in custody"

[12] Debtor arrested or imprisoned in execution of decree may present insolvency petition to Court having jurisdiction either in local area where he is in custody or where he resides or carries on business. ('12) 5 Sind L R 259 (259) (DB).

Proviso—Objection to jurisdiction

[13] Question of jurisdiction cannot be taken in appeal unless there is failure of justice. 1925 Mad 483 (483) [AIR V 12] (DB).

[14] Objection as to place of presentation must be taken at earliest possible opportunity and there must be consequent failure of justice. Both conditions must be present in order to vitiate proceeding on account of presentation to wrong Court. 1926 Mad 228 (229) [AIR V 13] (DB).

Section 12 — Note 1

[1] That the application is to be by petition duly verified, is a condition precedent to the making of an adjudication order. ('08) 12 Cal W N 538 (539).

[2] Sections 12 and 18 do not convert insolvency petitions into plaints but merely make some provisions relating to plaints applicable to petitions. 1940 Cal 244 (246) [AIR V 27] : I L R (1940) 1 Cal 344 (DB).

[3] When debtor is firm application for insolvency must be in name of firm and must be signed in manner laid down in Rr. 19, 22, 24 framed by Calcutta High Court under S. 79 of Act. 1924 Cal 436 (437) [AIR V 11] (DB).

Section 13 — Note 1

Scope

[1] Application under S. 55 (4), Civil P. C., to be declared insolvent need not contain particulars required by S. 13 of the Provincial Insolvency Act. 1931 Bom 444 (445) [AIR V 18].

[2] Section 13 imposes upon petitioning debtor obligation to state amount and particulars of all his property and that he is unable to pay his debts. 1933 Pat 43 (44) [AIR V 20]: 12 Pat 107 (DB) ✠ 1961 Andh Pra 219 (221) [AIR V 48 C 55].

Clause (1) (a)

[3] Inability to pay debts — Statements of insolvent as witness is prima facie proof. 1935

(d) the amount and particulars of all pecuniary claims against him, together with the names and residences of his creditors so far as they are known to, or can by the exercise of reasonable care and diligence be ascertained by, him;

(e) the amount and particulars of all his property, together with—

(i) a specification of the value of all such property not consisting of money;

(ii) the place or places at which any such property is to be found; and

(iii) a declaration of his willingness to place at the disposal of the Court all such property save in so far as it includes such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree;

(f) a statement whether the debtor has on any previous occasion filed a petition to be adjudged an insolvent, and (where such a petition has been filed)—

(i) if such petition has been dismissed, the reasons for such dismissal, or

(ii) if the debtor has been adjudged an insolvent, concise particulars of the insolvency, including a statement whether any previous adjudication has been annulled and, if so, the grounds therefor.

(2) Every insolvency petition presented by a creditor or creditors shall set forth the particulars regarding the debtor specified in clause *(b)* of sub-section *(1)*, and shall also specify—

(a) the act of insolvency committed by such debtor, together with the date of its commission; and

(b) the amount and particulars of his or their pecuniary claim or claims against such debtor.

[P. I., 1907—S. 11 (1); P. T. I., 1909—S. 15 (1).]

Section 13 — Note 1 *(contd.)*

Lah 213 (213) [AIR V 22] ✠ 1928 Mad 394 (396) [AIR V 15] (DB). (Allegation of inability to pay debt must be proved substantially.)

[4] Under S. 11 (1) of old Act of 1907, if the statement that petitioner-debtor was unable to pay his debt was found to be false, either on the face of the proceedings or on representation of creditors, the Court could dismiss the petition. Law is not different under the present Act of 1920. 1922 Bom 80 (80, 81) [AIR V 9] : 46 Bom 757 (DB).

Clause (1) (d)

[5] Mis-statement of amounts due, value of property, etc., does not disentitle insolvent to order of adjudication. ('13) 19 Ind Cas 685 (685) (DB) (Cal). (Case under old Act of 1907.) ✠ 1922 Bom 80 (80) [AIR V 9] : 46 Bom 757 (DB). (Do.)

[6] Mention of fictitious debts in petition will not justify dismissal—It can, however, be considered at time of discharge. 1930 Lah 738 (738) [AIR V 17] ✠ 1915 All 455 (455) [AIR V 2] (DB). (Case under Act of 1907.)

[7] Mentioning only of the names of the creditors and amount of loan is not sufficient compliance with S. 13 (1) (d) of the Act. 1958 Pat 528 (529) [AIR V 45 C 168].

Clause (1) (e)

[8] Share in joint family — Failure to include in schedule amounts to non-compliance with S. 13 (1) (e). 1933 All 841 (842) [AIR V 20] (DB).

Clause (2) (a)

[9] If petition for adjudication does not give all particulars about acts of insolvency, it should be amended or dismissed. 1932 Cal 290 (291) [AIR V 19] (DB).

[10] It is necessary for the petitioning creditor to allege the acts of insolvency complained of by him in the petition and specify particulars as to the time and place of their commission. 1949 East Punj 359 (360) [AIR V 36 C 90] ✠ 1932 Lah 643 (647) [AIR V 19] : 14 Lah 117 (DB).

[11] A creditor presenting a petition need not aver in his petition that the debtor is unable to pay his debt. The question of ability of the debtor to pay his debt is only material under S. 25, for the ability to pay his debt is one of the grounds on which the Court may dismiss the petition. If such an issue is raised where creditor presents petition, it is raised for the benefit of the debtor so as to enable him to satisfy the Court that he was able to pay the debts. 1949 East Punj 359 (361) [AIR V 36 C 90].

14. Withdrawal of petitions.

No petition, whether presented by a debtor or by a creditor, shall be withdrawn without the leave of the Court.

[P. I., 1907—S. 7; P. T. I., 1909—Ss. 13 (8) and 15 (2).]

Section 13 — Note 1 *(contd.)*

[12] Where an insolvency petition is presented by a creditor, the onus is on the debtor to satisfy the Court that he is able to pay his debts. 1949 East Punj 359 (361) [AIR V 36 C 90].

[13] While it is primarily for the creditor to present his petition in proper form and while it is also the duty of the Court itself to insist on a meticulous compliance with the requirements of the statute, it nevertheless is also open to the debtor to object to the form so that the Court may reject the petition in limine or in a proper case give leave to the creditor to amend his petition by supplying the necessary particulars or curing the formal defects. 1949 East Punj 359 (360) [AIR V 36 C 90].

[14] Person cannot be adjudicated as insolvent at instance of his creditors on act of insolvency not relied on in the application against him. Mere mention by petitioner of warrant of arrest having been issued against the debtor during insolvency proceedings does not justify the Court to take notice of it and for issuing order when this fact is not mentioned in petition. 1935 Pesh 168 (170) [AIR V 22].

[15] It may not always be possible for the petitioning creditor to specify the exact time or date of the departure of the debtor from his dwelling house or place of business since it may not be within his knowledge. In such cases, the debtor is entitled to object to the form so that the Court may in a proper case permit the creditor to amend his petition by supplying the necessary particulars. Where such objection is not taken either in the trial Court or the lower appellate Court and the debtor did not evidently feel embarrassed in contesting proceedings by reason of the absence of the exact date of the commission of the act of insolvency, it cannot be said that the formal defect has resulted in any substantial injustice requiring interference in revision. 1949 East Punj 359 (360) [AIR V 36 C 90].

[16] The words "with intent to defeat and delay his creditors" omitted but act of insolvency clearly set out—The amendment to include those words should be allowed—The defect is merely formal. 1935 Mad 202 (203) [AIR V 22].

[See however 1934 Rang 87 (88, 89) [AIR V 21] : 12 Rang 150 (DB). (Omission to mention that act complained of was done with intent to defeat or delay creditors—Not formal defect and leave to amend after 3 months should not be granted.)]

[17] Where in a petition by the creditors under S. 9 (1) to adjudicate certain debtors insolvents, allegations made against the debtors consist of an incomprehensible mixture of Cls. (b) and (c) of S. 6 and the petition is so framed that it cannot be ascertained whether it alleges that debtors had made a transfer of part of their property with intent to defeat or delay their creditors jointly or whether they had made a transfer of property which would be void as a fraudulent preference, if they were adjudicated insolvents, the petition ought to be dismissed on this ground alone. 1937 Rang 189 (190) [AIR V 24].

Clause (2) — Limitation

[18] Section 5, Limitation Act does not apply to petitions for insolvency. 1933 Lah 821 (822) [AIR V 20].

Section 14 — Note 1

[1] A petition for insolvency cannot be withdrawn under S. 14 except with Court's permission. 1925 Mad 242 (243) [A I R V 12] (DB).

[2] Section 14 applies only to withdrawals before adjudication. After an order of adjudication, the insolvency petition cannot be withdrawn even with leave of Court. 1956 Trav-Co 27 (29) [(S) A I R V 43 C 7] : I L R (1955) Trav-Co 909 (FB) ✠ 1916 Sind 52 (52) [AIR V 3] : 10 Sind L R 47. (Case under old Act of 1907.)

[3] In deciding whether debtor should be allowed to withdraw petition for insolvency, interest of creditors also should be considered. 1939 Lah 190 (191) [A I R V 26].

[4] Matters which have to be considered under S. 14 cannot be said to be matters arising in insolvency and S. 4 cannot be applied to them. 1956 Trav-Co 27 (29) [(S) A I R V 43 C 7] : I L R (1955) Trav-Co 909 (FB).

[5] Leave granted to petitioning creditors to withdraw petition—Non-petitioning creditors served with notice under S. 19 but not with one of intention to withdraw petition—Non-petitioning creditors appealing to District Judge — District Judge remanding case for opportunity being given to appellants to object to withdrawal order held to be legal. 1930 Lah 749 (749) [A I R V 17].

[6] Where an insolvency petition was withdrawn by leave of Court prior to adjudication as a result of compromise among the creditors and neither the guardian of the minor creditors nor any counsel had certified to the Court that the compromise was beneficial to the minors nor had the Insolvency Court considered the question whether the compromise was beneficial to the minors and the minors subsequently sued for full recovery of their dues on the ground that the compromise was not binding on them, it was held that the order granting leave to withdraw the insolvency petition did not constitute *res judicata* so far as the question whether the compromise was beneficial to the minors and was binding on them was concerned. 1956 Trav-Co 27 (29) [(S) A I R V 43 C 7] : I L R (1955) Trav-Co 909 (FB).

15. Consolidation of petitions.

Where two or more insolvency petitions are presented against the same debtor, or where separate petitions are presented against joint debtors, the Court may consolidate the proceedings or any of them, on such terms as the Court thinks fit.

[P. I., 1907—S. 8; P.T.I., 1909—S. 91.]

16. Power to change carriage of proceedings.

Where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of a petitioning creditor.

[P. I., 1907—S. 9; P. T. I., 1909—S. 92.]

Section 14 — Note 1 *(contd.)*

[7] Insolvency petition allowed to be withdrawn under misapprehension due to fraud—Revision lies. 1937 Lah 631 (631, 632) [A I R V 24].

[8] Where the Insolvency Court strikes off the insolvency petition without adverting to S. 14 this is an error apparent on the face of the record and attracts the application of O. 47, R. 1, Civil P. C. 1955 Trav-Co 49 (50) [(S) A I R V 42 C 22] : I L R (1954) Trav-Co 1042 (DB).

[9] A withdrawal of a petition, for which no provision is made in the Act, cannot be regarded as legally equivalent to its dismissal by consent. ('08) 32 Bom 321 (334) (DB). (Case under Indian Insolvency Act (11 and 12 Vict., c. 21).)

[10] The effect of the withdrawal of an insolvency petition is only to relegate the parties to *status quo ante*, that is to say, the position of the parties would be as if no insolvency petition had been filed and the creditors would be free to enforce their claim against the debtor subject to any discharge effected or lawful agreement made between them after the institution of the insolvency petition. 1956 Trav-Co 27 (29) [(S) AIR V 43 C 7] : I L R (1955) Trav-Co 909 (FB).

[11] Withdrawal of petition after vesting property in official assignee — The vesting order comes to a determination and the insolvent's property revests in him. ('07) 9 Bom L R 1006 (1009). (Case under Indian Insolvency Act 11 and 12 Vict., c. 21.)

[*See* ('08) 32 Bom 321 (334). (Application for withdrawal after vesting order — Suit by official assignee for recovery of money due to insolvent before orders on withdrawal application — Suit held could be continued after order for withdrawal which did not become effective to divest official assignee and revest property in insolvent — Case under Indian Insolvency Act, 11 and 12 Vict., c. 21.)]

Section 15 — Note 1

[1] Petitions cannot be consolidated before admission. 1931 Sind 65 (66) [AIR V 18] (DB) ✠ 1956 Mad 157 (159) [A I R V 43 C 44]. (Order of consolidation must be passed after admission of the petition and after affording opportunity to the other parties concerned of showing that the petition is not competent.)

[2] Section 15 *prima facie* refers to the consolidation of insolvency petitions after they are admitted and pre-supposes that such petitions are otherwise competent. 1956 Mad 157 (159) [A I R V 43 C 44].

[3] Section 15 does not require that a formal order of consolidation should be passed. Express order is not necessary and can be inferred from the conduct of the proceedings. 1956 Mad 157 (159) [A I R V 43 C 44].

[4] Single petition is maintainable against persons liable on joint debts. 1931 Lah 384 (384) [A I R V 18].

SECTION 16 — SYNOPSIS

1. Object and scope.
2. Conditions for substitution.
3. Limitation.
4. Effect of substitution.

1. Object and scope.—[1] The object of S. 16 is to serve as a check on the fraud of a creditor who has presented the application for insolvency and to prevent other creditors from being injured by the action of the former, who by reason of collusion or otherwise, may not diligently prosecute the petition and to give the other creditors the benefit of the date of the original petition, no matter how much later be the date of their own introduction into the case. 1960 Andh Pra 600 (601) [A I R V 47 C 192] ✠ 1946 Bom 20 (23) [A I R V 33 C 5] : I L R (1945) Bom 734. (Object is to serve as a check on the fraud of either the debtor or the creditor who has presented the application for insolvency.) ✠ 1938 Oudh 206 (207, 208) [A I R V 25] : 14 Luck 164 (FB). (Object of S. 16 is to prevent other creditors from being injured by action of one creditor who, by reason of collusion or otherwise, may not diligently prosecute petition.) ✠ 1942 Mad 172 (173) [AIR V 29] : I L R (1942) Mad 316 (DB).

[2] The petition filed by the first petitioning creditor enures for the benefit of all the creditors of the insolvent on that date and any other creditor whose debt exists on the date of the filing of the insolvency petition can be allowed to proceed with the insolvency petition as petitioning creditor ('58) 1958-2 Mad L Jour 530 (531) ✠ 1953 Mad 993 (994) [AIR V 40 C 390].

[3] Under S. 16, a creditor who is aggrieved by the conduct of the petitioning

Section 16 — Note 1 *(contd.)*
creditor can come by way of an application for being substituted and not for being added as an additional party. 1951 Mad 665 (666) [AIR V 38 C 201] : I L R (1951) Mad 463.

[4] An application for substitution must be made only under S. 16 and not under O. 1, R. 10, Civil P. C. The remedy provided in the Act is distinct from the one provided by O. 1, R. 10 of the Code of Civil Procedure. 1951 Mad 665 (666, 667) [AIR V 38 C 201] : I L R (1951) Mad 463.

[5] Other creditor can be substituted at any time in place of original petitioner, while the insolvency proceedings are pending. 1929 Rang 291 (293) [AIR V 16]: 7 Rang 785 (DB).

[6] Substitution can be inferred from Court continuing proceedings on application of creditor applying to be substituted under S. 16— Express order is not necessary. 1938 Oudh 206 (207, 208) [AIR V 25] : 14 Luck 164 (FB).

[7] Even where the conditions laid down in S. 16 are not satisfied, the Court has power to act under S. 151 of the Civil Procedure Code and order substitution when the petitioning creditor walks out of the scene. 1953 Mad 993 (995, 996) [AIR V 40 C 390].

[8] Creditor who has been substituted in place of original creditor can, in his turn, be substituted by another creditor and so on. 1938 Oudh 206 (208) [AIR V 25]: 14 Luck 164 (FB).

2. Conditions for substitution.—[1] Where a petitioning creditor, who is a representative of the whole body of creditors, comes to an arrangement with the debtor and seeks not to prosecute his application any further, his action amounts to a failure to proceed with due diligence in the highest degree and S. 16 has to be invoked. 1955 Trav-Co 49 (51) [(S) A I R V 42 C 22] : I L R (1954) Trav-Co 1042 (DB) ✠ 1938 Oudh 101 (102) [A I R V 25] : 13 Luck 757 ✠ 1929 Rang 291 (293) [AIR V 16] : 7 Rang 785 (DB).

[2] Unless finding is arrived that petitioning creditor is not proceeding on his application with due diligence, no order of substitution can be made — Court allowing withdrawal of petition — It can be urged that Court was satisfied with conduct of petitioning creditor and did not suspect want of diligence. 1940 Lah 470 (471) [AIR V 27].

[3] Where the petitioning creditor withdraws the amount deposited by the insolvent towards the debt and does not proceed with the insolvency petition and where the consequent annulment of the adjudication would result in defeating all other creditors, the requirements of S. 16 are satisfied. ('58) 1958-2 Mad L Jour 530 (531).

[4] The substitution under S. 16 contemplates a petition that is alive and is not dead, a petition that is pending and has not been dismissed. 1955 Trav-Co 49 (50) [(S) A I R V 42 C 22]: I L R (1954) Trav-Co 1042 (DB)✠ 1933 Rang 251 (252) [AIR V 20]: 11 Rang 407 (DB).

[*See* 1946 Bom 20 (23, 24) [AIR V 33 C 5] : ILR (1945) Bom 734. (Petition under S. 9(1)(c) dismissed for default—Application by another creditor to substitute — Court has inherent power to restore under S. 151, Civil P. C.)]

[But see 1953 Mad 993 (996) [A I R V 40 C 390]. (Even where creditor's petition is dismissed not for want of diligent prosecution but on merits and even in cases where S. 16 cannot be invoked, the Court has power to order restoration and substitution under S. 151, Civil P. C., to meet the ends of justice in suitable cases.)]

[5] When an insolvency petition filed by the petitioning creditor is dismissed for lack of due diligence on his part, it will be just and proper for the Court to wait for some reasonable time before a final order of dismissal for default is passed, with a view to enable the other creditors to get themselves substituted for the creditor who has failed to prosecute the petition with due diligence. Where there is a compromise or settlement entered into between the petitioning creditor and the debtors, as a result of which the petition is likely to be dismissed once for all, an opportunity should be given to the other creditors who would like to safeguard their interests from being jeopardised. 1953 Mad 993 (995) [AIR V 40 C 390].

[6] Application by creditors for withdrawal — Order "file" made on it does not mean allowed to withdraw — Other creditors can apply for substitution. 1938 Oudh 206 (207) [AIR V 25] : 14 Luck 164 (FB).

[7] Creditor's application for adjudication dismissed on intimation that creditors had come to some arrangement with insolvent— Some months later another creditor applying to be substituted, should not be allowed to be substituted but be left to file fresh petition. 1933 Rang 251 (252) [AIR V 20].

3. Limitation.—[1] Substitution of creditor after three months of act of insolvency is legal. 1932 All 147 (149) [A I R V 19] : 54 All 72 (DB)✠ 1960 Andh Pra 600 (602) [AIR V 47 C 192]✠1953 Mad 993 (996) [AIR V 40 C 390]. (Substitution ordered on petition filed more than five months after the dismissal of the insolvency application of petitioning creditor, after restoring the petition to file.)

[2] When the petitioning creditor does not proceed with the petition, any other creditor can be substituted though the debt due to the latter had become barred by the date of substitution provided that it was enforceable on the date of the original petition. 1960 Andh Pra 600 (602) [AIR V 47 C 192] ✠ 1928 Mad 608 (609) [AIR V 15] : 51 Mad 594 (DB).

4. Effect of substitution.—[1] A second creditor who is substituted under S. 16 on the ground that the original petitioning creditor was not prosecuting with due diligence, gets the benefit of the date of the original petition, no matter how much later may be the date of his own introduction into the case. The creditor substituted under S. 16 cannot be compelled to prove the qualification of the original creditor to file the petition. 1942 Mad 172 (173) [A I R V 29] : I L R (1942) Mad 316 (DB).

[2] The effect of substitution would be that the substituted creditor takes the place of the

17. Continuance of proceedings on death of debtor.

If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued so far as may be necessary for the realisation and distribution of the property of the debtor.

[P. I., 1907—S. 10; P. T. I., 1909—S. 93].

Section 16 — Note 4 *(contd.)*

first creditor *ab initio* and is entitled to prosecute the original petition as if it was his own petition. 1960 Andh Pra 600 (602) [AIR V 47 C 192]✠ 1929 Rang 291 (293) [AIR V 16]: 7 Rang 785.

Section 17 — Note 1

Scope

[1] The aim of the Bankruptcy Law is to realize and distribute the property of the debtor among the creditors. 1952 Hyd 80 (83) [AIR V 39] : I L R (1952) Hyd 196 (FB).

[2] The death of the debtor either before or after adjudication does not divest the Court of its power to continue the proceedings so far as may be necessary for realisation and distribution of his property for the benefit of the general body of creditors. 1952 Hyd 80 (83) [AIR V 39] : ILR (1952) Hyd 196 (FB) ✠ 1954 Mys 52 (53) [A I R V 41 C 25] : I L R (1954) Mys 95 (DB). (Death of the insolvent is no bar to the Court making orders if it deems fit for realisation of the property.) ✠ 1934 Lah 468 (471) [A I R V 21] : 15 Lah 698 (DB) ✠ 1930 Cal 590 (591) [AIR V 17] (DB).

[3] Where on the death of the insolvent the Court does not pass any orders in regard to the realisation of the property, the properties revert to the debtor. 1954 Mys 52 (53) [A I R V 41 C 25] : ILR (1954) Mys 95 (DB).

[4] In the case of the death of a debtor, the provisions of S. 17 of the Act should be given preference over the provisions of Order 22 of the Civil Procedure Code. 1952 Hyd 80 (83) [AIR V 39] : ILR (1952) Hyd 196 (FB).

[5] There is a clear distinction between S. 17 of the Act and Order 22, Civil P. C. Under S. 17, the Court is given discretion to continue the Insolvency Proceedings so far as may be necessary for the realisation and distribution of the debtor's property. Order 22 gives no such initiative to the Court in the matter. The Court or the receiver (when appointed) acting under S. 17 can bring such persons on record if necessary in the place of the deceased for collecting the assets of the insolvent for distribution irrespective of the question of limitation whereas proceedings under Order 22 are conditioned by the law of limitation. 1952 Hyd 80 (83) [AIR V 39] : ILR (1952) Hyd 196 (FB).

[6] There is no law that upon the death of the Insolvent his legal representative should be brought on record in his place since the receiver represents the estate of the Insolvent. 1952 Hyd 80 (87) [AIR V 39]:ILR (1952) Hyd 196 (FB).

[7] Proceedings in matter for realisation and distribution of property — Section 17 authorizes the Court by necessary implication to pass an adjudication order even after the death of the debtor. 1954 Mys 189 (192) [AIR V 41 C 82] : I L R (1955) Mys 98 ✠ 1944 Cal 370 (371) [A I R V 31] (DB) ✠ 1932 Lah 264 (265) [AIR V 19] ✠ 1928 Mad 480 (482) [AIR V 15] : 51 Mad 495 (DB). (Whether petition was by or against debtor) ✠ 1928 Mad 476 (477) [AIR V 15] : 51 Mad 344 (DB).

[8] The reason why an adjudication order can be passed even after the death of the debtor is that proceedings relating to the matter of realization and distribution cannot be conducted unless there is a person in whom the property is vested, which vesting will take place only on adjudication following. 1954 Mys 189 (192) [A I R V 41 C 82] : I L R (1955) Mys 98.

[9] Death of debtor before adjudication but after petition—Official receiver or creditors can apply to set aside voidable alienations. 1933 Mad 25 (27) [AIR V 20].

[10] Adjudication after death of debtor — Legal representative can enter into composition. 1941 Nag 238 (238, 239) [AIR V 28].

Death after adjudication

[11] Death of insolvent after vesting of property in receiver—Receiver is not divested of his property — Heirs of insolvent can sue to show that debt was tainted with immorality. 1925 Lah 366 (366) [A I R V 12] (DB).

[12] Property of a deceased insolvent vested in the receiver although presumed to be ancestral, can be made exempt from sale after the death of the insolvent only if his heirs succeed in showing that the debts of the deceased were tainted with immorality or were otherwise illegal. 1930 Lah 1034 (1035) [AIR V 17] : 12 Lah 367 (DB).

[13] Death of insolvent does not affect power of official receiver to distribute assets of insolvent vested in him by order of adjudication. ('11) 9 Ind Cas 633 (633) (Sind). (Case under Act of 1907.)

Right of legal representatives

[14] There is no complete abatement of proceedings on death of insolvent ; appeal by deceased insolvent can be continued by his heirs. 1937 All 435 (437) [A I R V 24] : I L R (1937) All 616 (DB) ✠ 1952 Hyd 80 (87) [AIR V 39] : ILR (1952) Hyd 196 (FB). (Insolvency Proceedings do not abate by reason of Insolvent's death.)

[15] On the death of the insolvent during the pendency of the appeal in the High Court the right to appeal if any does survive and the heirs of the insolvent can contest the adjudication in appeal. The appeal does not abate. 1942 Bom 159 (159, 160) [AIR V 29] : I L R (1942) Bum 175 (DB) ✠ 1921 Lah 331 (332) [AIR V 8].

[But see 1932 Lah 121 (121) [A I R V 19] : Lah 396✠1928 Lah 11 (119) [AIR V 15] :

18. Procedure for admission of petition.

The procedure laid down in the Code of Civil Procedure, 1908, with respect to the admission of plaints, shall, so far as it is applicable, be followed in the case of insolvency petitions.

[P. I., 1907—S. 6 (1)].

19. Procedure on admission of petition.

(1) Where an insolvency petition is admitted, the Court shall make an order fixing a date for hearing the petition.

(2) Notice of the order under sub-section *(1)* shall be given to creditors in such manner as may be prescribed.

(3) Where the debtor is not the petitioner, notice of the order under sub-section *(1)* shall be served on him in the manner provided for the service of summons.

[P. I., 1907—S. 12].

Section 17 — Note 1 (*contd.*)

9 Lah 306 (DB). (Order being personal appeal abates under O. 22, R. 4, Civil P. C.).]

Termination of proceedings

[16] Where property has been distributed prior to death of insolvent proceedings terminate on death of insolvent. 1933 Lah 997 (998) [AIR V 20].

Section 18 — Note 1

[1] The provisions of the Code of Civil Procedure will not apply when there are other provisions in the Provincial Insolvency Act governing the case. 1957 Andh Pra 603 (604) [AIR V 44 C 199].

[2] Petition was presented on July 3. Court ordered "check and file emergently". It was checked and filed on the same day. On July 7 notice and publication were ordered — *Held* that the date of admission was July 3 and not July 7. Order to issue notice may constitute act of admission in many cases but cannot be a universal rule of law. 1942 Mad 88 (89) [AIR V 29].

[3] Date of admission of insolvency petition must be deemed to be date when Court passed order requiring insolvent to furnish security for attendance. 1940 Lah 166 (167) [A I R V 27] ✠ 1936 Lah 885 (886) [AIR V 23].

Section 19 — Note 1

[1] Sub-sections (1) and (2) of section 19 apply to applications both of creditors and debtors, while sub-section (3) applies to the application of a creditor. 1958 Raj 223 (225) [AIR V 45 C 73] : ILR (1958) 8 Raj 221 (DB) ✠ 1926 Lah 360 (360) [AIR V 13].

[2] Section 19 merely provides that the date is to be fixed after the admission of the petition; it is not necessary that it should be fixed at the same time or on the same date. 1936 Lah 885 (887) [AIR V 23].

[3] Provisions of S. 19, Provincial Insolvency Act are mandatory and the Court, on admitting insolvency petition, must issue notice to the creditors. 1945 Oudh 319 (320) [AIR V 32] (DB).

[4] Section 19 (2) provides notice of the order made under S. 19 (1) fixing a date to be given to the creditors. The notice must refer to the insolvency petition in which the date is fixed under S. 19 (1) and since the date that is fixed is in both kinds of petitions, whether by a creditor or by a debtor, the notice that is prescribed in sub-section (2) refers to both kinds of petitions. 1958 Raj 223 (225) [AIR V 45 C 73] : ILR (1958) 8 Raj 221 (DB).

[**See however** 1929 Lah 636 (637) [AIR V 16]. (Section 19 (2) primarily applies to cases where debtor is the petitioner.)]

[5] The fact that in a creditor's petition, there is, generally speaking, no mention of other creditors as opposite parties in addition to the debtor makes no difference to the issue of notice under sub-section (2) in all petitions whether made by creditors or by debtors. 1958 Raj 223 (225) [AIR V 45 C 73] : ILR (1958) 8 Raj 221 (DB).

[6] A decision in an insolvency matter is a decision in rem, and as such affects not only the parties before the Court, but all those who are creditors of the insolvent and who meddle with his property. That is the reason why, even where the petition for insolvency is by a debtor, a general notice is prescribed by the Rules of the High Court in addition to the specific notice to the creditors named in the application, so that if for some reason some creditor is left out, he may come to know by general notice that his debtor has applied for insolvency and may appear in Court and contest the same as an interested person. 1958 Raj 223 (225) [AIR V 45 C 73] : ILR (1958) 8 Raj 221 (DB).

[7] Section 19 provides for notice being given to the rest of the creditors who are not before the Court by means of publication in the Gazette. 1953 Mad 993 (995) [AIR V 40 C 390].

[8] Notification of petition for insolvency in local official Gazette is not illegal. 1926 Lah 360 (361) [AIR V 13].

[**See however** 1940 Pat 623 (625) [AIR V 27]. (Where it was held that such notice is not sufficient.)]

[9] Private notice to all creditors (without general notice as required by law) is of no avail. 1917 Mad 203 (204) [AIR V 4] (DB). (Case under old Act, 1907).

[10] Notice on agent is notice to principal — Debtor's agent not raising objections as to

Section 19 — Note 1 *(contd.)*

irregularity of time etc., amounts to waiver. 1916 Mad 144 (146) [AIR V 3] : 39 Mad 693 (DB).

[11] An order of adjudication is not incompetent merely because one of the creditors is a foreign sovereign not amenable to the jurisdiction of the Court and mere issue of notice to sovereign under S. 19 (2) does not attract application of S. 86, C. P. C. 1940 Cal 244 (248) [AIR V 27] : ILR (1940) 1 Cal 344 (DB).

[12] The provisions of S. 19 are mandatory. Mere publication of the general notice in the official gazette is not enough. It must be served by registered post on each creditor. The question whether the creditor was prejudiced or not by the non-service of the notice is irrelevant. Therefore where the creditor proves absence of notice, the Court is bound to allow his application for setting aside an ex parte order granting the debtor's petition for being declared an insolvent and rehear the matter. 1940 Pat 623 (625) [AIR V 27] (DB) ✠ 1935 Lah 412 (413) [AIR V 22]. (No prejudice caused by absence of notice required under S. 19 — Order of adjudication should not be interfered with.)

[13] Court must call on petitioning creditors to establish their right to present petition before ordering debtor to file inventory under S. 24. 1929 Lah 636 (637) [AIR V 16].

[14] Notice is necessary to other creditors in petition by one creditor to adjudge debtor insolvent. 1915 Mad 589 (589) [AIR V 2] (DB). (Case under old Act of 1907, S. 12 (3).)

[15] In a creditor's petition of insolvency the petitioner gave notices to all creditors and the debtor of the date fixed for hearing as laid down by the Madras Provincial Rules (1922) R. 21 (3) made under S. 79, Provincial Insolvency Act. The actual hearing, however, was postponed to a later date when the order of adjudication was made. In the meantime between the date fixed for hearing and date on which the petition was actually heard R. 21 was amended so as to make service of notice necessary on the transferee, the transfer in whose favour was alleged to be an act of insolvency. The order of adjudication was made in the absence of the transferee — *Held* that the petitioner had done all that was required of him under the existing rules, and the fact that the rule was amended between the date fixed and the date of actual hearing did not render additional notice necessary under the amendment rule and that the amended rule was not retrospective in that sense. 1946 Mad 262 (263, 264) [AIR V 33 C 142].

[16] Where after the petitioning creditor's insolvency petition was admitted and before the hearing date was fixed the Court called upon the petitioner to deposit charges and ordered notice to respondents and also a notification to be published in the Gazette and where the notification appeared in the Gazette as prescribed by Rule 21 of the Provincial Insolvency Rules and the respondents who were debtors were also served and where the Court on the date fixed for hearing the petition gave a week's time for creditors, if any, to appear and to be heard, it cannot be contended that the requirements of S. 19 (2) were not complied with. 1953 Mad 993 (994) [AIR V 40 C 390].

[17] Rule 21 sub-r. 3 framed under the Act provides that in a creditor's petition to adjudge the debtor as insolvent, notice of the date fixed for the hearing of the Insolvency Petition under S. 19 (1) of the Act shall be sent by registered post to the debtor and to any transferee the transfer in whose favour is alleged to be an act of insolvency. The Rule is mandatory in its nature and the Court is bound to follow it. The failure to issue such notice to the transferee does not necessarily vitiate the proceedings or render it void. It merely renders the resultant order of adjudication irregularly passed and the order can be got set aside by the aggrieved person for want of notice. 1957 Mad 299 (299) [AIR V 44 C 94].

[**See however** 1950 Mad 386 (386) [AIR V 37 C 170]. (An order of adjudication passed without notice to such transferees is unsustainable and liable to be set aside, all the more so when the transferees who applied before adjudication for being brought on record as parties so that they might object to the adjudication of the debtor, were denied the opportunity to do so.)]

[18] The effect of the failure to issue notice to the transferee as prescribed by R. 21 (3) would be that the finding arrived at by the Insolvency Court as to the nature of the alienation will not be binding on the transferee. 1957 Mad 299 (300) [AIR V 44 C 94].

[19] The debtor on whom notice was served is precluded from urging the failure to serve notice on the transferee as a ground for invalidating the order of adjudication, particularly so when he had not raised such objection before the Insolvency Court. 1957 Mad 299 (300) [AIR V 44 C 94].

[20] Rule 423 of the General Rules (Civil) framed by the High Court of Rajasthan provides for two modes of issue of notice under S. 19 (2). There is first a general notice to be issued whether there is any other creditor mentioned in the application filed by the petitioning creditor or not. In addition to this, provision is made for specific notice to be issued to creditors whose names and addresses are given in the petition. Only in cases where the names and addresses of the creditors are disclosed, this specific notice is to be given in addition to the general notice. 1958 Raj 223 (225) [AIR V 45 C 73] : ILR (1958) 8 Raj 221 (DB).

[21] Section 19 (3) lays down that where the petitioner is not the debtor, a notice has to be given to the debtor also in the manner provided for the service of summons. Subsection (3) was necessary inasmuch as if it were not there, there would be no provision in the Insolvency Act for notice to the debtor where the petition has been made by a creditor. 1958 Raj 223 (225) [AIR V 45 C 73] : ILR (1958) 8 Raj 221 (DB).

[22] The debtor is not liable under S. 22 for failure to comply with processes of prohibi-

20. Appointment of interim receiver.

The Court when making an order admitting the petition may, and where the debtor is the petitioner ordinarily shall, appoint an interim receiver of the property of the debtor or of any part thereof, and may direct him to take immediate possession thereof or of any part thereof, and the interim receiver shall thereupon have such of the powers conferrable on a receiver appointed under the Code of Civil Procedure, 1908, as the Court may direct. If an interim receiver is not so appointed, the Court may make such appointment at any subsequent time before adjudication, and the provisions of [a][this section] shall apply accordingly.

[P. I., 1907—S. 13 (2); P.T.I., 1909—S. 16].

[a] *Substituted* for "this sub-section" by the Repealing and Amending Act, 1939 (XXXIV of 1939), S. 2 and Sch. I.

STATE AMENDMENT

UTTAR PRADESH

In its application to the State of Uttar Pradesh, for the existing section 20 *substitute* the following, namely,—

"**20.** The Court when making an order admitting the petition may, and where the debtor is a petitioner, shall, appoint an interim receiver of the property of the debtor and may direct such receiver to take immediate possession thereof, and the interim receiver shall thereupon have such of the powers conferrable on a receiver appointed under the Code of Civil Procedure, 1908, as the Court may direct.

Where in any case an interim receiver is not appointed at the time of admitting the petition, the Court may make such appointment at any subsequent time before adjudication and the provisions of this section shall apply accordingly.

Explanation.—The order appointing an interim receiver may in cases where the debtor is not the petitioner be in respect of either the whole or a part only of the debtor's property." — U. P. Act XXIV of 1954, S. 2 & Sch. [30-11-1954].

Section 19 — Note 1 *(contd.)*

tion and injunction issued by an insolvency Court on a creditor's petition at least, until he has due notice of the same under S. 19 (3). 1936 Nag 237 (239) [AIR V 23] : ILR (1937) Nag 185 : 38 Cri L Jour 230.

SECTION 20 — SYNOPSIS

1. Scope and object.
2. Appointment—Discretion of Court.
3. Status of interim receiver.
4. Powers of interim receiver.
5. Setting aside sale under O. 21, R. 89, Civil P. C.
6. Setting aside sale under O. 21, R. 90, Civil P. C.
7. Effect of appointment.

1. Scope and object. — [1] In an insolvency case an order for the appointment of an interim receiver of the property of the debtor is made for the protection of the estate of the debtor for the benefit of the entire body of creditors. 1915 Cal 734 (735) [AIR V 2] : 42 Cal 289 (DB) ✣ 1953 Trav-Co 266 (267) [AIR V 40 C 95].

[2] *Ad interim* receiver should be appointed where property of insolvent has to be preserved from destruction or disappearance. 1917 Mad 945 (946) [AIR V 4] (DB).

[3] A receiver cannot be appointed in respect of an insolvent's undivided share in the property of the joint family of which he is a member. Such undivided share is not "property" as defined in the Act. 1918 Oudh 303 (304) [AIR V 5] ✣ 1954 Pat 459 (463) [AIR V 41 C 159] : 33 Pat 185. (Resort to S. 4 cannot give possession of joint family property to interim receiver — Section 4 cannot override express provisions of S. 20.)

[4] It is competent to the High Court in the exercise of its inherent powers, as a Court of appeal to make an *ad interim* order for the protection of the petitioner-appellant and for the appointment of a receiver of his assets during the pendency of the appeal. ('10) 11 Cal L Jour 435 (437) (DB).

[5] Where the receiver is clearly appointed under S. 56 the mere fact that the appointment is determined later on as a result of the adjudication order being set aside, does not make the receiver an *ad interim* receiver appointed under S. 20. 1938 Nag 230 (232) [AIR V 25].

2. Appointment—Discretion of Court.— [1] This section gives the Court a wide discretion in the matter of appointment of a receiver. 1932 Bom 228 (230) [AIR V 19] (DB).

[2] A second appeal does not lie under the Act from an order of the insolvency Court appointing a temporary receiver under S. 20 in the case of a person against whom a petition in insolvency has been presented. In such a case there is no question of jurisdiction involved. 1932 Bom 228 (230) [AIR V 19] (DB).

[3] On creditor's application for adjudication unless the Court is satisfied that the applicant for appointment has a fair chance of success, no receiver should be appointed at his instance. 1932 Lah 643 (644) [AIR V 19] : 14 Lah 117 (DB).

3. Status of interim receiver.—[1] Status of receiver is that of agent of owner of property or person interested therein. 1937 Mad 589 (590) [AIR V 24].

Section 20 — Note 3 *(contd.)*

[2] *Ad interim* receiver appointed under S. 20—Property of debtor does not vest in receiver unless Court makes further order vesting property in him. 1931 Pat 70 (72) [AIR V 18] : 9 Pat 945 (DB).

[3] Once the *interim* receiver has taken possession of the property, his powers would be those which could have been conferred on a receiver appointed under the Civil P. C. He does not derive his power by reason of his appointment but in virtue of his taking possession of the property under the orders of the Court. His appointment has not the same effect as the effect of the appointment of an official receiver after adjudication. It is only after adjudication that an insolvent can be said to be divested of his property. It is only then and not till then that the property would vest in the official receiver but before the adjudication, the debtor continues to be the legal owner of the property. The attachment of the insolvent's property by his creditors cannot, therefore, be invalid on account of the appointment of an *interim* receiver before the attachment. 1939 Mad 438 (440) [AIR V 26] ✠ 1955 Bom 170 (172) [(S) AIR V 42 C 45] : ILR (1955) Bom 236.

4. Powers of interim receiver.—[1] Appointment of receiver subsequent to petition but prior to adjudication purports to be under S. 20 and Court should direct which powers are to be exercised by him. 1938 Cal 182 (184) [AIR V 25] : ILR (1938) 1 Cal 245.

[2] Under the provisions of S. 20 the interim receiver has no authority to take possession of properties which were not admitted to be the properties of the debtor. 1955 Pat 413 (417) [AIR V 42 C 106] (DB) ✠ 1954 Pat 459 (463) [AIR V 41 C 159] : 33 Pat 185.

[3] Insolvent in possession as lessee under mortgagee—Court cannot order delivery of possession to mortgagee before adjudication of debtor but receiver may retain possession. 1934 Lah 1006 (1008) [AIR V 21] (DB).

[4] Attachment by receiver—Receiver acting on information of creditors in attaching third person's property — Objections raised by third persons—Receiver should stay hands till objection is decided. 1938 Cal 182 (186) [AIR V 25] : ILR (1938) 1 Cal 245 (DB).

[5] Ad interim receiver does not possess powers of official receiver and has under S. 20 only powers of receiver appointed under C. P. Code. He is not clothed with even those powers till he takes possession of debtor's property. 1926 Mad 432 (433) [AIR V 13] (DB).

[*See* 1928 Mad 454 (455) [AIR V 15].]

[6] The word 'and' before cl. (d), R. 1, O. 40, means 'also' or 'in addition to'; i.e., powers conferred under cl. (d) are in addition to all or any of the powers conferred under O. 40, R. 1 (a), (b) or (c). Again under cl. (d) power can be conferred upon the receiver to realize property, i.e., to reduce the property into possession—It is obvious that this cannot relate to property of which the receiver has been put into possession. 1937 Mad 589 (590) [AIR V 24].

[7] Interim receiver can institute suit for recovery of debtor's property from third parties with sanction of Court. 1946 Mad 202 (203) [AIR V 33 C 113]: ILR (1946) Mad 727.

[8] Where an interim receiver appointed under S. 20 takes possession of the property of which the insolvent is in possession, in pursuance of the direction of the Court, but a claim of title is preferred by a third party to such property, the insolvency Court has jurisdiction to conduct a summary inquiry as to the sustainability of the claim even prior to the passing of adjudication order. The order passed at such an inquiry is not however final and conclusive as between the parties to it. 1953 Trav-Co 266 (267) [AIR V 40 C 95].

5. Setting aside sale under O. 21, R. 89, Civil P. C. — [1] Where an interim receiver of the insolvent's property appointed under S. 20 is ordered to exercise all powers of owner under O. 40, R. 1 (1), Civil P. C. and also empowered to act under O. 21, R. 89, Civil P. C., to set aside the sale of the said immovable property after raising the necessary funds, his appointment divests the insolvent of all control over the property and operates as an injunction restraining him from interfering with the possession of the same or taking any action in regard thereto. Interim receiver is competent to apply to set aside sale under O. 21, R. 89, as the insolvent would have been competent so to do but for the appointment of the interim receiver. 1937 Mad 589 (589, 590, 591) [AIR V 24].

[2] Interim receiver under S. 20 has no power to act under O. 21, R. 89, C. P. Code in absence of Court's order authorising him to so act. 1926 Mad 357 (357, 358) [AIR V 13].

6. Setting aside sale under O. 21, R. 90, Civil P. C. — [1] Where an interim receiver makes an application under O. 21, R. 90, Civil P. C., it cannot be considered to be an application under S. 47, Civil P. C. as an interim receiver does not represent the judgment-debtor for purpose of getting the property to escape execution. No second appeal therefore lies from an order passed on such an application. As to whether he is a representative of the judgment debtor for purposes of S. 47, Civil P. C., is a question of fact. 1932 Cal 203 (204) [AIR V 19] (DB).

[2] Interim receiver appointed under S. 20 can apply under O. 21, R. 90, C. P. Code. This is all the more so when the debtor in charge of whose property he is placed, is later adjudged insolvent. 1928 Mad 454 (455) [AIR V 15].

7. Effect of appointment.—[1] Appointment of interim receiver has not got same effect as vesting order or order of adjudication. Its effect is that he will have such of the powers conferrable on a receiver appointed under the Civil P. C. as the Court may direct. 1927 Mad 693 (695) [AIR V 14] ✠ 1960 Andh Pra 53 (54) [AIR V 47 C 16]. (Expenses incurred by him are not expenses of administration within S. 61 (3) of Insolvency Act but are covered by O. 40, R. 1, Civil

21. Interim proceedings against debtor.

At the time of making an order admitting the petition or at any subsequent time before adjudication the Court may either of its own motion or on the application of any creditor make one or more of the following orders, namely :—

(1) order the debtor to give reasonable security for his appearance until final orders are made upon the petition, and direct that, in default of giving such security, he shall be detained in the civil prison ;

(2) order the attachment by actual seizure of the whole or any part of the property in the possession or under the control of the debtor, other than such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree ;

(3) order a warrant to issue with or without bail for the arrest of the debtor, and direct either that he be detained in the civil prison until the disposal of the petition, or that he be released on such terms as to security as may be reasonable and necessary :

Provided that an order under clause *(2)* or clause *(3)* shall not be made unless the Court is satisfied that the debtor, with intent to defeat or delay his creditors or to avoid any process of the Court,—

(i) has absconded or has departed from the local limits of the jurisdiction of the Court, or is about to abscond or to depart from such limits, or is remaining outside them, or

(ii) has failed to disclose or has concealed, destroyed, transferred or removed from such limits, or is about to conceal, destroy, transfer or remove from such limits, any documents likely to be of use to his creditors in the course of the hearing, or any part of his property other than such particulars as aforesaid.

[P. I., 1907—S..13].

Section 20 — **Note 7** *(contd.)*

P. C.) ✠ 1955 Bom 170 (172) [(S) AIR V 42 C 45] : I L R (1955) Bom 236. (Till debtor is adjudicated insolvent property continues to remain vested in debtor.)✠ 1954 Pat 459 (463) [AIR V 41 C 159] : 33 Pat 185.

[2] Court cannot pass any order which may amount to the divesting of any person of the possession of the property who has a present right to retain that possession against the insolvent. 1934 Lah 1006 (1008) [AIR V 21] (DB).

[3] Powers of interim receiver include taking immediate possession of property of alleged insolvents but not so as to divest person who has present right to possession against insolvents of his possession; such powers shall be determined by Court with reference to O. 40, C. P. C. 1934 Lah 1006 (1008) [AIR V 21] (DB).

[4] There is apparently no provision under which Court can make vesting order before adjudication, but interim receiver has very much same rights and liabilities as receiver. Section 56, applies to interim receiver so far as may be. 1928 Mad 454 (455) [AIR V 15].

SECTION 21 — SYNOPSIS

1. Scope.
2. Clause (1).
3. Clause (2).
4. Clause (3).

1. Scope. — [1] Section 21 empowers the Court while admitting the petition to order the attachment by actual seizure of the property in possession or under the control of the debtor. These powers are conferred on the Court to see that the property of the insolvent is not wasted or taken out of the reach of the Court during the pendency of the petition. 1953 Trav Co 266 (267) [AIR V 40 C 95] (DB) ✠ 1933 Cal 76 (77) [A I R V 20] : 59 Cal 1338 (DB).

[2] Powers under Ss. 21 and 22 are entirely in the discretion of the Court and High Court should not in second appeal interfere with that discretion. 1926 Lah 360 (360) [AIR V 13].

[3] If a prisoner under arrest neglects to apply to be declared insolvent and is committed to prison under S. 55, Civil P. C., he cannot obtain his release simply on the admission of his subsequent petition of insolvency under S. 13 of Act of 1907 (now S. 21) but only upon adjudication thereon. ('10) 4 Sind L R 47 (48) (DB).

2. Clause (1).—[1] Where money is deposited in Court by the debtor during the pendency of insolvency proceedings against him, it ought to be kept in Court and the petitioning creditor should not be allowed to withdraw it during continuance of the insolvency proceedings. 1929 Rang 338 (339) [AIR V 16] (DB).

22. Duties of debtors.

The debtor shall on the making of an order admitting the petition produce all books of account, and shall at any time thereafter give such inventories of his property, and such lists of his creditors and debtors and of the debts due to and from them, respectively, submit to such examination in respect of his property or his creditors, attend at such times before the Court or receiver, execute such instruments, and generally do all such acts and things in relation to his property as may be required by the Court or receiver, or as may be prescribed.

[P. I., 1907—S. 43 (1); P. T. I., 1909—S. 33 (1), (2)].

Section 21 — Note 2 (*contd.*)

[2] Court can demand fresh security if it is satisfied that security already given is insufficient. 1935 Lah 148 (148) [AIR V 22].

[3] A security bond executed in pursuance of an order of Court under S. 21 (1) hypothecating also immovable property should be stamped under Art. 40, and not under Art. 57 of Sch. I, Stamp Act. 1938 Mad 262 (263). [AIR V 25] : ILR (1938) Mad 460 (FB).

3. Clause (2).—[1] The powers of attachment under S. 21 (2) are limited to the position before adjudication and are not as wide as those conferred upon a civil Court. 1939 Nag 10 (12) [A I R V 26] : I L R (1941) Nag 696.

[2] The jurisdiction given to the Insolvency Court under S. 21 (2) should be exercised only where property of the insolvent alleged to be absconding has to be preserved from destruction or disappearance and not in order to vest in the *ad interim* receiver the properties attached by other Courts in execution. 1917 Mad 945 (946) [A I R V 4] (DB). (An order appointing *ad interim* receiver and vesting the insolvent's properties in him while sale proceedings were going on in execution held illegal.)

[3] Attachment under S. 21 (2) is analogous to an attachment before judgment and the provision of Civil P. C., apply to such attachment by virtue of S. 5, Provincial Insolvency Act. But before ordering attachment under S. 21 (2) the Court must be satisfied as to whether the requisite conditions are present or not. 1938 Cal 182 (185) [AIR V 25] : I L R (1938) 1 Cal 245 (DB).

[4] An attachment under S. 21 (2) is analogous to an attachment before judgment under O. 38, Rr. 5 to 12, Civil P. C. The Court is bound to entertain and investigate an objection of a person who claims to be the owner of the property which the Court has attached as the property of the insolvent under S. 21 (2). It is open to the objector to wait and appeal (under S. 22 of Act of 1907 now S. 68) but he is not bound to do so and can question the order of attachment itself. 1914 All 264 (265) [AIR V 1] : 36 All 65 (DB).

[5] Where the debtor had not included a house in the schedule of assets filed by him and his wife claimed it as her own, it was held that attachment of the house by the Court without adjudication into the claim of the wife was not legal. 1933 Cal 76 (77) [AIR V 20] : 59 Cal 1338 (DB).

4. Clause (3).—[1] When the Court has only ordered the debtor to appear in Court to answer the allegations made against him, the penalty for his not appearing being an adjudication order in the absence of the insolvent, the Court is not justified in issuing a warrant for the arrest of the debtor. 1929 Lah 808 (808) [AIR V 16].

Section 22 — Note 1

[1] The powers under Ss. 21 and 22 are entirely in the discretion of the Court and the High Court should not in second appeal interfere with that discretion. 1926 Lah 360 (360) [AIR V 13].

[2] The first part of S. 22 that the debtor shall on the making of an order admitting the petition produce all account books does not apply when an order has been made on a creditor's petition. But the second part applies to both the debtor's and creditor's petition and to all stages of proceedings that follow the order admitting the petition, leaving it to the Court or the receiver to make the requisition at any stage. 1934 Cal 409 (410) [A I R V 21] : 61 Cal 537 : 35 Cri L Jour 937 (DB).

[3] The debtor is not liable under S. 22 on a creditor's petition at least until he has due notice of the same. 1936 Nag 237 (239) [A I R V 23] : I L R (1937) Nag 185 : 38 Cri L Jour 230.

[4] Insolvency Court has power to issue such processes as prohibition and injunction in order to prevent alienation of his property by the debtor. 1936 Nag 237 (239) [AIR V 23] : I L R (1937) Nag 185 : 38 Cri L Jour 230.

[5] The hearing of an insolvency petition by the debtor is not merely a formal matter. The statements in the petition by themselves if merely repeated formally in the evidence are not sufficient *prima facie* grounds for believing such statements. The truth or otherwise of the debtor's statement that he does not keep account books must be found out. It is the duty of the Court to be satisfied *prima facie* and after following the necessary procedure and making the necessary investigation to come to a conclusion that the statements by the debtor are true. 1933 Pat 43 (44) [AIR V 20] : 12 Pat 107 (DB).

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23. Release of debtor.

(1) At the time of making an order admitting the petition or at any subsequent time before adjudication the Court may, if the debtor is under arrest or imprisonment in execution of the decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary.

(2) The Court may at any time order any person who has been released under this section to be re-arrested and re-committed to the custody from which he was released.

(3) At the time of making any order under this section, the Court shall record in writing its reasons therefor.

24. Procedure at hearing.

(1) On the day fixed for the hearing of the petition, or on any subsequent day to which the hearing may be adjourned, the Court shall require proof of the following matters, namely :—

(a) that the creditor or the debtor, as the case may be, is entitled to present the petition :

Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon ;

SECTION 23 — SYNOPSIS

1. Clause (1).
2. Clause (2).
3. Clause (3).

1. Clause (1). — [1] Before adjudication insolvent has no right to be protected unless he is arrested in execution of a decree. 1924 Mad 893 (893) [AIR V 11] (DB) ✣ 1932 Rang 51 (51) [A I R V 19] : 10 Rang 71 : 33 Cri L Jour 435.

[2] An application under this section can be made by a debtor after his arrest and not before it. 1931 Lah 121 (122) [AIR V 18].

[3] Pending application for adjudication, warrant for arrest of insolvent issued in execution of money-decree—Court held had no power to pass *ad interim* protection order. 1934 Lah 113 (114) [AIR V 21].

[4] Magistrate passing sentence of imprisonment under S. 488 (3) — Accused filing insolvency petition and obtaining protection order — Magistrate cannot cancel sentence—Accused is not person under imprisonment in execution of decree for payment of money within S. 23, Provincial Insolvency Act. 1940 Mad 697 (698) [AIR V 27] : I L R (1940) Mad 692 : 41 Cri L Jour 785 (DB) ✣ 1957 Trav-Co 49 (50) [AIR V 44 C 17] : ILR (1956) Trav-Co 1072 : 1957 Cri L Jour 392 (DB).

[5] Debtor under arrest by order of revenue officer under S. 45, Burma Land and Revenue Act—Revenue officer is not Court—Insolvency Court has no jurisdiction to release debtor. 1928 Rang 81 (82) [AIR V 15] : 5 Rang 806 (DB).

[6] Where a person is arrested under the orders of the manager, Encumbered Estates under S. 10, Sind Encumbered Estates Act read with S. 157, Bombay Land Revenue Code the Insolvency Court has no jurisdiction to grant him an interim order of protection as he is not under arrest in execution of a decree of any Court for payment of money. 1927 Sind 123 (124) [A I R V 14] : 22 Sind L R 24 : 28 Cri L Jour 194 (DB).

2. Clause (2).—[1] Debtor suceeeding in avoiding arrest before judgment on the statement that he had more than sufficient assets to pay off his debts but arrested after decree—Shortly after debtor filing iusolvency petition and obtaining interim protection — Order directing re-arrest under S. 23 (2) held proper. ('34) 1934 Mad W N 1144 (1146) (DB).

3. Clause (3).—[1] The provisions of the section are not mandatory but the Court is bound to record its reasons in writing for refusing to release the petitioner. 1924 Pat 559 (560) [AIR V 11] : 3 Pat 543 (DB).

SECTION 24 — SYNOPSIS

1. Sub-section (1).
2. Inability to pay debts—Proviso to sub-section (1) (a).
3. Examination of debtor—Sub-section (2).
4. Time for further evidence — Sub-section (3).
5. Non-compliance with the provisions of the section—Effect.

1. Sub-section (1).—[1] On an application by the creditor for debtor's adjudication as insolvent it is the duty of the Court to enquire whether the debtor owed the petitioning creditor Rs. 500 or more, and also generally to follow the procedure laid down in S. 24. 1926 Lah 638 (639) [AIR V 13].

[2] The scope of inquiry preliminary to the order of adjudication is indicated in Ss. 10 and 24. The insolvency Court has no power

(b) that the debtor, if he does not appear on a petition presented by a creditor, has been served with notice of the order admitting the petition; and

(c) that the debtor has committed the act of insolvency alleged against him.

(2) The Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon.

(3) The Court shall, if sufficient cause is shown, grant time to the debtor or to any creditor to produce any evidence which appears to it to be necessary for the proper disposal of the petition.

(4) A memorandum of the substance of the examination of the debtor and of any other oral evidence given shall be made by the Judge, and shall form part of the record of the case.

[P. I., 1907—S. 14; P. T. I., 1909—Ss. 13 (2), 90 (3).]

Section 24 — Note 1 *(contd.)*

to enquire into the correctness of the particulars of the claims furnished under S. 13 (1) (d) and has no power to direct deletion of any of the items included in such particulars. Before making the order of adjudication the Court has no power to enquire what debts are provable in insolvency. 1957 Cal 16 (16) [AIR V 44 C 5.]

[3] Having regard to the entire scheme of the Act and the fact that all matters are open for determination by the Insolvency Court and there is no provision for trial of any issue by a regular suit (as there is in the Presidency Towns Insolvency Act or the English Bankruptcy Act) the insolvency Court has no option but to try all the matters. Further, the insolvency Court has to determine whether the creditor's application is proper or not and to dismiss it if it is not; and for this purpose the inquiry, though summary, has to be made. Insolvency Court cannot leave the matter suspended for years and refer the applicant to a regular suit if it finds that the complicated pleas of law and facts are involved. Such is not the intention to be gathered from the Act as a whole. 1953 Nag 189 (191) [AIR V 40 C 69] : ILR (1953) Nag 608. (AIR 1935 Bom 80, *Dissented from*; AIR 1941 Mad 895, *Foll.*)

[**But see** 1935 Bom 80 (82) [AIR V 22] : 59 Bom 161]. (Where a creditor presents an application, and the debtor challenges the creditor's right to apply, the Insolvency Court, under S. 24, will ask for proof from the creditor as to his right to apply and is entitled to go into that question. But it does not follow therefrom that the Insolvency Court must decide every question connected with it or which may incidentally arise from it, and cannot refer the parties to a regular suit in any case, if it is of opinion that a complicated question of fact or law arises therein.)]

[4] Where a debt is alleged and it is denied by a debtor the duty of the insolvency Court is to examine into the existence of the debt. It cannot refer the creditor to another civil suit. Under the Insolvency Act the Court has power to enquire into the genuineness of the debts denied by the debtor, and that power extends to judgment debts also. The enquiry may be made at the instance of the Official Receiver or the debtor himself. This does not, however, mean that the Court is bound to enquire into the allegations of the debtor in every case. There may be a case in which the debt was contested in a regular suit and upheld. The debtor in such a case cannot ask the insolvency Court to re-investigate the matter on the same allegations. 1954 Nag 33 (35) [AIR V 41 C 10] : ILR (1953) Nag 625.

[5] Where a person presents an insolvency petition claiming to be a creditor of the debtor, it is open to another creditor of the debtor to contest the petition on ground that the petitioner is not a creditor at all. 1936 Lah 499 (500) [AIR V 23]+ 1957 Andh-Pra 603 (604) [AIR V 44 C 199]. (It is not necessary to add him as a party under the terms of Order 1, rule 10, Civil Procedure Code. When the Provincial Insolvency Act itself has made adequate provision the provisions of the Code of Civil Procedure will not apply.)

[6] An order of the Court rejecting an insolvency petition on the ground that the petitioning creditor had not proved his right to present the petition would not operate as *res judicata* against other creditors. 1928 Sind 121 (124) [AIR V 15] : 22 Sind L R 105 (DB).

[7] The mere fact that the debtors are unable to pay their debts amounting to more than Rs. 500 is insufficient to justify an adjucation order against them because before adjudicating a person insolvent Court has to record a definite finding that he has committed an act of insolvency as defined in S. 6. 1929 Lah 239 (240) [AIR V 16].

[8] In insolvency proceedings by creditor, burden of proving that mortgage was fraudulent or without consideration lies upon the creditor. 1934 Rang 242 (242) [AIR V 21] (DB).

[**See also** 1961 Madh-Pra 15 (21) [AIR V 48 C 11]. (The burden on the petitioning creditor is discharged as soon as it is shown that the property stood in the name of the debtor. It is then for the transferee to show that he was the real owner and the debtor was only a benamidar.)]

[9] Evidence of other acts of preference committed by the debtor shortly before and shortly after the particular act of preference alleged as an act of insolvency, is admissible. 1936 Mad 275 (275) [AIR V 23].

Section 24 — Note 1 *(contd.)*

[10] Where the insolvent himself gives evidence saying that he is unable to pay the debts and where the situation is as if he is himself the petitioner, there is no purpose in closely scrutinizing the acts of insolvency. 1925 Mad 483 (483) [AIR V 12] (DB).

[11] The decision of the District Judge in an insolvency application declaring the sale to be fraudulent and amounting to act of insolvency is not binding on the vendee who was not a party to the proceedings and can be challenged by him when the Receiver applies under S. 53 for annulment of the sale. 1960 Punj 24 (25) [AIR V 47 C 10].

2. Inability to pay debts — Proviso to sub-section (1) (a).—[1] On the day of the hearing of petition by a debtor no elaborate enquiry should be undertaken into the genuineness of the debts mentioned or the dealings of the petitioner with his property, but only *prima facie* proof of the right of the petitioner to present the petition should be required. 1929 Lah 87 (88) [AIR V 16]✠ 1932 Cal 817 (817) [AIR V 19] : 59 Cal 1279 (DB)✠ 1930 Lah 75 (75, 76)✠ [AIR V 17]✠ 1930 Lah 644 (645) [AIR V 17]. (Section 24 does not contemplate a searching enquiry.)

[2] In a case where a debtor's application for being adjudged an insolvent is not contested by the creditors and the Judge is satisfied that the debtor is unable to pay his debts, he need not hear further evidence. But where the debtor's application is contested by the creditors then it is not proper for the :Judge to ride roughshod over the rights of the creditors and say that he is satisfied from the debtor's statement alone about his inability to pay his debts and that he is not going to hear the creditors or entertain their evidence on that point. It is true that he need not make an elaborate or searching enquiry at this stage, but he must give hearing and equal opportunity to both the parties. 1957 Raj 354 (355) [AIR V 44 C 133]: ILR (1957) 7 Raj 287. (AIR 1933 Pat 43 and AIR 1936 Rang 108, *Rel. on.*)

[3] In the summary enquiry under S. 24, it is not proper to go into the question whether the debts mentioned are real debts but the Court has to see whether *prima facie* the person applying to be adjudicated insolvent is unable to pay his debts; the mere fact that some of the debts entered in the petition are fictitious would not, by itself, justify an order of dismissal of the petition, though it could be taken into consideration at the time of discharge. 1938 Lah 490 (491) [AIR V 25]: ILR (1938) Lah 535 (DB) ✠ 1915 All 455 (455) [AIR V 2] (DB)✠ 1927 Cal 69 (70) [AIR V 14] (DB) ✠ 1930 Lah 644 (645) [AIR V 17]✠ 1930 Lah 738 (738) [AIR 17] ✠ 1929 Lah 49 (49) [AIR V 16].

[**See however** 1933 Lah 629 (630) [AIR V 20].

[4] If there are *prima facie* grounds for believing that the person who applies for adjudication is unable to pay his debts, the Court should not hold an inquiry for the purpose of determining whether some of the debts mentioned in his petition are real debts or whether there has been fraudulent concealment of his property or whether he has transferred his property benami to defraud his creditors. 1934 Cal 27 (28) [AIR V 21] (DB)✠ 1961 Orissa 91 (92) [A I R V 48 C 39]. (It is only at the stage of making the order of discharge that the question as regards the concealment of property or the question of the debtor being guilty of any fraud or fraudulent breach of trust can be raised and it is only at that stage that the creditors are entitled to adduce evidence on these points.)✠ ('30) 31 Pun L R 1016 (1016). (The Court cannot calculate the value of the assets and liabilities and enquire as to whether the assets are sufficient to discharge the debts or to determine whether the debts are fictitious.)✠ ('13) 36 Mad 402 (407, 408) (DB).

[5] Ordinarily, the question of benami cannot be and should not be gone into in a proceeding for adjudicating the debtor as insolvent, none the less it does not debar a Court from looking into the conduct of the debtor and to see as to whether really he is in a position not to pay the debts as alleged by him. While coming to this satisfaction on *prima facie* evidence, the Court can look into the attending circumstances and the conduct of the debtor. It is not a case of going into the question of benami nature of the transaction if from the answers given by the debtor in cross-examination the Court comes to the conclusion that the debtor purported to bring into existence a sale deed transferring his half share in the ancestral house in favour of his younger brother in order to defraud the creditors. 1960 Pat 522 (522) [AIR V 47 C 175].

[6] In the case of a debtor's petition the court is bound to require proof of the fact that the debtor is entitled to present his insolvency petition under S. 10 (1) of the Act. Where the debts mentioned in the insolvency application are challenged by a creditor as fictitious, it is the duty of the debtor to examine the creditors concerned or to take steps to get the handnotes produced in court. It is not sufficient for the debtor merely to repeat the statement in the petition in his evidence in court for discharging his obligation under the proviso to S. 24 (1) (a). 1958 Pat 528 (530) [AIR V 45 C 168]. (AIR 1933 Pat 43, *Applied.*)

[7] Where an application for adjudication as insolvent is made, before adjudicating an applicant to be an insolvent, the Court is required to be satisfied that he is not in a position in fact to pay his debts. The Court is not bound to accept statement of petitioner but is required to investigate facts for itself. The duty of the Court is to be satisfied prima facie that is, after following the necessary procedure and making the necessary investigation to come to a conclusion that the statement by the debtor is true. 1934 Pat 97 (97) [AIR V 21] : 12 Pat 866 (DB).

[*See also* 1937 Pat 62 (63) [AIR V 24] (DB).]

[8] In insolvency proceedings, at the stage of adjudication, the Court is enabled to deal summarily with the opposition by the creditor, that is to say, the Court must listen to

Section 24 — Note 2 *(contd.)*

such evidence as the debtor may care to adduce and the debtor may be cross-examined, and if the Judge is satisfied after such hearing, he may refuse to hear any further evidence and may grant the adjudication. But if the Court is inclined to hear any evidence presented by the creditor, he is entitled to hear such evidence. He may, if he likes, hear the evidence and may hear as much evidence as he may think fit in the circumstances which will vary, of course, according to the difficulty of the case. 1936 Pat 18 (19, 20) [AIR V 23] : 15 Pat 177 (FB). (AIR 1927 Pat 188 and view of Sahai J. in AIR 1928 Pat 477 held wrong.)

[9] The fact that the petitioner is acting mala fide by keeping back account books does not arise at the initial stage at all. Where the petition is dismissed merely because the Court suspects that there were account books which the petitioner has not produced before it the Court commits a material irregularity and the order is open to be interfered with in revision 1936 Pesh 102 (102, 103) [AIR V 23]

[10] In dealing with an application for adjudication of insolvency the Court should enquire into the present value of the properties which are available for meeting the liabilities of the debtor and decide whether having regard to proviso (a) to this section, the debtor has proved his inability. 1928 Nag 226 (227) [AIR V 15] ✣ 1924 Cal 436 (437) [AIR V 11] (DB).

[11] Where a debtor applied to be adjudicated an insolvent, and the creditors contended that though the debtor had been arrested once in execution, yet there was no reason to believe that he was unable to pay his debts, or anything more than unwillingness to pay his debts, although the Court under S. 24 (1) (a), is not bound to do so, yet it is entitled to hear further evidence. In fact under such circumstances, the Court is bound to take the evidence tendered to it and to pass orders refusing to adjudicate the petitioner if necessary. 1936 Rang 108 (109) [AIR V 23] (DB).

[12] There is nothing in this section to the effect that the Court, if not satisfied with the examination of the debtor can proceed to dismiss the petition without any rebuttal. 1929 Lah 49 (49) [AIR V 16].

[13] Mere fact that the debtor has large properties is no ground to hold that he is able to pay his debts. 1928 Mad 1193 (1193, 1194) [AIR V 15].

[14] It is not necessary in order to establish petitioner's inability to pay his debts to prove that value of his assets is less than his liabilities. 1929 Lah 87 (88) [AIR V 16].

[15] The summary enquiry under S. 24 as to whether a debtor is entitled to present a petition has nothing to do with S. 4 of the Act which section only comes into play after adjudication in disputes between the debtor's estate represented by a receiver and the claims of one or all of his creditors. Hence a finding in an enquiry under S. 24 that a certain debt is fictitious is not final and does not operate as res judicata under S. 4 of the Act. 1938 Lah 490 (491) [AIR V 25] : ILR (1938) Lah 535 (DB) ✣ 1955 Pat 413 (418) [AIR V 42 C 106] (DB). (AIR 1938 Lah 490 (492), *Rel. on.*)

[16] Where a person applied to be adjudicated an insolvent and deposed to his inability to pay his debts and the Court did not disbelieve him:

Held, that he had established a prima facie case and that the application should not be rejected. 1927 Rang 329(329) [AIR V 14] (DB).

[17] Where an insolvent has admitted the debt due to the creditor (petitioner) and the lower Court has not considered it necessary to frame an issue and call for further proof, it is open to the District Judge in appeal to frame an issue on the point and to remand the case for further evidence if he thinks fit to do so. But he is not justified in dismissing the petition without giving the petitioner an opportunity to produce proof of his debt. 1934 Lah 128 (128) [AIR V 21] (DB).

[18] In the case of a debtor's petition for adjudication when a creditor is able to prove to the Court that in fact the debtor was not unable to pay his debts and on the strength of it the Court dismisses the petition, it cannot be said that the Court had gone beyond the requirements of law. ('46) 1946 Oudh W N (H C) 97 (98). (AIR 1933 All 841, *Foll.*)

3. Examination of debtor — Sub-section (2). — [1] Sub-section (2) is mandatory and if the debtors are present in Court there is an obligation on the Court to examine them and failure to do so would vitiate the order of adjudication. 1927 Cal 32 (33) [AIR V 14] (DB)✣('55) 8 Sau L R 21 (24). (The examination cannot be dispensed with merely on the ground that the facts are admitted by the debtor. The debtor's admission will not bind the opposing creditor and if the examination is dispensed with the opposing creditor will be deprived of his right to question the debtor and to prove in a given case that the admission is made collusively.)✣1926 Cal 234 (235) [AIR V 13] (DB). (The burden is on the debtor to show that the debtor was present.)✣ 1930 Lah 746 (746) [AIR V 17] ✣ 1917 Lah 354 (354) [AIR V 4]✣1935 Pesh 139 (140) [AIR V 22] (DB). (The section does not distinguish between debtors' and creditors' petitions.)

[**But see** 1937 Nag 226 (227) [AIR V 24] : ILR (1939) Nag 463. (Failure to examine the debtor when the petition is presented by a creditor does not invalidate the subsequent proceedings unless it can be shown that the debtor has been prejudiced by the omission.)✣ 1932 Rang 67 (68) [AIR V 19] : 10 Rang 187 (DB). (Unless the debtor is prejudiced, failure to examine the debtor as provided in S. 24 (2) does not ipso facto vitiate the adjudication order.)]

[2] The procedure laid down in S. 24 sub-s. (2) is to be adopted as a preliminary to the decision as to whether to grant the petition or not and, therefore, the matters disclosed by that procedure are material to be taken into consideration. 1933 Pat 43 (44) [AIR V 20] : 12 Pat 107 (DB).

[3] Section does not say that debtor must be examined after the examination of credi-

25. Dismissal of petition.

(1) In the case of a petition presented by a creditor, where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.

(2) In the case of a petition presented by a debtor, the Court shall dismiss the petition if it is not satisfied of his right to present the petition.

[P. I., 1907—S. 15 (1); P. T. I., 1909—S. 13 (4).]

Section 24 — Note 3 *(contd.)*

tor's witnesses. Creditors can prove their right to present petition even by examination of the debtor; examination of creditor's witnesses before the debtor's examination is not necessary. ('42) 1942 Nag L Jour 409 (411) (DB).

[4] It is the duty of a petitioner who is a debtor to put himself in the witness-box and to give a full account of his conduct, dealings and property in the presence of such of his creditors as are present; and such creditors have a right to question him thereon. 1929 Lah 87 (87) [AIR V 16].

[5] It is for the Court under S. 24 (2) itself to examine the debtors as to their conduct, dealings and property besides hearing the evidence which the parties wish to produce. 1929 Lah 49 (49) [AIR V 16].

[6] In the case of a petition presented by a creditor although the act of insolvency may have been proved it is not open to the Court merely on that fact proved to adjudge the debtor an insolvent. The Court must examine the debtor as to his property, conduct and dealings and his ability to pay his debts. 1930 Lah 855 (855) [AIR V 17].

4. Time for further evidence—Sub-section (3). — [1] Whether witnesses are or are not present it is incumbent on the Court to examine the debtor who applies to be declared an insolvent when it declares its intention of hearing the petition. It is after the examination of the debtor in the presence of the creditors that the Court has to consider whether sufficient cause has been shown to grant time to procure further evidence. 1926 Lah 508 (508) [AIR V 13]✠('12) 9 All L Jour 233 (233, 234) (DB).

[2] The debtor or creditor asking for time must show sufficient cause to induce the Court to extend time. The debtor can show that he would satisfy all his creditors in a short time. The creditor can also show that the application for adjudication is bogus. ('13) 36 Mad 402 (406, 407) (DB).

[3] Creditor's application to declare debtor insolvent — On the date fixed for hearing petition some of the creditors applying for time to produce account books of the insolvent—Some creditors not served with notice—On adjourned date books not produced though the creditors could have done so — Judge refusing further adjournment examining the debtor who made a statement that he was unable to pay his debts and had actually compounded with the creditors — *Held* that the statement by debtor was ample proof of the act of insolvency entitling the creditor to file the petition. *Held* also that the Court was justified in refusing the adjournment asked for. ('13) 18 Ind Cas 729 (729, 730) (DB) All).

[4] The finding of the Lower Court holding that there was no sufficient cause within the meaning of S. 24 (3) is one of fact and is binding in second appeal.1955 N U C (Ajmer) 774 [AIR V 42].

5. Non-compliance with the provisions of the section — Effect. — [1] Order of adjudication passed without observing procedure laid down in sub-sections (2) (3) (4) of Act is bad in law and inoperative. 1916 Lah 406 (406) [AIR V 3]✠('55) 8 Sau L R 21 (24) (Non-compliance of S. 24 (2)).

SECTION 25 — SYNOPSIS

1. **Creditor's petition.**
2. **"Any other sufficient cause."**
3. **Debtor's petition.**
4. **Dismissal of petition—Effect.**
5. **Appeal.**
6. **Revision.**

1. Creditor's petition.—[1] When an act of insolvency is alleged, the Judge must first satisfy himself whether the creditor is a creditor for the amount alleged or for a sufficient amount to justify a petition under the Act. The Court must then be satisfied of the service on the debtor of the order admitting the petition. It must then be satisfied or express its dissatisfaction, for adequate reasons with the alleged act or acts of insolvency. It must then consider whether it has been satisfied by the debtor that he is able to pay his debts and when the learned Judge has come to all the necessary findings on the issues indicated above and he still finds that there is prima facie ground for making an order against the insolvents he must consider whether there is any other sufficient cause why no order should be made. If on the other hand he has found that the issues have not been made out against the insolvents he will dismiss the petition without considering any other sufficient cause. But he must take either one or the other of those two courses. If when the Act is properly administered, the surrounding circumstances of the case justify an order being made independently of the sufficient cause then the court of appeal has a right to overrule the finding of the learned

Section 25 — Note 1 *(contd.)*

Judge on the question of sufficient cause even though it is merely a question of discretion. 1924 All 686 (687, 688) [AIR V 11] : 46 All 713 (DB).

[2] The Provincial Insolvency Act does contemplate an enquiry by the Insolvency Court as to the existence of a debt; hence the dismissal of an insolvency petition on the ground that it cannot be granted until petitioning creditor had proved his claims in a regular suit, was held wrong in law. 1927 Lah 111 (111) [AIR V 14] ✣ 1954 Nag 33 (34) [AIR V 41 C 10] : ILR (1953) Nag 625. (AIR 1953 Nag 189, *Rel. on.*)

[3] The question whether the relation of debtor and creditor exists between the petitioning creditor and the debtor sought to be adjudged insolvent is a question expressly and explicitly for the decision of the Insolvency Court. The Insolvency Court has no discretion to refuse to decide that question and to refer the parties for the decision of it to a different tribunal. 1941 Mad 895 (896) [AIR V 28] : ILR (1942) Mad 147 (DB).

[4] Regard being had to the entire scheme of the Act and the fact that all matters are open for determination by the insolvency Court and there is no provision for trial of any issue by a regular suit the insolvency Court has no option but to try all these matters. Further the insolvency Court has to determine whether the creditor's application is proper or not and to dismiss it if it is not; and for this purpose the inquiry though summary has to be made. The insolvency Court cannot leave the matter suspended for years while the matter is being fought out elsewhere. 1953 Nag 189 (191) [AIR V 40 C 69] : ILR (1953) Nag 608. (AIR 1935 Bom 80, *Dissented from* and AIR 1941 Mad 895, *Foll.*)

[5] The Insolvency Court has power to enquire into the genuineness of the debts denied by the debtor and that power extends to judgment-debts also. But the Court is not bound to investigate into the allegations of the debtor in every case. A debtor who has contested a debt in a regular suit cannot ask the insolvency Court to re-investigate the matter on the same allegations after the debt had become judgment debt. 1954 Nag 33 (35) [AIR V 41 C 10] : ILR (1953) Nag 625.

[6] A proceeding in insolvency is a proceeding in rem which binds not merely the parties to the proceeding but third parties as well, and it is extremely doubtful whether an adjudication order can be grounded entirely on a petition of compromise filed on behalf of the petitioning creditor and the debtor. At the most, it can be said that the petition of compromise can be looked upon as withdrawal of objection by the debtor to the application for insolvency presented by the creditor. On such petition being filed, the proceeding can take the shape of ex parte proceeding, but even then evidence must be adduced before the Court, and the Court must be satisfied upon such evidence that the conditions required by law for adjudging a debtor insolvent were fulfilled. ('48) ILR (1948) 1 Cal 131 (133) (DB).

[7] Under S. 25, sub-s. (1), in the case of petition presented by a creditor, the Court shall dismiss the petition if it is satisfied by the debtor that he is able to pay his debts. Consequently, it is essential that the District Court should come to a finding as to whether the debtors are able to pay their debts or not. 1936 Rang 26 (27) [AIR V 23] : 13 Rang 717 ✣ 1939 Lah 349 (352) [AIR V 26] : ILR (1939) Lah 408 (DB).

[8] Under the Provincial Insolvency Act, the creditor need do no more than prove his right to present the petition and the alleged act of insolvency and adjudication must follow unless the Court is satisfied by the debtor that he is able to pay his debts. 1938 Mad 489 (489, 490) [AIR V 25] (DB).

[9] A creditor presenting a petition need not aver in his petition that the debtor is unable to pay his debt. The ability to pay his debt is one of the grounds under S. 25 on which the Court may dismiss the petition. If such issue is raised it is for the benefit of the debtor and the onus of satisfying the Court that he is able to pay his debts is on the debtor. 1949 East Punj 359 (361) [AIR V 36 C 90] ✣ 1930 Lah 592 (595) [AIR V 17] ✣ 1937 Nag 127 (128) [AIR V 24].

[10] The scheme of S. 25 is that a debtor, in order to escape adjudication on a well-founded petition and act of insolvency, must satisfy the Court that he has a present ability to pay his debts. It is not sufficient for him to show that his assets exceed his liabilities and that he will be able to pay in the more or less distant future. 1936 Mad 275 (276) [AIR V 23] ✣ 1939 Lah 349 (351, 352, 354) [AIR V 26] : ILR (1939) Lah 408 (DB) ✣ 1937 Nag 127 (128) [AIR V 24].

[*See also* 1954 Mys 189 (192) [AIR V 41 C 82] : ILR (1955) Mys 98. (*Held*, that the finding of the Courts below that the debtor might have had slightly more assets than liabilities was not only not correct but was not even a very relevant circumstance to be taken into account while deciding whether the debtor was able to pay his debts.)]

[11] Where there is no evidence on record to the effect that the debtor is possessed of sufficient property with which he might be considered to pay off his debts, an order of adjudication should be passed. ('28) 5 Oudh W N 964 (966, 967) (DB).

[12] Ground that debtors are not unable to pay their debts is not open to debtors' transferee but only to debtors. 1929 Lah 79 (80) [AIR V 16].

[13] A Judge in dismissing a petition for adjudication should indicate one of the grounds set forth in the section as that on which he purports to act. ('12) 15 Cal L Jour 631 (632) (DB).

[14] Under S. 6 (5) (b), it is an act of insolvency if the debtor makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors. Therefore, when the District Judge finds that he had committed an act of insolvency, he has no jurisdiction to decide whether he owns sufficient property to pay his creditor. It is entirely besides the mark in determining that he ought to be

Section 25 — Note 1 *(contd.)*
adjudged or not. 1937 Lah 618 (619) [AIR V 24].

[15] Where in a creditor's petition for adjudicating the debtors as insolvents, the allegations made against them consist of an incomprehensible mixture of cls. (b) and (c) of S. 6, and the petition is so framed that it cannot be ascertained whether it alleges that the applicants had made a transfer of part of their property with intent to defeat or delay their creditors jointly, or whether they had made a transfer of property which would be void as fraudulent preference, if they were adjudged insolvents, the petition should be dismissed. 1937 Rang 189 (190) [AIR V 24].

[16] One of the several creditors made an application to have the debtor declared insolvent. The debtor appeared and made a certain statement which went to prove that he had committed an act of insolvency. No other proof was given and the debtor was declared insolvent — *Held*, that the statement made by the debtor was ample proof of the act of insolvency and the right of the creditors to file the application. ('13) 18 Ind Cas 729 (730) (DB) (All).

2. "Any other sufficient cause." — [1] The words "for any other sufficient cause" in S. 25 cannot be taken to override an express provision of law, especially on question of procedure. S. 5 states that subject to the provisions of the Act, the Court, in regard to proceedings under it, shall have the same powers, and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction. Where the documents are not either in the possession or power of the creditor, the Court has no jurisdiction to proceed under O. 11, R. 21, Civil P. C. and if it cannot proceed under that rule, it cannot proceed under the general provisions of S. 25. When the Court dismisses the creditor's petition on this ground, it acts without jurisdiction. 1936 Nag 130 (131) [AIR V 23] : I L R (1936) Nag 142.

[2] The dismissal of a creditor's petition by the Court upon the statement by the creditor that his debt had been paid and that the petition should be dismissed is one under S. 25 (1) as it comes within the words "for any other sufficient cause" of that section. 1938 Mad 267 (268) [AIR V 25].

[3] Where an application for adjudicating the debtors as insolvents has not been filed for the purposes of having their debtors' assets distributed proportionately amongst their creditors, but with the object of injuring their credit by dragging them into the Insolvency Court and has been persisted in notwithstanding the fact that the Court had permitted the applicants to be paid out of the fund in Court, the action of the petitioning creditors cannot be condemned too strongly as an abuse of the process of the Court and the petition can be dismissed as being *mala fide*. 1943 Mad 355 (357) [AIR V 30] : ILR (1944) Mad 21 (DB).

[4] Registered agreement under S. 12 (2), C. P. and Berar Debt Conciliation Act subsisting — Creditor subsequently obtaining decree against debtor — Decree cannot be executed till instalments on debts due to other creditors are paid — Petition by creditor under S. 9— *Held* that there was sufficient cause for dismissing petition under S. 25 and there was no reliable data to warrant rejection of the stand of the debtors that they were able to satisfy debts. ('55) ILR (1955) Nag 456 (458).

3. Debtor's petition. — [1] No elaborate enquiry is required at the initial stage of the bankruptcy proceedings when the petitioner is a debtor. It has to be seen whether the petitioner has made out a *prima facie* case for adjudication by proving that his debts exceed Rs. 500 and that he is unable to pay those debts. The fact that petitioner is acting *mala fide* by keeping back his account books does not arise at this stage at all and where the Court dismisses the petition merely on the ground that the petitioner has kept back his account books, it commits a material irregularity and its order is open to revision. 1936 Pesh 102 (102, 103) [AIR V 23] ✠ ('10) 32 All 645 (648) (DB) ✠ 1933 Lah 330 (331) [A I R V 20].

[*See also* ('16) 1916 Pun L R No. 82, p. 220 (220, 221).]

[**But see** ('10) 32 All 547 (549) (DB).]

[2] When a person presents a petition to be adjudicated an insolvent that petition itself is treated as an act of bankruptcy under the Insolvency Law. And when he says that his liabilities are more than his assets, that must be taken as some evidence that he is unable to meet his liabilities. No enquiry need be made as to whether some of the debts mentioned in his petition are real debts. An enquiry into the *bona fide* of the insolvent should be held when he applies for discharge and not before. 1926 Mad 494 (494, 495) [AIR V 13] (DB).

[3] Before a Court can reject a petition in insolvency filed by the debtors on the ground that it was merely an attempt by them to have their estates managed by Courts and is thus an abuse of the process of the Court there must be a finding that the assets exceed liabilities on evidence before it, and that the debtors are in a position to pay up their debts out of their assets. 1914 Mad 334 (334) [AIR V 1] (DB).

[4] A person has only to make out a *prima facie* case in order to be declared insolvent and if there be any fraudulent concealment of assets the matter can be gone into by the Insolvency Court later on. 1927 Lah 27 (27) [AIR V 14] ✠ ('12) 10 All L Jour 188 (189, 190) ✠ 1922 Bom 80 (80, 81) [AIR V 9] : 46 Bom 757 (DB) ✠ 1930 Lah 16 (16) [AIR V 17].

[5] The application of the debtor to be declared an insolvent cannot be rejected simply on the ground that he could not satisfy the Judge that he was unable to pay his debts and that he had concealed some of his properties. ('12) 9 All L Jour 699 (701) (DB) ✠ ('11) 15 Cal W N 990 (991) (DB).

[**See however** 1933 All 841 (842)[AIR V 20] (DB). (Under the Provincial Insolvency Act, inability to pay debts is made a condition precedent to the presentation of a debtor's petition. Before a debtor can seek the protec-

Section 25 — Note 3 *(contd.)*

tion of the Insolvency Court, he has to satisfy it that he is unable to pay his debts. If he is unable to prove that he cannot pay his debts, then the Court has power to dismiss his petition under the provisions of S. 25; 'unable to pay his debts', in S. 25 means that market-value of realizable assets is less than total amount of his debts.)]

[6] In the case of a debtor's petition for adjudication when a creditor is able to prove to the Court that in fact the debtor was not unable to pay his debts and on the strength of it the Court dismisses the petition, it cannot be said that the Court had done beyond the requirements of law. ('46) 1946 Oudh WN (HC) 97 (98).

[7] Where the Court places the onus on the creditors in an insolvency petition, of proving that certain occupancy holdings were not capable of being sold and that they should not be included in the insolvent's assets, the Court commits an error. 1933 Lah 582 (583) [AIR V 20].

[8] A finding that the Judge is not satisfied that the debtors are unable to pay their debts must be a finding arrived at like any other finding by a judicial tribunal in which the reason for so holding is stated in such a way that it may be checked against the evidence and weighed in the balance. It is not enough for a Judge to resort to a mere negative and say, "I do not know you may be able or you may not, but I am not satisfied." 1924 All 800(2) (801) [AIR V 11] (DB).

[9] Court has inherent power to dismiss petition for insolvency if it is not presented with *bona fide* view of obtaining adjudication, but for inequitable and collateral purpose. 1916 Sind 53 (53) [AIR V 3] : 10 Sind L R 28.

[*See also* ('12) 16 Cal W N 853 (854) (DB).]

[10] An application by a judgment-debtor to be declared an insolvent cannot be dismissed simply because the evidence on the other side shows him to be a man of sufficient means. ('12) 14 Ind Cas 224 (224) (DB) (All).

[11] Fact that brother of applicant has not joined in application is not valid reason for rejecting it. 1918 All 368 (368) [AIR V 5] : 40 All 75 (DB).

[12] Mere omission to disclose in application for adjudication that previous application by same applicant has been dismissed is not sufficient reason for dismissing application. 1917 All 417 (417) [AIR V 4] (DB).

[13] Mere suspicion that petitioner is guilty of criminal misappropriation is no ground for dimissing petition of debtor. 1919 All 344 (345) [AIR V 6] : 41 All 486 (DB).

[14] The fact that debtor is a dishonest man is not ground for refusing adjudication under the Act. 1917 All 243 (244) [AIR V 4] (DB).

[15] Misconduct on part of debtor is to be dealt with upon debtor's application for discharge and is not ground for refusing order of adjudication. 1916 P C 64 (65) [AIR V 3] : 44 Ind App 11 : 44 Cal 535.

[16] Fact that mother of applicant is possessed of large property to which he is sole heir is not sufficient reason for dismissing application. ('11) 9 Ind Cas 633 (633) (DB) (All).

[17] Court should not dismiss petition because petitioner had improperly alienated portion of his property in lieu of dower. Question of bad faith or improper dealing arises for consideration at much later stage of proceedings when debtor applies to Court for order of discharge. ('10) 12 Cal L Jour 445 (448) (DB) ✣ 1914 Lah 501 (503) [AIR V 1] : 1915 Pun Re No. 28. (Petitioner showing undue preference to some of his creditors.)

[18] Fact that petitioner has transferred his property to his son is no ground for refusing to declare petitioner insolvent. 1918 Lah 297 (297) [AIR V 5] : 1918 Pun Re No. 52.

[19] Large portion of debt was incurred for litigation on behalf of wife to recover property left by her former husband. Creditors lent money with eyes open. It could not be said petitioners had no reasonable prospect of being able to repay loan. ('11) 9 Ind Cas 462 (463) (DB) (Rang).

[20] A debtor's petition to be adjudged insolvent was dismissed on the grounds: (1) that the applicant allowed the pilgrim register containing the names of pilgrims allotted to him on partition to remain with his brothers; (2) that he removed his place of residence; (3) that he inserted fictitious amounts and dates of some of the debts and (4) that he gave false account of his present income— *Held*, that none of these grounds were valid for the dismissal of the application. 1921 Pat 315 (316) [AIR V 8] (DB).

[21] Hindu son can be adjudicated insolvent in respect of his father's debt. 1926 Mad 133 (133) [AIR V 13] : 49 Mad 217 (DB).

[22] Order of adjudication based on debtor's denying his joint status with his sons is not proper without opportunity to creditor to prove that insolvent and his sons possessed large property not shown in schedule as members of joint Hindu family. 1917 Oudh 152 (152) [AIR V 4].

[23] Where a person after applying to the Court to be made an insolvent effects a composition with his creditors in full discharge of all his liabilities he can no longer be regarded as an insolvent; consequently the insolvency proceedings should be dropped. 1916 Lah 307 (308) [AIR V 3].

4. Dismissal of petition — Effect. — [1] Dismissal of application for restoration of application for adjudication dismissed for default is no bar to presentation of fresh application for insolvency. 1919 Cal 108 (108) [AIR V 6] (DB).

[2] Where a petition for adjudication by a debtor is dismissed and he subsequently files another petition alleging change of circumstances, there can be no bar in the nature of res judicata. But the Court should not take the allegation of the petitioner as correct without further proof. 1935 Pesh 25 (25) [AIR V 22].

[3] Where an application made by a debtor for insolvency was rejected as also the application made by one of the creditors for the adjudication as insolvent of the debtor where-

26. Award of compensation.

(1) Where a petition presented by a creditor is dismissed under sub-section *(1)* of section 25, and the Court is satisfied that the petition was frivolous or vexatious, the Court may, on the application of the debtor, award against such creditor such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the debtor for the expense or injury occasioned to him by the petition and the proceedings thereon, and such amount may be realised as if it were a fine.

(2) An award under this section shall bar any suit for compensation in respect of such petition and the proceedings thereon.

[P. I., 1907—S. 15 (2), (3).]

Section 25 — Note 4 *(contd.)*

upon another creditor made a similar application — *Held* that the dismissal of the previous application did not operate as res judicata in the later proceeding though the second applicant was a party to the first application. 1928 Pat 116 (117) [AIR V 15] (D B).

[4] Order of adjudication under the Act will not bar question whether petitioner shall have his final discharge. ('11) 12 Ind Cas 403 (403) (Mad).

5. Appeal.—[1] An order under S. 25 dismissing the creditor's application for adjudication of the debtor as insolvent is appealable under S. 75 of the Act. ('38) 40 Punj L R 433 (434].

[2] An appeal against the order under S. 25 in the District Court is a miscellaneous appeal and the judgment of the District Judge should not be followed by a decree but should be followed by a formal order adjudicating the appellants. 1936 Rang 26 (26) [AIR V 23] : 13 Rang 717.

[3] An order refusing permission to verify the petition and striking off the petition after notice has been issued amounts to an order of dismissing the petition for insolvency and is appealable. 1932 Lah 28 (29) [AIR V 19].

[4] The decision of the question whether the debtor has a right to present the petition for insolvency comes under S. 25 and is subject to only one appeal and a second appeal against that decision is incompetent under S. 75. 1942 Oudh 80 (81) [AIR V 29] ✠ 1954 Mys 133 (134) [AIR V 41 C 54] : ILR (1953) Mys 566. (No second appeal lies against an order passed under S. 25.)

[5] Creditor's application—Insolvency Court finding questions to be complicated referring parties to civil Court and keeping petition pending in the meanwhile — Appeal against dismissed — No second appeal lies to High Court. 1953 Nag 189 (190) [AIR V 40 C 69] : ILR (1953) Nag 608.

[6] The discretion given to Court by the provision of S. 25 should not in general be exercised by the appellate Court to set aside order of adjudication. 1927 Mad 153 (154) [AIR V 14] : 50 Mad 396 (DB).

6. Revision. — [1] It is not usual in the High Court to go into the facts in revision even under S. 25. 1930 Sind 282 (283) [AIR V 17] (DB).

[2] No second appeal lies against an order passed under S. 25. The High Court may, however, in certain circumstances treat the second appeal as revision and examine the order of the District Judge and determine about its legality and correctness. 1954 Mys 133 (134) [A I R V 41 C 54] : ILR (1953) Mys 566. (AIR 1936 Rang 26; AIR 1931 Mad 745 and AIR 1934 Lah 807 (1), *Foll.*)

Section 26 — Note 1

[1] "Debtor" in S. 26 means person against whom insolvency application has been presented by creditor. 1938 Mad 267 (268) [AIR V 25].

[2] To attract the application of S. 26, it is not necessary that at the time of dismissal under S. 25 (1), the Court should be satisfied that the petition was frivolous or vexatious. The Court may consider the matter on a separate application subsequently put in even though it did not do so at the time of the dismissal of petition under S. 25 (1). 1938 Mad 267 (268) [AIR V 25].

[3] A creditor in whose favour a Hindu father had executed a promissory note presented a petition for adjudication as insolvent against the father and his two sons. Four months subsequently on the creditor's statement that his claim was satisfied, the insolvency petition was dismissed under S. 25 (1). The sons claimed compensation under S. 26. It was found on evidence that the debt was one binding on the family for which the sons' share could be made liable and that within ten days after service of notice demanding payment of the debt, the sons together with their father, had set about alienating a large portion of the family properties and that they had no ready money to pay the debt— *Held* that the creditor had reasonable cause to suppose that fraud was being attempted by the sons and, therefore, it could not be said that the petition of the creditor against the sons was frivolous or vexatious and hence no compensation was recoverable. 1938 Mad 267 (270) [AIR V 25].

Order of Adjudication

27. Order of adjudication.

(1) If the Court does not dismiss the petition, it shall make an order of adjudication, and shall specify in such order the period within which the debtor shall apply for his discharge.

(2 The Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge, and in that case shall publish notice of the order in such manner as it thinks fit.

[P. I , 1907—S. 16 (1); P T I., 1909—Ss. 13 (5); 15 (1).]

SECTION 27 — SYNOPSIS

1. Order of adjudication—Sub-section (1).
2 Extension of time fixed for discharge.
3. Appeal.

1 Order of adjudication — Sub-s. (1) —

[1] Court is bound to make order of adjudication if it is satisfied that the applicant is insolvent and that provisions of S. 10 are complied with. ('11) 1911-1 Upp Bur Rul 86 (86) + 1957 Andh Pra 375 (376) [AIR V 44 C 119]. (Debtor satisfying requirement of S. 10 —Application cannot be dismissed on ground that it was not bona fide.)+('10) 13 Oudh Cas 94 (95, 96). (It is only when debtor applies for order of discharge that questions relating to alleged bad faith or fraud by debtor arise for decision.)

[2] Where a petitioner has obviously brought his case within the four corners of the Act, he is entitled to an order of adjudication as a matter of right where there is no question of abuse of the process of the Court. It may be that when the peti ioner applies for discharge, his conduct during the ti e which will elapse between the date of the adjudication and the date of the application for discharge will have to be scrutinized and scrutinized carefully and whether an order for discharge should be eventually made or not must depend on various circumstances which are independent of the circums ances brought to the notice of the Court by the insolvent when he filed his application for being adjudicated as insolvent. 1930 Cal 576 (576) [A I R V 17] (DB) + 1914 All 17 (18) [A I R V 1] : 36 All 250 (FB.).

[3] An order declaring a person as an insolvent involves a certain am unt of disgrace and harassment to the party and the provisions of Insolvency Act should be strictly observed before stig a is placed upon a person. 1940 Pat 187 (189) [AIR V 27] (DB).

[4] The orders and circulars issued by the High Court should be followed by the lower Courts and the Court should not hear the case ex parte on the last clearance day and pass an order of adjudication. 1940 Pat 58 (59) [AIR V 27] (DB).

[5] A conditional order directing an insolvent to pay fixed amount monthly out of his salary as a condition precedent to his being adjudged insolvent is illegal by virt ie of the provisions of S. 60 (i), C. P. Code. Proper course would be to take steps against insolvent under S. 69. 1930 Pat 326 (326) [A I R V 17] : 9 Pat 304 (DB).

[6] There is no provision in the Act empowering the Court at the time of adjudicating a person an insolvent to pass an order requiring him to pay certain amount into Court in payment of his debts. 1930 Rang 236 (236) [AIR V 17] (DB).

[7] Where a debtor presents a petition for adjudication as an insolvent the Court has no power without making an order for adjudication or appointing a receiver, to order a debtor of the insolvent to pay into Court any money which he owes to insolvent. 1918 Nag 97 (97) [AIR V 5].

[8] Section 27 is imperative. The period within which the debtor should apply for his discharge must be mentioned along with the order of adjudication. An order, specifying the period within which the debtor is to apply for his discharge, passed more than two years after the order of adjudication under cl. (1), S. 27, contravenes S. 27 (1). 1928 Pat 338 (339) [A I R V 15] : 7 Pat 375 (FB).

[9] When a firm consists of adult and minor partners and an adju lication order is sought against the firm itself, it will not be made against the firm, but the a lult partners alone will be a ljudicated. 1935 Rang 327 (327) [A I R V 22] (DB).

[10] When making order of adjudication against partners of firm, Court need not make order as to course of administration in insolvency with reference to joint esta e of firm and separate estates of partners. 1920 Cal 189 (190) (AIR V 7] (DB).

[11] By mere filing of a petition under old Act petitioner did not acquire vested right to particular kind of order which cannot be affected by the new Act. The nature of order to be pa sed is a matter of mere procedure. 1926 Mad 123 (124) [AIR V 13].

[12] Where an order of the Insolvency Court fiixing a year for the insolvent to apply for discharge, is challenged by way of revision, time for applying for discharge should be calculated fro n the date of the order in revision. 1941 Oudh 308 (309, 310) [A I R V 28] (DB).

[13] Once a person has been declared an insolvent, it is not open to him to apply for a second order of adjudication until he has obtained an order of discharge or until his previous adjudication has been annulled. 1929 Oudh 149 (150) [AIR V 16] (DB).

[14] A person against whom a petition in insolvency has been presented can be declared insolvent in spite of the fact that he dies before the application for his being declared

Section 27 — Note 1 *(contd.)*

insolvent is decided. 1932 Lah 264 (265) [AIR V 19].

[15] Mortgage by insolvent constituting alleged act of insolvency—Court adjudicating ex parte mortgagor to be insolvent and holding mortgage as void — Mortgagee suing for declaration that mortgage is valid — Former order of Court having been passed erroneously held to be no bar of res judicata. 1932 Mad 233 (233, 234) [AIR V 19].

[16] An application for insolvency by some of the members of a joint Hindu family does not *ipso facto* result in the insolvency of all the members of the family. 1931 Lah 125 (126) [AIR V 18]✠ 1940 Mad 241 (245, 246) [AIR V 27] (DB). (Where the manager of an undivided family business commits an act of insolvency, the other coparceners cannot be deemed to have committed the act.)

[17] A member of a joint Hindu family cannot be adjudicated insolvent simply on the ground that he cannot enforce partition of the joint property during the lifetime of his father as his undivided interest can be mortgaged or sold by him with the consent of his co-sharers in discharge of debts and it can also be sold in execution of a decree against him. 1930 Lah 227 (228) [AIR V 17].

[18] Minor co-parceners of joint Hindu family cannot be adjudicated insolvent. 1942 Lah 121 (122) [AIR V 29].

[19] Insolvency petition by creditor — Receiver appointed — Debtor applying under Temporary Postponement of Execution of Decrees Act, 1937 — Act repealed — On case coming back debtor applying under O. 23, R. 3, Civil P. C. — Insolvency judge holding compromise as genuine and recording it — No order dismissing insolvency petition nor order of adjudication made — Procedure held misconceived. 1945 Oudh 319 (320) [AIR V 32] : 21 Luck 52 (DB).

[20] Adjudication based on transfer as act of insolvency—No notice to transferee—Order of adjudication is not conclusive against him —He can apply to set it aside. 1948 Nag 385 (388) [A I R V 35 C 132] : I L R (1948) Nag 523.

[21] Rule 21, sub-rule (3) framed under the Act by the Madras High Court is mandatory in its nature and the Court is bound to follow it. But that does not necessarily mean that the order of adjudication passed without notice to the transferee as required under R. 21, sub-rule (3) is non est as being null and void. The failure to conform to the rule would merely render the resultant order of adjudication irregularly passed which could be got set aside by the persons aggrieved by want of notice. 1957 Mad 299 (300) [AIR V 44 C 94].

[*See also* 1950 Mad 386 (386) [A I R V 37 C 170].

2. Extension of time fixed for discharge. — [1] Court has jurisdiction to extend the time originally fixed under S. 27 of the Provincial Insolvency Act, for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43 of the Provincial Insolvency Act. 1938 Oudh 122 (124, 125) [AIR V 25] : 14 Luck 40 (FB) (A I R 1928 Oudh 376, *Overruled.*) ✠ 1941 Oudh 308 (310) [AIR V 28] (DB) ✠ 1939 Nag 103 (104) [A I R V 26] : ILR (1939) Nag 478 ✠1937 All 686 (687) [AIR V 24] : ILR (1937) All 855 ✠ 1933 All 230 (230) [A I R V 20] : 55 All 241 ✠ 1933 Rang 133 (134) [AIR V 20] (DB)✠1932 Nag 22 (23) [AIR V 19] : 27 Nag L R 374 ✠ 1930 Mad 389 (390, 392) [AIR V 17] : 53 Mad 288 (FB). (AIR 1924 Mad 635, *Overruled.*)✠1930 Mad 278 (280) [AIR V 17] : 52 Mad 648 (DB) ✠ 1929 Lah 399 (399) [AIR V 16]✠ 1929 Nag 11 (12) [AIR V 16] ✠ 1928 Pat 338 (340) [AIR V 15] : 7 Pat 375 (FB)✠ ('28) 108 Ind Cas 803 (804) (DB) (Pat)✠ 1927 Lah 763 (763) [AIR V 14] ✠ 1926 Sind 94 (97) [AIR V 13] (DB)✠1925 Lah 416 (416) [A I R V 12] ✠ 1924 Cal 777 (778) [AIR V 11] : 51 Cal 337 (DB).

[2] Section 43 is controlled by S. 27 — Application for extension of period can be made by any one interested and is not restricted to debtor. 1930 Mad 342 (342) [AIR V 17] (DB) ✠1930 Mad 278 (280) [A I R V 17] : 52 Mad 648 (DB).

[3] Either insolvent or any of creditors can apply for extension of period of discharge before an order has been passed annulling the adjudication. 1929 Nag 11 (13) [AIR V 16].

[4] Application to extend time for discharge is maintainable even at instance of a creditor. 1927 Rang 136 (136) [AIR V 14] (DB).

[5] It is open to an insolvency Court to extend the period specified in order of adjudication within which debtor should apply for his discharge on application of creditors, or *suo motu*. 1928 Lah 82 (83) [AIR V 15] : 10 Lah 357 (DB)✠1942 Oudh 97 (98) [AIR V 29]: 17 Luck 271 (DB)✠ 1931 Rang 27 (28) [A I R V 18] : 8 Rang 506 (DB). (There is nothing whatever in S. 43 (1) which could be construed as meaning that a Court cannot extend time for the application for discharge on its own motion.)

[6] Where no notice of application for extension of period is given to alienee, though it is desirable that it should be so given if it does not prejudice him; it is immaterial. 1930 Mad 342 (342) [AIR V 17] (DB).

3. Appeal. — [1] Order under S. 27 extending time during which to apply for discharge is not one that can be taken to be under S. 4. Proviso of S. 75 (2) will not apply to such an order and second appeal will not therefore lie, the order being under Sch. I. 1929 Mad 43 (44) [AIR V 16] : 52 Mad 337 (DB).

[2] No appeal lies against an order rejecting an application made under S. 27 (2) for extension of period for application of discharge. 1926 Oudh 186 (186) [AIR V 13].

[3] An appeal lies to the High Court from appellate order of a District Judge upholding order of adjudication by trial Court under S. 27. 1926 Mad 123 (125) [AIR V 13].

28. Effect of an order of adjudication.

(1) On the making of an order of adjudication, the insolvent shall aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors.

(2) On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose.

(3) For the purposes of sub-section *(2)*, all goods being at the date of the presentation of the petition on which the order is made, in the possession, order or disposition of the insolvent in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, shall be deemed to be the property of the insolvent.

(4) All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver, and the provisions of sub-section *(2)* shall apply in respect thereof.

(5) The property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree.

(6) Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

(7) An order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made.

[P. I., 1907 — S. 16; P. T. I., 1909 — Ss. 33 (3); 17; 52 (2) (c); 52 (2) (a); 52 (1); 17 (Proviso); 51.]

SECTION 28 — SYNOPSIS

1. Scope and object.
2. Scope and object of sub-section (2).
3. Property.
4. "Shall vest.....hereinafter provided."
5. Insolvency of Hindu father—See note on S. 28A.
6. Manager's insolvency.
7. Insolvency of coparcener.
8. Insolvency of firm.
9. Vesting of property situated in foreign territory.
10. Effect of adjudication in a foreign Court.
11. "Shall become divisible".
12. Termination of insolvency proceedings.
13. Bar of remedy.
14. "Commence any suit or other legal proceeding".
15. Leave of Court.
16. Leave of Court—When necessary.
17. Leave of Court—When not necessary.
18. Effect of not obtaining leave.
19. Rights and disabilities of insolvent.
20. Position of receiver.
21. Reputed ownership—Sub-section (3).
22. Vesting of property held on trust.
23. After-acquired property—Sub-section(4).
24. Property exempted under Civil P. C. — Sub-section (5).
25. Property exempted under other enactments — Sub-section (5).
26. Secured creditor—Sub-section (6).
27. Relation back—Sub-section (7).

1. **Scope and object.** — [1] Section 28 deals with the effect of an order of adjudication. 1940 Rang 289 (290) [AIR V 27] : 1940 Rang L R 544 (DB).

[2] Section is based on the broad principle that when once a person is adjudicated insolvent, creditors seeking any remedy against him must come to the Insolvent Court to get leave for that purpose. 1935 Mad 239 (240) [AIR V 22] (DB) ✣ 1936 Mad 819 (821, 822) [AIR V 23] : 59 Mad 928 (DB).

[3] The operation of S. 28 affects all creditors, whether they are judgment-creditors or not, or have proved their debts or otherwise. 1940 Rang 289 (290) [AIR V 27] : 1940 Rang L R 544 (DB).

Section 28 — Note 1 *(contd.)*

[4] The object of S. 28 is to secure for the official receiver the unrestricted right to dispose of an insolvent's property and it is to preserve that right that suits and other proceedings aimed at the insolvent's property are prohibited. It cannot be laid down that in all cases in which a suit is filed which offends against the provisions of S. 28 the Court has no jurisdiction to entertain the suit. 1936 Mad 57 (58) [AIR V 23].

[5] Even though, S. 28, Provincial Insolvency Act and S. 25 of the Punjab Relief of Indebtedness Act are in conflict, the provisions of the former Act being earlier are impliedly repealed by the latter Act which is a later enactment. 1937 Lah 680 (682) [AIR V 24] : ILR (1938) Lah 120.

[6] Section 28 applies to suits and proceedings under the Agra Tenancy Act. 1932 All 434 (436) [AIR V 19] : 54 All 616 (DB).

2. Scope and object of sub-section 2. — [1] One of the objects of S. 28 (2) is to prevent unnecessary interference with the work of the Insolvency Court and especially with realization of the assets of the judgment-debtor in insolvency. 1940 Rang 289 (291) [AIR V 27] : 1940 Rang L R 541 (DB).

[2] The first part of sub-section (2) deals with remedies against the property of the insolvent and the second part deals with all remedies including the remedy against the person of the insolvent. 1931 Pat 357 (358) [AIR V 18] : 10 Pat 422 (DB).

[3] The provisions of sub-section (2) do not create any right of suit which does not otherwise exist; they operate as a bar on the rights of creditors in respect of remedies, suits and proceedings otherwise existing. That bar is in itself subject to an exception, namely, that permission of the Court may remove it. But permission of the Court operating as an exception to the bar created by the sub-section certainly cannot give the creditor any right which he has not apart from this sub-section. 1941 Cal 298 (301) [AIR V 28] (DB).

[4] Section 28 (2) refers only to the property of the insolvent and the prohibition against the institution of legal proceedings without the leave of the Court refers to proceedings with regard to the insolvent's property. 1939 Mad 572 (573) [AIR V 26] : ILR (1939) Mad 585 (DB).

[5] Application of S. 28 (2) is not dependent on notice of insolvent's application being given to person instituting suit. 1936 Oudh 236 (237) [AIR V 23] : 11 Luck 731.

[6] In case of a scheme, S. 28 (2) has to be read with S. 39 and the protection is taken away by S. 39 in respect of debts not included in the scheme. 1934 Mad 529 (532) [AIR V 21] : 57 Mad 1082 (DB).

[7] Section 28 (2) is not incorporated into the Companies Act. 1936 Pesh 57 (60) [AIR V 23] (DB).

[8] If under impression that her claim would be decided after the order of adjudication the third person did not appear at the time of the hearing of the adjudication matter, it can hardly be said that her claim has been finally determined by that adjudication order. 1955 Pat 413 (417) [AIR V 42 C 106] (DB).

3. Property. - [1] The property of an insolvent which by S. 28 vests in the receiver must mean only the property which is divisible amongst his creditors. 1947 Pat 7 (10) [AIR 34 C 3] (DB). (Brothers dividing family estate except certain government promissory notes among themselves — Interest on notes assigned to mother for maintenance — Notes deposited in bank—Bank not to hand over or endorse notes to any one — Two brothers adjudicated insolvents—Insolvents held had no such property in notes as would vest in receiver.)

[2] 'Property' in S. 28 (1) includes moneys received by way of income. 1942 Nag 83 (84) [AIR V 29] : ILR (1942) Nag 714 (DB).

[3] The subject matter of a suit for taking amounts of a dissolved partnership is property which vests in the receiver. 1925 Sind 18 (18) [AIR V 12] : 17 Sind L R 334 (DB).

[4] Salary is property of the insolvent within S. 28. 1914 Cal 1 (2) [AIR V 1] (DB).

[5] Right to receive money due is property within meaning of S. 28 (2). 1923 Nag 290 (291) [AIR V 10] : 19 Nag L R 144.

[6] The son's interest after the severance cannot be said to be the "property of the insolvent" within S. 28 (2). 1942 Mad 327 (329) [AIR V 29] (DB).

[7] The Municipal licences, which are personal and non-transferable, cannot form assets in the insolvency of the licensee. 1934 P C 1 (2) [AIR V 21].

[8] Under the Displaced Persons (Compensation and Rehabilitation) Act, a displaced person has to be paid the compensation for his verified claim, out of the compensation pool. Once the amount of compensation is determined, only the manner how that has to be paid is left to the discretion of the authority concerned The department cannot withhold it. Hence the right to receive such compensation is property just as the creditor's right to recover a debt is property. 1960 Punj 474 (475) [AIR V 47 C 170].

[9] Right to claim damages for a breach of a contract is property within the meaning of S. 2 (d). But where it is a mere right to sue for damages it is exempt from attachment and sale in execution of a decree under S. 60 (e), Civil P. C. and cannot vest in Official Receiver by virtue of S 28 (2) read with (5). A mere right to sue for damages is a right which either does not arise out of a right of property or though originally arising out of a right of property has been severed from it by transfer or otherwise and vests in a person different from the person who holds the antecedent right of property. Where the Official Receiver has become entitled to the benefits of a contract for goods on the insolvency of the promisee, the right to sue for damages for the breach by the promisor of the contract in his hands will not be a mere right to sue for damages, within the meaning of S. 60 (e), Civil P. C., even though the con-

Section 28 — Note 3 *(contd.)*

tract had been broken and had come to an end (in a loose sense) before the insolvent had applied in insolvency. Case law considered. 1949 All 433 (437) [AIR V 36 C 164] : I L R (1949) All 746 (DB).

4. "Shall vest . . . . . hereinafter provided." — [1] On the making of an order of adjudication, all the property of the insolvent vests in the Court or the Receiver and the insolvent ceases to have any right to deal with his property. 1932 Oudh 244 (245) [AIR V 19] : 8 Luck 87 (DB). (Transfer made by insolvent after adjudication is nullity.) ✣ 1957 Mad 1 (2) [AIR V 44 C 1] : I L R (1957) Mad 344 (DB). (Section 47 cannot in any way derogate or reduce the nature of the Official Receiver's right in the property that is vested in him.) ✣ 1956 Nag 57 (58) [AIR V 43 C 15]: I L R (1955) Nag 939 (DB). (Though the insolvent is entitled to surplus of the sale proceeds of the property that may remain after all the creditors are paid off it is not a legal right, but it is a mere hope or expectation.) ✣ 1948 All 49 (49, 50) [AIR V 35 C 22] : I L R (1947) All 634 ✣ 1941 Mad 753 758) [AIR V 28] ✣ 1939 Nag 10 (12) [AIR V 26] : I L R (1941) Nag 696 ✣ 1938 Mad 449 (452, 453) [AIR V 25] : I L R (1938) Mad 1063 (DB). (Once judgment-debtor has been adjudicated insolvent, Court executing decree has no power to sell his property.) ✣ 1936 Cal 434 (435 436) [AIR V 23] : ILR (1937) 1 Cal 127 ✣ 1936 Nag 117 (117) [AIR V 23) : ILR (1936) Nag 41 ✣ 1936 Pat 112 (113) [AIR V 23] (DB) ✣ 1935 Rang 328 (330) [AIR V 22] : 14 Rang 63 (DB) ✣ 1922 Mad 335 (336) [AIR V 9] (DB). (Decree obtained against insolvent after adjudication is nullity.) ✣ 1921 Mad 204 (208) [AIR V 8] : 44 Mad 524 (DB). (Any dealing with insolvent's property after order of adjudication without notice to receiver is ultra vires) ✣ 1919 Mad 957 (958) [AIR V 6] : 41 Mad 923 (DB). (Attachment after adjudication is ineffective.) ✣ 1918 All 402 (403) [AIR V 5] : 40 All 197 (DB). (Attachment of property made before adjudication ceases to have effect after adjudication.) ✣ 1918 Mad 294 (294) [AIR V 5] (DB) ✣ ('12) 14 Bom L R 511 (519). (Subsequent attachment of property is nullity.)

[2] The Provincial Insolvency Act has been designed to secure that the Insolvency Court should be at liberty to seize the debtor's property and to make it available for equitable distribution among his creditors. The property of the insolvent in his actual or constructive possession at the time of the filing of the petition of insolvency is presumed to be in the custody of the Insolvency Court from the filing of the petition and the Insolvency Court alone has power to hear and determine all conflicting claims in regard to title, possession and control of the property. The Insolvency Court exercises jurisdiction over the assets of the insolvent not because the insolvent has title in the property but because the insolvent is in actual or constructive possession of the property at the time of the filing of the petition of insolvency. When the assets of the insolvent have been brought into the custody of the Insolvency Court all orders, decrees and judgments of the said Court as to the rights and title to the property and as to the distribution of it among the parties are binding upon all persons and on every Court. ('57) 1957 Cri L Jour 92 (95) (Punj).

[3] It is the making of the order of adjudication which vests the property in the receiver and only upon such an order being made can any vesting take place at all. 1920 All 153 (154) [AIR V 7] : 42 All 433 (DB) ✣ 1939 Mad 438 (439) [AIR V 26] ✣ 1927 Mad 919 (920) [AIR V 14] : 50 Mad 977 ✣ 1921 Mad 642 (643) [AIR V 8] (DB).

[4] Where there is no ground for supposing that any verbal order appointing the official receiver of a particular estate was passed, it cannot be presumed that the official receiver must have been appointed receiver for the estate in the absence of a written order. 1921 Mad 642 (643) [AIR V 8] (DB).

[5] Where two different Courts have passed two orders of adjudication upon the same person, the adjudication order which is prior in time vests the property of the insolvent although the act of insolvency in the second case was prior in time to that in respect of which the first order was made. 1933 Cal 115 (116) [AIR V 20] : 59 Cal 1151 (DB).

[6] Legally the receiver and not the insolvent is the owner of the property which vests in the Receiver on the order of adjudication being passed. 1939 Lah 346 (347) [AIR V 26]: ILR (1940) Lah 40.

[7] What vests in the official receiver on the insolvency of a person is not the property which he knows he possessed but the property which he, in law, possesses. Where on the date of his insolvency, the insolvent possesses a certain legacy, but is ignorant of it and hence does not show it in the schedule of assets. the legacy would still vest in the official receiver. 1937 Sind 306 (307) [AIR V 24] : 31 Sind L R 506 (DB).

[8] The insolvent's property does not vest in the receiver free from the liabilities imposed upon it, and the receiver is bound by any covenant involving a liability on his property. 1932 All 78 (79) [AIR V 19] : 54 All 17 (DB).

[9] Where a receiver of the estate of an insolvent abandons a particular item of property as worthless and the insolvent after getting his discharge transfers the same, the transfer is not bad and the vendee is entitled to enforce his rights under the transfer. 1917 All 302 (302) [AIR V 4] : 39 All 223 (DB).

[10] Transfer of property without legal necessity by Hindu widow — Death of widow —Transferee adjudicated insolvent – Property does not vest in official receiver. 1942 All 39 (41) [AIR V 29] : ILR (1942) All 120 (DB).

[11] The question whether the property vested in the official receiver would depend upon the position at the date of the adjudication. Any property which has once vested in the receiver does not re-vest in the insolvent by virtue of some Act enacted subsequently

Section 28 — Note 4 *(contd.)*

e.g., U. P. Debt Redemption Act. 1944 All 237 (238) [AIR V 31] : I L R (1944) All 553 (DB).

[12] The holder of a decree against a zamindar for a monthly family allowance was adjudicated an insolvent. When the receiver applied for execution, the zamindar contended that he should be given credit for the payments that had been made to the decree-holder after his adjudication as insolvent — *Held*, that as the decree had become vested in the receiver from the date of adjudication, none of the payments could be recognised as against the receiver if, for no other reason than that none of them was certified to the Court under O. 21, R. 2, Civil P. C. 1932 Mad 250 (252) [AIR V 19] (DB).

[13] Where the insolvent has a right to receive maintenance allowance under his father's will, the monies as they accrued due would undoubtedly come to the receiver till the insolvent gets his discharge. 1942 Cal 241 (243) [AIR V 29]: ILR (1942) 1 Cal 427 (DB).

[14] A right of suit in respect of a tort resulting in injuries to insolvent's estate vests in the receiver in insolvency. 1933 Rang 268 (269) [AIR V 20] (DB).

[15] The definition of property under S. 2 does not include the right to sue for breach of contract and hence that right remains with the insolvent and does not pass to the receiver. 1937 All 317 (320) [AIR V 24] (DB).

[**But see** 1925 Sind 159 (162) [AIR V 12] : 19 Sind L R 286.]

[16] As regards onerous property such as leases, the Insolvency Court or receiver has the right to elect whether they will accept or repudiate the leasehold property belonging to the insolvent, and unless he accepts it, such property is not considered to vest in him. 1921 Nag 10 (11) [AIR V 8] : 17 Nag L R 205.

[17] When there is no receiver, the Court is vested with all the rights and is authorized to exercise all the powers conferred on a receiver. 1939 Nag 10 (12) [AIR V 26] : ILR (1941) Nag 696. (One of the rights is right to actual possession of insolvent's property.)✠ 1937 Nag 193 (195) [AIR V 24] : ILR (1937) Nag 249. (Receiver not appointed — Court represents the insolvent's estate.)✠ 1925 Mad 249 (252) [AIR V 12].

[18] The vesting of the property of the insolvent in the Court is not dependent upon there being a receiver. 1936 Pat 112 (113) [AIR V 23] (DB).

[19] No receiver appointed — Property of insolvent vesting in District Judge — District Judge must be made party to appeal by creditor in High Court. 1942 Pat 307 (308, 309) [AIR V 29] (DB).

[20] Where before an order vesting the property in the receiver has been made the receiver purports to sell the property and the Court subsequently makes an order vesting the property in the receiver, the vendee's title to the property becomes complete either on the principle of ratification or under Section 43 of the Transfer of Property Act. 1925 Mad 249 (252) [AIR V 12].

[21] The expression "as hereinafter provided" qualifies the word "receiver" and not the word "vest". 1922 Mad 51 (53) [AIR V 9] : 45 Mad 167 (DB).

[22] There is a difference between the "assets realised" and "assets vested in the Court." Though all the properties of the insolvents vest in the Insolvency Court, they cannot be said to be assets realised unless the same had been actually realised. 1960 Pat 176 (178) [AIR V 47 C 59] (DB).

[23] Money standing to the credit of insolvent in Provident Fund vests in Official Receiver. 1956 S C 336 (339, 341) [(S) AIR V 43 C 60] : 1956 S C R 100 : 35 Pat 359. [AIR 1951 Pat 488, *Reversed*.)

[24] It follows from S. 28 (2) of the Provincial Insolvency Act that an order of adjudication divests the insolvent of all right, title and interest to and in his property and this continues during the whole period of the insolvency. It is as if the law had effected a transfer of title from the insolvent to the receiver. Even if the insolvent applies to the Debt Conciliation Board for settlement of his debts S. 21 of the C. P. Debt Conciliation Act, cannot do more than "suspend" the insolvency proceedings. It cannot abrogate them, nor can it restore the status quo. Therefore, once the insolvent is divested of his property by the insolvency proceedings S. 21 does not have the effect of re-vesting it in him; all it does is to "suspend" the possibility of revestment. It follows from this that the insolvent has no authority or power to alienate his property after his adjudication and before its annulment by order of the Insolvency Court. 1951 Nag 241 (243, 244) [AIR V 38 C 61] : ILR (1951) Nag 12.

[25] Where during the pendency of a suit on mortgage the mortgagor is adjudicated but the decree is passed without making the Official Assignee a party to the suit and the decree-holder purchases the property in execution of the decree, the decree and the proceedings are not null and void in the sense that they have no legal effect at all. The proceedings are only ineffective to bind the equity of redemption which is vested in the receiver. The effect of annulment is to vest the property retrospectively in the insolvent, in other words the consequence of annulling an order of adjudication is to wipe out altogether the insolvency and its effect except to the limited extent reserved under the section. The Legislature introduced the fiction of vesting the title retrospectively in the insolvent. In view of this, the alienations made of property, movable or immovable by the insolvent after adjudication or the decree and execution proceedings suffered by him during such insolvency, notwithstanding the property is taken away and transferred from him are all restored and validated with effect from the date on which the insolvency petition was filed. 1954 Mad 604 (611) [AIR V 41 C 220] : ILR (1954) Mad 80 (FB). (AIR 1929 Mad 480, *Overruled* and AIR 1951 Nag 241 *Dissented from*.)

[26] Dicta : There is no statutory prohibition against the sale of property by an insol-

Section 28 — Note 4 *(contd.)*

vent after insolvency proceedings have been initiated. The vesting of the property in the Official Receiver is for the benefit of the creditors; and so does not purport to affect transactions between the insolvent and other persons, except in so far as they affect the administration of the insolvent's estate for the benefit of the creditors. As far as the parties to the transaction are concerned, they are binding on them. 1948 Mad 430 (431, 432) [AIR V 35 C 207] : ILR (1948) Mad 872 (DB).

[27] The purchaser in insolvency represents the interest of the insolvent, because it is the right and title of the insolvent which are vested in the insolvency Court or the receiver. When the sale takes place, it is of the property, right, title and interest of the insolvent, and the purchaser obtains it subject to any advantage or disadvantage which the insolvent himself enjoyed. 1956 Nag 241 (243) [AIR V 43 C 82] : ILR (1956) Nag 256 (DB).

[28] When a person is declared insolvent, he becomes civilly dead and on such death, all his rights and liabilities devolve on the Receiver. It being so, the necessary corollary of this is that he has no locus standi to maintain the appeal. ('60) 1960 M P L J 418 (419).

5. Insolvency of Hindu father. — See Note on S. 28A.

6. Manager's insolvency. — [1] Where one of the brothers, who is a manager of a joint Hindu family is adjudicated insolvent for the debts due personally from him, the shares of the other brothers do not vest in the official receiver. 1938 Lah 20 (21) [AIR V 25].

[2] Joint Hindu family governed by Dayabhag school — New trade started by *Karta*—Adjudication of adult members—No property belonging to minor members vests in receiver. 1922 P C 237 (239, 240) [AIR V 9] : 49 Cal 560 : 49 Ind App 108.

[3] The right of a manager who is not the father of the other coparceners to sell family assets to discharge debts which are payable out of the joint estate is not property and therefore cannot vest in the official receiver on the insolvency of the manager. 1942 Mad 682 (684, 685) [AIR V 29] : ILR (1943) Mad 83 (FB). (AIR 1926 Mad 994 (FB), *Dissented from*; AIR 1929 Mad 166, *Overru'ed.*) ✣ 1943 Mad 652 (653) [AIR V 30] : ILR (1944) Mad 212 (DB) ✣ 1943 Mad 303 (308, 309) [AIR V 30] ✣ 1942 Cal 533 (536) AIR V 29] : ILR (1942) 2 Cal 413. (Joint Dayabhaga family—Insolvency of manager — His power to sell interest of other coparceners for satisfaction of joint debts does not vest in receiver)✣ 1925 Bom 416 (416) [AIR V 12] : 49 Bom 785 (DB).

[But see 1940 Sind 141 (143) [AIR V 27] : ILR (1940) Kar 375 (DB) ✣ 1939 Cal 279 (280, 281) [AIR V 26] (DB) ✣ 1937 Cal 517 (518, 519) [AIR V 24] : ILR (1937) 2 Cal 675 (DB) ✣ 1933 Nag 150 (152) [AIR V 20] : 29 Nag L R 159 (DB).]

[4] Joint Hindu family carrying on ancestral business — Promissory note drawn in favour of family and not of *Karta*—*Karta* adjudicated insolvent — Official receiver does not derive right of suit through *Karta*—Per *Mya Bu J.* 1937 Rang 165 (168) [AIR V 24] (DB) (*Dunkley J.*—Contra.)

[5] The 1st defendant executed a promissory note to the plaintiff when he was the managing member of the family of himself and defendants Nos. 2 to 5. He became insolvent. The plaintiff then instituted a suit against the defendants on the promissory note. The suit was dismissed as against the estate of the 1st defendant as the debt was one provable in insolvency but a decree was passed against the shares of the other defendants on the ground that the debt was incurred for family purposes. On appeal—*Held* that though the suit could not be maintained against the estate of the 1st defendant, a decree could be passed against the shares of the other defendants in the family property. 1934 Mad 223 (224) [AIR V 21].

[6] *See also* Note on S. 28A.

7. Insolvency of coparcener. — [1] On the insolvency of a coparcener in a joint Hindu family his undivided interest in the joint family property vests in the receiver for the liquidation of his debts But the receiver cannot legally deal with the joint family property, except to the extent of the share vested in him. 1933 Nag 324 (325) [AIR V 20]. (Joint promissory note by members of joint Hindu family—Adjudication of some as insolvent—Suit against others on promissory note is not barred)

[2] Sale by three members of joint family—Subsequent insolvency of one member—*Held* Court could deal only with estate of insolvent, and sale in respect of insolvent's share alone could be annulled. 1917 Mad 414 (414) [AIR V 4] (DB).

[3] The insolvent's undivided share in the property of the joint family of which he is a member is property and therefore the receiver can sue for partition of the share of the insolvent vested in him. 1923 Oudh 154 (154) [AIR V 10] : 26 Oudh Cas 384 (DB).

[4] Members of a joint Hindu family were adjudged insolvents and receiver sought to sell their interest in the property purchased by the decree-holder—*Held*, that the receiver had the right to sell the interest, if any, of the insolvents in the family property and not the whole of the property purchased by the decree-holder. 1938 Pat 234 (235) [AIR V 25] (DB).

[5] Where a coparcener becomes insolvent, the official receiver can sell the right, title and interest of such coparcener in the joint family property and the purchaser's remedy is to compel partition as against the other coparceners. The actual shares of the other coparceners need not be determined at the time of the sale but can be determined at the time of partition. 1933 Lah 651 (652) [AIR V 20].

[6] Where the property has descended as obstructed heritage the sons of the acquirer do not obtain an interest by birth in the property and hence on the insolvency of one of the sons the official receiver cannot proceed

Section 28 — Note 7 *(contd.)*

against a part of such property as being the insolvent's share therein. 1938 Nag 7 (12) [AIR V 25] : ILR (1939) Nag 465.

[7] Coparcener insolvent - Insolvency does not effect his separation from joint family— Insolvent's share increased by death in coparcenary – Increase accrues to official receiver in whom that share is vested. 1946 Mad 503 (504) [AIR V 33 C 257] : ILR (1947) Mad 44 (DB).

8. Insolvency of firm. — [1] An order of adjudication against a firm is an order of adjudication against each individual partner of the firm. 1932 Sind 62 (63) [AIR V 19] (DB) ✠ 1926 Sind 31 (32) [AIR V 13]: 20 SindLR 209.

[2] When a partner is adjudged an insolvent the receiver appointed under S. 16 of the Act of 1907 merely replaces the insolvent partner and cannot claim to take exclusive possession of the entire assets of the firm. 1915 Cal 482 (485) [AIR V 2] : 42 Cal 225 (DB).

[3] A suit against partners so adjudged insolvent is not maintainable without the leave of the Court. 1927 Lah 234 (235) [AIR V 14].

[4] Partnership between stranger and joint Hindu family of father and minor sons– Firm adjudged insolvent — Adults mortgaging ancestral property for partnership debts — Minor's shares in ancestral property can be sold by receiver to discharge debts of firm. 1932 Pat 231 (233, 234) [AIR V 19] : 11 Pat Pat 399 (DB).

9. Vesting of property situated in foreign territory.—[1] Movable property in a foreign State belonging to the insolvent would ordinarily vest in the receiver and the latter can take steps to recover it through the insolvent or otherwise so as to make it available and distributable among his creditors. It may be that in some cases he may not succeed in doing so but the liability of the property being distributed among creditors does remain according to the law of British India. 1936 Bom 167 (169) [AIR V 23] : 60 Bom 706 : 37 Cri L Jour 577 (DB) ✠ 1922 Nag 221 (222) [AIR V 9] : 18 Nag L R 93.

[2] Adjudication in British India — Power over foreign immovables. 1932 Cal 310 (312) [AIR V 19] (DB).

[3] Undivided share in the joint family property is a property over which the insolvent has a disposing power. That property vests in the insolvency Court. The fact that the property was not situate in India would not matter so far as the vesting is concerned. ('50) 3 Sau L R 52 (53) (DB).

[4] Legislature in one State cannot legislate in respect of land situate in a foreign State. Even if the land in a foreign State (e. g., Baroda State before its merger) be regarded as vested on adjudication (by a former British Indian Court) in the Receiver in Insolvency in an ideal sense, unless the law of the foreign State recognises the vesting as a transfer of the property to the Receiver, the vesting cannot operate to confer title upon the Receiver in Insolvency and the property situate in the foreign State will continue to be liable for satisfaction of the claims against the debtor according to the law of that State and unaffected by the insolvency. Section 28 (1) imposes a purely personal obligation upon the insolvent which may be enforced by process of the Insolvency Court to compel compliance of all acts necessary for completing the title of the Receiver to property situate in a foreign territory. But the personal obligation cannot affect the jurisdiction of the Courts in the foreign State to deal with property situate in that State; nor can it compel the creditors, who are not amenable to the jurisdiction of the Insolvency Court which has adjudicated the debtor an insolvent, to allow other creditors to participate in the satisfaction obtained by them by taking proceedings in a foreign State. 1955 Bom 170 (173) [(S) AIR V 42 C 45] : I L R (1955) Bom 236.

10. Effect of adjudication in a foreign Court.—[1] When a foreign Court adjudicates person insolvent, the only property in British India which vests in the receiver is the movable property wnich the insolvent was free to assign at the date of the adjudication and such property vests by virtue of private international law. The adjudication does not, however, affect the rights of a creditor who has attached before the adjudication He remains entitled to the benefit of his attachment. But where the creditor attaches after adjudication he is not entitled to anything by reason of his attachment and he is left merely with the right to prove his debt in insolvency. 1940 Mad 47 (48, 49) [AIR V 27] (DB).

[2] Immovable property in British India does not vest in the receiver in insolvency on an adjudication in a foreign country. (11) 34 Mad 247 (248) (DB).

[3] Official receiver in foreign Court cannot take advantage of law applied in British India —Debtor declared insolvent in Secunderabad — Creditor attaching decree in favour of insolvent in execution of his decree – Attachment could not be discontinued. 1929 Mad 900 (902) [AIR V 16].

[4] The fact that the person adjudged bankrupt by a foreign Court has not been discharged will not affect his right to file a suit as the administrator of the estate of his father, which right does not vest in the assignee in his bankruptcy. Where, however he has been appointed as administrator by a foreign Court, and his father is a British Indian subject who has not acquired a foreign domicile, the son cannot sue as such administrator in British Indian Court for recovery of immovable property situated in British India. 1946 Mad 25 (29) [AIR V 33 C 11] : I L R (1946) Mad 486.

[5] Where a person is adjudicated insolvent in a British Indian Court and subsequently he is also adjudicated insolvent by a Court in a foreign state and a debt due to the insolvent is sold by the receiver appointed by the latter Court, the purchaser cannot prefer his claim as a creditor before the receiver appointed by the British Court. ('35) 1935 Mad W N 1223 (1224).

11. "Shall become divisible". — [1] At the date of insolvency the assets of the insol-

Section 28 — Note 11 *(contd.)*

vent's estate which have to be divided among the insolvent's creditors include not only debts due to the estate but also the interest accruing till the date of payment to the receiver. ('13) 1913 Pun L R No. 112, p. 400 (402).

12. Termination of insolvency proceedings.— [1] The insolvency proceedings do not end on mere adjudication. The insolvent's presence and help would be greatly needed so long as the estate has not been fully administered, but continues to be in the hands of the official receiver Simply because the judgment-debtor has been adjudicated insolvent and he has applied for discharge it cannot be said that the proceedings in insolvency have terminated. 1933 Mad 360 (362) [AIR V 20] + 1918 Sind 38 (39) [AIR V 5] : 12 Sind L R 20 (DB).

[2] Insolvency proceedings are not terminated by an order refusing the discharge of the accused 1928 Rang 109 (11) [AIR V 15]: 6 Rang 27 (DB) + 1927 Mad 919 (920) [AIR V 14] : 50 Mad 977.

[3] Subsequent to the adjudication of a person as insolvent, certain applications made by the creditors of the insolvent were ordered to be "filed" A previous order had made it clear that further steps were expected to be taken by the creditors. An application made by the sons of the insolvent for substitution of their names in place of the insolvent who had died during the proceedings was dismissed on the ground that the proceedings had terminated — *Held* that the proceedings were not terminated simply because the word "file" occurred in the order or because the application for substitution of names was rejected. 1935 Pat 480 (480) [AIR V 22] DB).

[4] There can be no termination of insolvency proceedings till a final and unconditional discharge is granted to the insolvent, his assets are realised and distributed among the creditors and the surplus if any is paid to the insolvent. ('49) 54 Mys H C R 261 (264) (DB).

13. Bar of remedy. — [1] A decree is not a remedy for a civil wrong but merely a step towards the remedy within old S. 16 (2) (b). The remedy is the benefit accruing to the creditor through the execution of his decree; i. e., the compensation secured to him in execution That remedy he can secure only through the Insolvency Court by proving his debt. 1921 Lah 270 (270, 271) [AIR V 8] : 2 Lah 95 (DB). (Decree under O. 34 R 6. Civil P. C.) + 1932 All 382 (383) [AIR V 19] : 54 All 532 (DB). (Declaratory decree.)

[But see ('11) 34 All 106 (109) (DB).]

[2] Where a creditor obtains his decree on the understanding that he was getting a decree against certain insolvents, his exclusive remedy would be to go to the Insolvency Court and get rateable shares in the assets and not that he would proceed separately by way of execution and claim priority as against the receiver. 1935 All 642 (644) [AIR V 22].

[3] Where a suit for specific performance of a contract entered previous to his insolvency is brought against an insolvent in a Court other than the Court of insolvency, such a Court has no jurisdiction to determine the question of fraudulent preference. 1928 Mad 860 (861) [AIR V 15] (DB).

[4] Father insolvent—Son's share sold prior to adjudication — Receiver has right to annul sale — Remedy lies in Insolvency Court and not in ordinary Civil Court. 1934 Nag 271 (272) [AIR V 21].

[5] Under the Provincial Insolvency Act, there is no provision which expressly or impliedly precludes an unsuccessful claimant from bringing a regular action to establish his title to the property seized by the Insolvency Court or the receiver. 1921 Lah 58 (58, 59) [AIR V 8] : 2 Lah 147 (DB).

[6] It is only after the making of an order of adjudication that the creditors are prevented from proceeding against the property of the insolvent. 1936 Nag 117 (118) [AIR V 23] : I L R (1936) Nag 41.

[7] Section bars the remedy of the creditor only during the pendency of the insolvency proceedings but where the sale was confirmed after they were over, the judgment-debtor has no right to ask the Court not to confirm the sale. 1941 Oudh 505 (507) [AIR V 28].

[8] The Act contains no prohibition to a creditor going on with a suit or proceeding already pending at the date of adjudication. ('28) 61 Ind Cas 534 (535 (Lah).

[9] An application under O. 34, R. 6, Civil P. C., is not a new proceeding but a continuation of the original suit, so that it does not come under the bar of the section. 1921 Lah 270 (270) [AIR V 8] : 2 Lah 95 (DB).

[10] The jurisdiction of a Civil Court to try a suit in respect of a debt or liability incurred by an insolvent after the order of adjudication is not barred by the Act. 1925 Nag 77 (78) [AIR V 12] : 22 Nag L R 118.

[11] No decree can be executed against insolvent in the normal Courts. Dues can only be realised in the insolvency proceeding and nowhere else, and that too only from the insolvent's assets, and not from any one else's assets. 1949 Kutch 2 3) [AIR V 36 C 2].

14. "Commence any suit or other legal proceeding."—[1] The suit or other legal proceeding contemplated by S 28 2) must be one against the insolvent himself or against persons whom it is sought to render liable through him. Where therefore, the liability of the defendant depends on his being the grandson of the debtor and not on his being the son of the insolvent, the section has no application. ('36) 63 Cal 194 (205) + 1942 Mad 327 (329) [AIR V 29] (DB).

[2] The words "any suit or legal proceeding" cover a case where the object of the suit or other legal proceeding is to obtain any remedy against the property or the person of the insolvent in respect of a provable debt. 1919 Sind 42 (46) [A I R V 6] : 12 Sind L R 61 + 1936 Oudh 177 (178) [AIR V 23]: 11 Luck 720 (DB).

[3] A suit under O. 21, R. 63, is "commencement of suit." 1929 Mad 323 (327) [A I R V 16] (DB).

Section 28 — Note 14 *(contd.)*

[4] An application was made under S. 4, Provincial Insolvency Act praying for a declaration that the scheduled property belonged to the insolvent and for a direction that the official receiver might sell the property for the benefit of the general body of creditors—*Held*, that these proceedings were proceedings which come within the provisions of S. 28 (2). 1935 Mad 809 (809) [A I R V 22] (DB).

[5] An application for execution of a decree is the commencement of a legal proceeding within S. 28 (2). 1931 Pat 357 (357, 358) [AIR V 18] : 10 Pat 422 (DB).

[6] An execution of a decree of specific performance compelling the judgment-debtor and a person claiming as his representative to execute a mortgage in favour of the decree-holder is not a legal proceeding in respect of a debt within the meaning of S. 28 (2) and previous leave of the Court is not necessary. 1951 Mad 687 (688) [AIR V 38 C 217] (DB).

[7] An application to recover a judgment debt by arrest of the judgment-debtor is a legal proceeding within the section. 1936 Oudh 177 (178) [A I R V 23] : 11 Luck 720 (DB).

[8] An application contemplated in S. 25, Madras Debt Conciliation Act to the Debt Conciliation Board is a legal proceeding or at least the institution of a legal proceeding. 1938 Mad 808 (808) [AIR V 25].

[9] No decree can be executed against insolvent in the normal Courts. Dues can only be realised in the insolveney proceeding and now here else, and that too only from the insolvent's assets and not from any one else's assets. 1949 Kutch 2 (3) [AIR V 36 C 2].

[10] In Kutch, there is no Insolvency Act : Hence a suit against a firm which has been adjudicated as insolvent in Bombay is maintainable in the Kutch Courts as the firm is not to be treated as insolvent in Kutch. 1949 Kutch 5 (6) [AIR V 36 C 4].

15. Leave of Court.—[1] Section 28 (2) is mandatory and after an order of adjudication is made, no suit or other proceedings can be instituted against the insolvent or his property without the leave of the Insolvency Court. 1937 Mad 667 (669) [AIR V 24] : I L R (1937) Mad 841 (DB)+1940 Rang 289 (290) [A I R V 27] : 1940 Rang L R 544 (DB).

[2] It is only those suits that seek relief against the property of the insolvent and which were admittedly the insolvent's property at the date of the insolvency petition that would require the leave of the Court. 1946 Mad 25 (29) [A I R V 33 C 11] : I L R (1946) Mad 486 (DB).

[3] Provision as to grant of leave is confined to claims of creditors. 1924 All 40 (43) [AIR V 11] : 46 All 16 (DB).

[4] The grant of permission to institute a suit does not necessarily cover permission to execute a decree obtained in that suit and therefore the decree-holder cannot execute his decree obtained in such suit against the insolvent's property. 1926 All 640 (640) [A I R V 13] : 48 All 482 (DB).

[5] There is no rule of law requiring notice to be given to an insolvent before leave to file a suit is granted, and whether it is necessary to issue a notice to the insolvent or not must be decided on the facts of each particular case. 1928 Rang 326 (327) [A I R V 15] : 6 Rang 533.

[6] An order granting leave passed without notice to the other party must be regarded to have been passed without prejudice to the interests of those against whom it was passed. 1941 Mad 577 (579) [AIR V 28].

[7] Petition to receiver praying to set aside transfers by insolvent as *benami* — Receiver declining to proceed in matter — Application to Court under S. 4—Attention of Court drawn to fact that receiver declined to proceed and that he was joined as party to application — *Held* that there was sufficient compliance with S. 28 (2) as sanction of Court was asked for by necessary implication. 1935 Mad 809 (810) [AIR V 22] (DB).

[8] Where a creditor made an application to a District Munsif sitting as an Insolvency Court under S. 4 praying for a declaration that a certain transaction was *benami* and the Munsif entertained the application, heard it and gave a decision upon it—*Held*, that though no formal application had been made for leave under S. 28 and no formal leave had been granted the fair inference from what took place was that leave of the Court had been granted and the application under S. 4 was not, therefore, barred for want of leave under S. 28. 1935 Mad 46 (46) [AIR V 22] (DB).

[9] Where the plaintiff and other creditors of the debtor opposed the latter's application for adjudication as an insolvent on the ground that a transfer effected by him was fraudulent and collusive and examined witnesses in support of their allegation but the Judge stopped recording further evidence, being of opinion that the transaction having been effected more than two years before the application for insolvency, its genuineness and validity could more appropriately be determined in a separate suit and accordingly passed an order of adjudication, but in this order he stated specifically that the plaintiff or the other creditors might, if so advised, file a separate suit for having the transfer declared void—*Held* that the permission to sue was granted by the Insolvency Judge, and it was not necessary for the plaintiff to make another application at a later stage for the repetition of the previous order. 1934 Lah 460 (462) [AIR V 21] : 15 Lah 849 (DB).

16. Leave of Court—When necessary.—[1] Suit filed after filing of insolvency petition but before adjudication — Leave of Court is necessary. 1935 Mad 817 (821) [A I R V 22] : 58 Mad 1032 (DB).

[But see 1940 Rang 234 (235) [AIR V 27] : 1940 Rang L R 396 (DB). (Suit or legal proceeding commenced before order of adjudication, whether before or after presentation of insolvency petition is not invalid without leave)].

[2] Where a creditor seeks any relief against his debtor by way of suit which is intended to

Section 28 — Note 16 *(contd.)*

secure, directly or indirectly, the realization of his debt in the insolvency proceeding, leave of the Insolvency Court is necessary before institution of such a suit. 1938 Lah 856 (858) [AIR V 25] ✣ 1940 Rang 289 (290) [AIR V 27] : 1940 Rang L R 544 (DB). (Suit to set aside a sale by the receiver.) ✣ 1915 Mad 1076 (1076) [A I R V 2] (DB) ✣ ('11) 5 Sind L R 80 (82) (DB).

[3] A suit to recover a debt contracted after filing insolvency petition but before adjudication is not maintainable without the leave of Court. 1932 Bom 511 (512) [AIR V 19].

[4] A suit for arrears of rent against a tenant who is adjudicated insolvent is not maintainable without the leave of Court. ('12) 34 All 121 (122) (DB).

[5] A depositor is forbidden from instituting a suit for money deposited with insolvent except with the leave of the Court. 1936 Oudh 236 (237) [AIR V 23] : 11 Luck 731.

[6] Suit against undischarged bankrupt in respect of debt mentioned in list attached to his application and of which notice was duly served on creditor is not maintainable without leave of insolvency Court. 1918 Oudh 32 (32) [A I R V 5] : 20 Oudh Cas 304.

[7] Insolvent's discharge refused—Leave to sue him is still necessary. 1928 Rang 109 (110) [A I R V 15] : 6 Rang 27 (DB). (A I R 1926 Rang 2, *Overruled*).

[8] Since the insolvency proceedings do not terminate with the order of discharge of the insolvent, his creditor would be precluded by S. 28 (2) from enforcing his remedy in any other Court or in any other manner, except in the Insolvency Court and in the manner provided in the Insolvency Act. 1939 Nag 103 (105) [AIR V 26] : ILR (1939) Nag 478.

[9] A decree-holder of the insolvent or a creditor who has been a party to the insolvency proceedings, cannot bring a declaratory suit without the leave of the Court. 1933 Nag 217 (217) [A I R V 20] ✣ 1917 Low Bur 60 (60) [AIR V 4] : 9 Low Bur Rul 47 ✣ 1930 Rang 317 (319) [AIR V 17] : 9 Rang 7 (DB).

[10] Where a person obtained a decree against the members of a joint Hindu family after two of them had been adjudicated insolvents without obtaining the leave of the Court, held that the suit offended against the provisions of S. 28. 1936 Mad 57 (57) [A I R V 23].

[11] Joint Hindu family — Decree against father alone—Insolvency of father—Creditor cannot proceed against son's share without leave of Court. 1943 Mad 94 (96) [AIR V 30] (DB).

[12] Hindu insolvent — Claim by mother and unmarried sisters for arrears of maintenance, marriage expenses, residence and clothing — Suit without leave of Court is barred. 1940 Mad 951 (952) [AIR V 27].

[13] A suit by an official receiver cannot be referred to arbitration without the leave of Court. 1914 Sind 59 (59, 60) [A I R V 1] : 8 Sind L R 60.

[14] Execution petition cannot be filed without leave of Court against a person whose property is vested in the official receiver. 1936 Mad 284 (286) [AIR V 23] : 59 Mad 759 (DB).

[15] Debtor adjudicated insolvent—Creditor cannot without leave of Court file execution application against him with prayer for his arrest. 1935 Mad 239 (240) [A I R V 22] (DB) ✣ 1936 Oudh 177 (177, 179) [AIR V 23]: 11 Luck 720 (DB) ✣ 1928 Lah 258 (259) [AIR V 15] ✣ 1927 Mad 919 (920) [A I R V 14] : 50 Mad 977 ✣ 1926 Mad 510 (510) [AIR V 13] ✣ 1925 Mad 915 (915) [A I R V 12] (FB) ✣ 1923 Mad 487 (487) [AIR V 10] (DB).

[But see 1932 All 188 (189) [AIR V 19] : 54 All 416 : 34 Cri L Jour 18 ✣ 1929 Bom 135 (135) [A I R V 16] (DB) ✣ 1929 Lah 453 (454) [AIR V 16] ✣ 1927 All 418 (419) [AIR V 14] : 49 All 201 (DB).]

[16] An application under S. 25, Madras Debt Conciliation Act, comes within the mischief of S. 28 (2) and cannot be made without the leave of Court. 1938 Mad 808 (808) [AIR V 25].

17. Leave of Court — When not necessary.—[1] A suit by a creditor under S. 53 of the Transfer of Property Act to set aside an alienation made by the debtor before he is adjudged an insolvent is maintainable without the leave of the Insolvency Court. 1941 Mad 903 (905) [AIR V 28]: ILR (1942) Mad 1 (FB). (A I R 1919 Mad 167, *Overruled*.) ✣ 1946 Mad 25 (29, 30) [AIR V 33 C 11] : ILR (1946) Mad 486 (DB).

[But see ('28) 110 Ind Cas 386 (386) (Lah).]

[2] Insolvency of Hindu father — Son's shares in family property do not vest in receiver—Son's creditor can attach son's share without leave of Court. 1939 Mad 572 (573) [A I R V 26] : ILR (1939) Mad 585 (DB).

[3] Hindu father adjudicated insolvent—Suit against undivided sons for debt incurred by father for family benefit — Leave of Insolvency Court is not necessary. 1942 Mad 360 (361) [A I R V 29] (DB).

[4] A creditor is not prohibited from filing a suit even as against a person who is jointly indebted with the insolvent and whose property could not have vested in the official receiver. Consequently where after the adjudication of the father, there is a severance of status between the father and the son, leave of the Insolvency Court is not necessary for a suit against the son. 1942 Mad 327 (329) [A I R V 29] (DB).

[5] Suit for damages for use and occupation or for rent for period subsequent to defendant's adjudication as insolvent—Not barred by S. 28 (2) on ground that no leave of Court was obtained. 1945 Mad 239 (240) [A I R V 32].

[6] Judgment-debtor adjudicated insolvent —Suit by decree-holder under O. 21, R. 63, Civil P. C. against successful objector — Objector alleging to have purchased property from judgment-debtor prior to attachment effected before insolvency — Leave of Court held was not necessary. 1929 Mad 323 (326) [A I R V 16] (DB).

[But see 1927 Mad 201 (203) [AIR V 14].

[7] Declaratory decree obtained by sons of judgment-debtor — Judgment-debtor adjudi-

Section 28 — Note 17 *(contd.)*
cated insolvent before decree — Appeal by decree-holder without leave—Appeal held not barred. 1932 All 382 (383) [A I R V 19] : 54 All 532 (DB).

[8] A stranger to the insolvency proceedings can file a declaratory suit against the insolvent without the leave of the Court. 1933 Nag 217 (217) [A I R V 20].

[9] Composition deed—Sureties agreeing to pay creditors — Annulment of adjudication—Plaintiff's debt disputed by sureties—Plaintiff bringing suit on disputed claims — Leave of Court held was not necessary. 1935 Mad 929 (931) [A I R V 22] (DB).

[10] There is no statutory provision under which leave is necessary to file a suit against official receiver. 1924 All 40 (43) [AIR V 11]: 46 All 16 (DB)+1919 Cal 781 (781, 782) [AIR V 6] (DB)+1924 Pat 259 (260) [AIR V 11]: 2 Pat 724 (DB)+1917 Sind 22 (23) [A I R V 4] : 10 Sind L R 179 (DB).

[1] A stranger to the insolvency proceedings is not required to obtain the leave of the Court before bringing an action in respect of a property seized by the receiver on the ground tnat it belonged to him and not to the estate of the insolvent. 1930 Lah 708 (709) [AIR V 17] (DB).

[12] Partition suit against *A* and debtor—Debtor adjudged insolvent during pendency of suit—Suit decreed against both with costs —Suit by *A* against official receiver for recovery of half of costs paid by *A*—Leave of Court held was not necessary as amount of costs was not debt provable in insolvency. 1937 Mad 725 (727) [AIR V 24].

[13] The obtaining of leave is a matter between the receiver and the Court and the absence of leave is not a valid defence to a suit by the official receiver 1922 Mad 51 (53) [AIR V 9] : 45 Mad 167 (DB).

[14] Creditors who sue the divided sons for realisation of the pre-partition debts of the father who was adjudged insolvent cannot be said to be seeking a remedy against the property of the insolvent in respect of the debt within the meaning of S. 28 (2) of the Act. Therefore leave of the Insolvency Court is not necessary for a creditor's suit against the divided sons of the insolvent debtor. 1957 Andh Pra 692 (700) [(S) AIR V 44 C 223] (DB).

[15] An appeal is a continuation of the suit and not a commencement of a new proceeding. Where a suit has been filed before the adjudication of the debtors as insolvents, there can be no question of seeking leave from the insolvency Court under S 28 (2) of the Provincial Insolvency Act and of making the Receiver-in-insolvency a party to the suit and consequently it is not necessary to take the leave of the Court or to make the Receiver a party to the appeal, filed in the suit after the adjudication. 1960 Cal 469 (473) [A I R V 47 C 126 (DB).

[16] The words 'suit or other legal proceeding' in S. 28 (2) mean suit or other legal proceeding against the property of the insolvent, which vests in the Receiver and the remedy against which is controlled by that subsection. Section 28 (2) has no application in respect of any suit or appeal which is merely a personal action against the insolvent, for example, a suit for bare claim of money against the insolvent. 1960 Cal 469 (473, 474) [AIR V 47 C 126] (DB).

[17] Collusive and fraudulent decree and execution — Possession delivered to auction-purchaser—Suit by other creditors for declaration that decree and all other proceedings are null and void Suit maintainable — Leave of Insolvency Court under S. 28 (2) not necessary as no remedy was sought in the suit against properties of the insolvent. 1959 Mad 141 (142) [AIR V 46 C 44] (DB).

18. Effect of not obtaining leave. — [1] The leave of the Insolvency Court for the institution of a suit or other proceedings against the insolvent or his property is a condition precedent to the right of action and must be obtained before the institution of the suit or proceedings 1937 Mad 667 (669) [AIR V 24] : ILR (1937) Mad 841 (DB) + 1939 Bom 344 (345) [AIR V 26] : ILR (1939) Bom 493+ 1929 Mad 323 (333) [AIR V 16] (DB) + 1927 Mad 925 (927) [AIR V 14] : 51 Mad 833 (DB).

[2] It is clear from the terms of S. 28 (2) that as on the making of an order of adjudication the estate vests in the Receiver no suit shall be commenced except with the leave of the Court The terms of the section are mandatory and there can be no question of any waiver of objection as to the maintainability of the suit on the part of the parties so as to nullify the effect of the section. The suit is not maintainable unless leave of the Insolvency Court is obtained prior to its institution. 1955 Andh 115 (115, 116) [(S) AIR V 42 C 43].

[3] Leave of the Insolvency Court under S. 28 (2) of the Act is essential to the institution of a suit or other legal proceeding of the nature described in the sub-section. Want of leave before the institution of the suit or proceeding entails its dismissal and cannot be cured by the grant of leave subsequently. But the fact that the leave of the insolvency Court was not obtained for the institution of a suit by a creditor under S 28 (2) does not render the decree passed therein a nullity. *Obiter* : — There may be some ambiguity in the word "thereafter" as used in S 28 (2) but it must be held that the doctrine of relation back in S. 28 (7) applies to the first part of S. 28 (2) and not to the second part and that a suit instituted after the filing of an insolvency petition and before adjudication does not become incompetent or unsustainable by reason of want of leave of the insolvency Court. Section 29 of the Act refers to such a suit and the Court in which it is instituted has to act under the provisions of that section, if and when an order of adjudication is made by the insolvency Court. 1957 Andh Pra 692 (699) [(S) AIR V 44 C 223] (DB).

[4] The want of previous sanction is a defect fatal to the suit and subsequent leave cannot validate it. 1937 Mad 667 (669 [A I R V 24] : ILR (1937) Mad 841 (DB) + 1929 Mad

Section 28 — Note 18 (*contd.*)

323 333 [AIR V 16] (DB) ✣ 1927 Mad 925 (927) [AIR V 14] : 51 Mad 833 (DB) ✣ 1933 Nag 217 (217) [AIR V 20] ✣ 1918 Sind 38 (39) [AIR V 5] : 12 Sind L R 20 (DB).

[But see 1942 Lah 289 (295) [AIR V 29] : ILR (1942) Lah 517 (FB) ✣ 1915 Sind 34 (34, 35) [AIR V 2] : 9 Sind L R 34]

[5] The annulment of the adjudication has the effect of vesting the title in the property retrospectively The attachment made after the insolvency of a partner of the property belonging to him would become valid by reason of subsequent annulment. Similarly, if the suit was instituted without leave of the Court during the pendency of the insolvency proceedings its maintainability could not be questioned after the insolvency proceedings terminated. The consequence of annulment is to wipe out altogether the insolvency and its effect except to the limited extent reserved under the section. The alienations made of property, movable or immoveable, by the insolvent after adjudication, the decrees and execution proceedings suffered by him, the status of an agriculturist notwithstanding the property is taken away and transferred from him are all restored and validated with effect from the date on which the insolvency petition was filed. 1954 Mad 604 (612, 613) [AIR V 41 C 220] : I L R (1954) Mad 80 FB. (AIR 1951 Mad 63 (FB), *Approved*; A I R 1929 Mad 480, *Overruled*.)

[6] If the leave of the Court is not obtained, the suit must necessarily be dismissed. 1939 Bom 344 (345) [AIR V 26] : I L R (1939) Bom 493 ✣ 1936 Mad 984 (984) [AIR V 23].

[7] A suit brought without the leave of the Insolvency Court is nullity. 1922 Nag 108 (109) [AIR V 9] : 19 Nag L R 126. (Decision in such suit is not res judicata.) ✣ 1928 Lah 738 (739) [AIR V 15]. Award obtained without leave.) ✣ 1945 Mad 388 (389) [AIR V 32]. (Suit filed without leave — Decision not binding on receiver.)

[But see 1933 Mad 917 (919) [AIR V 20] : (Suit instituted without leave— Decree passed in suit is not nullity.)]

[8] The prohibition contained in S. 28 (2) is aimed at creditors to whom notice of the insolvency proceedings has been given, and does not affect persons having claims against the insolvent to whom no notice whatever of the insolvent's application has been delivered. 1914 Oudh 322 (324) [AIR V 1] : 17 Oudh Cas 267.

[9] A firm was adjudicated insolvent, but no schedule of creditors was prepared, nor was notice of the insolvency proceedings served on all creditors. One of the creditors, who was not served with notice brought a suit against the insolvent, but the suit was dismissed on the ground that no permission of the Court was obtained from the Court — *Held* that the suit was not barred. 1920 Lah 42 (43) [AIR V 7] ✣ ('35) 69 Mad L Jour 793 (794) ✣ 1924 Nag 300 (301) [AIR V 11] : 21 Nag L R 9.

[10] Where a defence as to want of leave is not specifically taken in the lower Court, the objection must be deemed to have been waived and cannot be pressed in appeal. 1936 Lah 286 (288) [AIR V 23] (DB) ✣ 1933 Mad 917 (919) [AIR V 20] ✣ 1929 Mad 323 (328) [AIR V 16] (DB).

[11] Leave to continue a suit filed after order of adjudication without the leave of the Insolvency Court cannot be granted subsequently under S. 29 of the Act, as it applies to suits which are already pending when the order of adjudication is made and as the granting of such leave would render the provisions of S. 28 (2) nugatory. 1937 Mad 667 (669, 671) [AIR V 24] : I L R (1937) Mad 841 (DB) ✣ 1928 Lah 28 (29) [A I R V 15] : 8 Lah 593 (DB).

[But see 1932 Bom 344 (349, 351) [A I R V 19] : 57 Bom 623.]

[12] The auction sale of the property in execution of the decree against the insolvent without the leave of the insolvency Court and without impleading the receiver to represent the estate is valid even when the order of adjudication which then existed has been annulled afterwards without ordering the vesting of the property in any person. Therefore, when an Assignee of the rights of such an auction-purchaser seeks redemption of the mortgage with respect to the property sold he is entitled to a decree. 1955 Trav Co 241 (242) [(S) AIR V 42 C 99] : ILR (1955) Trav-Co 68 (DB).

19. Rights and disabilities of insolvent. — [1] An insolvent after his adjudication is not entitled to institute a suit in regard to the property which has vested in the official receiver. 1939 Mad 196 (197) [A I R V 26] ✣ ('38) 40 Bom L R 956 957) ✣ ('34) 60 Cal L Jour 581 (583) (DB).

[2] An undischarged insolvent is entitled to maintain a suit for a debt which has become due since the adjudication order was made against him subject to the intervention of the of the receiver. 1924 Pat 667 (668) [A I R V 11] (DB) ✣ ('12) 6 Low Bur Rul 174 (175) (DB).

[3] An insolvent is entitled to sue for defamatory words whether published before or after his adjudication. Though in a suit for damages for defamation of the insolvent a part of the claim refers to injury to the insolvent's estate, the insolvent may still carry on the suit as the right of action for the injury to his character and reputation remains vested in him. 1932 Sind 33 (33, 34) [A I R V 19] : 26 Sind L R 21

[4] A suit for a declaration by the plaintiff that his property is not liable to attachment and sale under S. 44, Co-operative Societies Act, is not barred by S. 28 by reason of his being adjudged insolvent before the filing of the suit 1927 Nag 217 (219) [AIR V 14] : 23 Nag L R 66.

[5] Section 28 does not affect the liability of the insolvent to be sued or the right of the creditor to sue him in respect of a debt not provable under the Act. 1925 Nag 77 (78) [AIR V 12] : 22 Nag L R 118.

[6] Suit by plaintiff to re-partition property belonging to him and his brothers — Plaintiff adjudicated insolvent — Suit dismissed —

Section 28 — Note 19 *(contd.)*
Refusal by receiver to appeal — Plaintiff held not entitled to appeal. 1943 Mad 662 (663) [AIR V 30].

[7] Receiver in possession of property — Application for release of property dismissed — Appeal without impleading receiver is not maintainable. 1919 Lah 363 (363) [AIR V 6].

[8] A judgment-debtor who has been adjudicated insolvent cannot maintain an appeal against a decision in execution proceedings that certain properties belonging to him were fraudulently concealed by him from his creditors. The only person who can appeal against such a decision is the official receiver. 1919 Cal 1006 (1006) [AIR V 6] (DB).

[9] If during the pendency of a suit a party is adjudicated an insolvent, he is not disqualified by reason of his insolvency from appealing. After the annulment of the order of adjudication he is entitled to continue the appeal. 1929 Bom 202 (204) [AIR V 16] (DB)✠ 1921 Mad 402 (402) [AIR V 8] (DB).

[10] A person who has preferred an appeal claiming a certain amount as damages, for wrongful appropriation of crops by the respondent in breach of an agreement is entitled to prosecute the appeal even after his adjudication as insolvent. 1933 Nag 6 (9) [A I R V 20] : 28 Nag L R 340.

[11] An insolvent is entitled to make an application for execution of a decree obtained by him before an order for his adjudication was passed. 1939 Mad 196 (198) [AIR V 26].

[12] After a receiver has been appointed, an insolvent has no locus standi to maintain an application under S. 28 (2) for having it declared that a sale in execution of a decree was void for want of leave of the Insolvency Court. 1935 Cal 391 (391) [A I R V 22] (DB).

[13] Objection under Cl. (2) to mortgage by insolvent cannot be raised by person, who does not represent creditors or receiver but only insolvent-mortgagor. 1921 All 232 (233) [AIR V 8] : 43 All 555 (DB).

[14] Where the insolvent heirs of a Muhammadan testator signify their consent to a bequest in the will in favour of another heir, their consent validates the bequest and the property vests in the legatee and in the receiver. 1920 All 243 (244) [A I R V 7] : 42 All 593 (DB).

[15] An alienation by an undischarged insolvent of property belonging to him is not void but only voidable at the option of the receiver or the Court. 1933 All 449 (450) [AIR V 20] : 55 All 503 (DB).

[16] It is competent for a partner of an undissolved firm, who is adjudicated insolvent, to execute a deed of assignment on behalf of the firm validly transferring their interest in the decree in favour of the assignee. 1928 Sind 71 (72) [AIR V 15] : 26 Sind L R 153.

[17] During the subsistence of the receivership or of the order of adjudication, the rights of the insolvent are in a state of suspense or abeyance. They are not extinct. Whatever the insolvent may do and whatever proceedings may be taken against him will no doubt not bind the receiver or the insolvency Court. But by his acts and by the proceedings to which he is a party the insolvent is bound and on the disappearance of the obstacle by the accomplishment of the purpose or its becoming impossible by an unconditional order of annulment the acts and proceedings will bind the property that reverts to him. 1955 Trav-Co 241 (243) [(S) AIR V 42 C 99] : ILR (1955) Trav Co 68 (DB).

[18] The provision under S. 28 is for purposes of administration of the estate for discharging the debts of the insolvent. If that purpose is accomplished by discharge of all liabilities in full or becomes impossible on account of annulment of adjudication without a vesting order under S. 37, the insolvent gets back the property in his original right. No transfer from the receiver to the insolvent is needed. Nor would there be an interregnum when the insolvent had no right. 1955 Trav-Co 241 242, 243) [(S) A I R V 42 C 99] : I L R (1955) Trav-Co 68 (DB).

[19] As there is no prohibition under the Insolvency Act for an insolvent borrowing or entering into contracts giving rise to a liability, it necessarily follows that a promissory note debt incurred by him after presentation of his petition but before adjudication is a post-insolvency debt and is not provable in insolvency. Consequently the promissory note debt and the subsequent decree and execution proceedings cannot be said to be absolutely without any effect on the insolvent's estate on the ground that the decree on the foot of that promissory note was obtained without the leave of the insolvency Court and without the Official Receiver being made a party. 1954 Mad 508 (510) [AIR V 41 C 188] : ILR (1954) Mad 484 (DB).

[20] An undischarged insolvent is not legally incapacitated from incurring any debt and a creditor is not prevented from recovering on the basis of a debt so incurred by way of a suit or otherwise. 1951 Mad 1045 (1047) [AIR V 38 C 357] : ILR (1952) Mad 312 (DB). (Judgment in Application No. 552 of 1949 in I. P. No. 71 of 1940, *Overruled*.)

20. Position of receiver. — [1] Whereas an official assignee in a Presidency-town may sue and be sued as such without mentioning his name under S. 83, Presidency-Towns Insolvency Act, there is no such corresponding section under the Provincial Insolvency Act. 1918 Mad 422 (424) [AIR V 5].

[2] When the property of the insolvent has vested in the receiver, after such a receiver has been appointed by the Insolvency Court, the receiver completely represents the insolvent under the law in respect of his properties 1935 Cal 391 (391) [AIR V 22] (DB).

[3] The official receiver is not a mere representative of the creditors of the insolvent's estate but is also an officer of the Court. 1919 Sind 42 (45) [AIR V 6] : 12 Sind L R 61.

[4] The relationship between an Official Receiver and the insolvent is nothing akin to that between a principal and agent. 1957 Mad 1 (3) [AIR V 44 C 1] : ILR (1957) Mad 344 (DB).

Section 28 — Note 20 (*contd.*)

[5] By the operation of S. 28 (7) the insolvency of the insovent relates back to the date of the filing of the application for insolvency and a decree, in a suit for specific performance of an agreement to execute a mortgage filed against him before the application for insolvency, passed during the pendency of the application is not binding on the official receiver if he is not made a party to such suit even though the official receiver is bound by the equities of the insolvent and cannot be executed against him. The official receiver is not a legal representative of the insolvent. The devolution in favour of the official receiver under S. 28 (2) being a devolution by law, S. 52, T. P. Act has no application. The official receiver cannot be impleaded in execution of the decree and no relief can be claimed against him. 1951 Mad 687 (691, 692) [AIR V 38 C 217] (DB).

[6] Insolvency proceedings pending against person—Receiver appointed by Court obstructed in taking possession of property of such person— Obstruction amounts to contempt of Court. ('11) 9 Ind Cas 485 (485) (Sind).

[7] A decision against an official receiver does not necessarily operate as res judicata. 1919 Sind 42 (45) [AIR V 6] : 12 Sind L R 61. (Official receiver not impleaded as representing general body of creditors and not defending suit on their behalf — Ex parte decree passed against him—Decree does not operate as res judicata in subsequent suit by creditors.)

[8] Where, in a suit by creditor to recover a debt secured or otherwise, the defendant-debtor is adjudicated insolvent before decree or thereafter, the plaintiff-creditor seeking to sell the defendant's property must either implead the official receiver before decree or take the necessary steps in execution for the purpose of binding him. Otherwise the sale will not be binding on him as the devolution of interest in such a case is not due to a transfer affected by the doctrine of lis pendens. 1943 Mad 381 (384) [AIR V 30] : I L R (1943) Mad 702 (DB) ✣ 1933 Mad 858 (859) [AIR V 20] ✣ 1917 Mad 98 (99) [AIR V 4] (DB) ✣ 1914 Sind 114 (115) [AIR V 1] : 8 Slnd L R 325.

[*See also* 1923 All 306 (308) [AIR V 10].]

[9] Where a receiver was a party in the trial Court and had acquiesced in the order but was not made a party in appeal, held that the defect was not fatal as the order in appeal was in favour of the receiver. 1922 Mad 439 (440) [AIR V 9] (DB).

[10] Section 28 read with Ss. 51 and 52 of the Act indicates that an attaching creditor of the insolvent's property has no priority over the receiver in insolvency. 1943 Nag 101 (108) [AIR V 30] : ILR (1943) Nag 390 (DB).

[11] Where pending arbitration the defendant is adjudicated an insolvent by an ex parte order and the Court while setting aside the order expressly vests the properties of the insolvent in the Official Receiver the award obtained in the arbitration made behind the back of the receiver could not bind the receiver even though it is filed in Court before defendant is re-adjudicated since the properties continue to vest in the receiver. ('54) ILR (1954) Mad 765 (773) (DB).

[12] A stay order passed by Court takes effect from the date on which it is pronounced and not on the date on which it is communicated to the Receiver and therefore a sale held despite the passing of such a stay order is ultra vires even though the same is not communicated. ('47) 1947 Marwar L R (Civ) 91 (93) (DB).

[13] A combined reading of Ss. 28 (2) and 59 (g) makes it clear that when the property of the insolvent is vested in the Official Receiver he can mortgage or sell the property or renew the existing mortgage for a further term. Under Cl. (g) of S. 59 of the Act the Official Receiver has power to acknowledge a binding debt of an insolvent. 1957 Mad 1 (2) [A I R V 44 C 1] : I L R (1957) Mad 344 (DB). (AIR 1951 Mad 814, *Overruled.*)

[14] It is an elementary prinicple of insolvency law that subject to the special provisions enacted by the insolvency statute—Ss.51 to 54—the official receiver merely steps into the shoes of the insolvent and can claim no higher rights than the insolvent. Where under a contract of lease entered into by the insolvent he was bound to make adjustment towards rent a certain amount received by him at the time of entering into the lease the official receiver as the representative of the insolvent, is equally bound to give effect to the contract. He can have no real legal basis for disputing the adjustment or to claim that the adjustment would not be binding upon him. 1958 Mad 486 (488) [AIR V 45 C 164].

21. Reputed ownership—Sub-section (3). —[1] The doctrine of reputed ownership applies only when the goods are proved to be in the possession of the insolvent with the consent of the true owner — A countermanding order to deliver the goods to the vendor re-vests the property in the vendor before it gets into the possession of the insolvent and thus prevents the applicability of the doctrine. 1936 Sind 106 (108) [AIR V 23] : 30 Sind L R 148.

[2] An oil press worked by kerosene oil engine is not goods within the meaning of this section though it is capable of being removed without damage to the building. ('12) 6 Low Bur Rul 44 (45) (DB).

[3] Where the local custom of the trade was that lawful possession as pledgees of a railway receipt entitled the holder of that receipt to get possession of the goods from the carrier and to retain the goods as security for the moneys advanced on pledge of the railway receipt, *held* that the custom really created a charge on the goods themselves in the possession of the carrier and as soon as the pledge was made the insolvent pledgor's right to get delivery from the railway company ceased. The goods were no longer in the possession, order or disposition of the insolvent within the meaning of S. 16 (3) of the old Act. 1916 Mad 750 (751) [AIR V 3] (DB).

[4] Goods entrusted to a commission agent for sale are his property of which a receiver can take possession. But if the agent is not

Section 28 — Note 21 *(contd.)*
the reputed owner, the principal is entitled to have the goods restored to him. ('11) 5 Sind L R 78 (79).

[5] Where an undischarged insolvent jeweller who had been entrusted with certain jewels by a stranger for sale, gave them to a third person to sell and the latter did not return the jewels or their value—*Held*, that as the insolvent's position was only that of a bailee, the title to the jewels did not pass to the receiver and the insolvent was, therefore, entitled to maintain a suit for the return of the jewels or their value. 1930 Mad 913 (915) [AIR V 17] : 54 Mad 5 (FB).

22. Vesting of property held on trust.— [1] Valid trust deed—Subsequent insolvency—Properties vest in trustees and do not vest in receiver nor can receiver administer estate in accordance with terms of trust. 1935 P C 104 (107) [AIR V 22].

[2] Firm supplied with money to be invested in other firms —Slowly firm investing the amount in their own business — Firm becoming insolvent — Death of lender — Share in fund allotted on partition to minor sons of lender — *Held*, that insolvents held funds as agents and were trustees. 1937 P C 296 (297, 298) [AIR V 24]: 64 Ind App 343: 31 Sind L R 678: ILR (1938) Mad 91.

[3] Where jewels are entrusted to a goldsmith for sale they cannot be called the reputed property of the goldsmith They are the jewels of the bailor and so being easily identifiable cannot vest in the receiver in case of the insolvency of the goldsmith. 1930 Mad 913 (915) [AIR V 17]: 54 Mad 5 (FB).

[4] Insolvent holding certain sum under deceased brother's oral will —As per instructions of brother insolvent paying money to brother's widow —Widow giving back money to insolvent under trust deed executed by her—Trust to be managed by several trustees of whom insolvent was one— Beneficiaries mentioned in trust deed— On date of execution of trust deed, insolvent passing receipt for amount to widow—Receipt reciting some provisions of trust deed—Documents held created trust entitling beneficiary to priority under S. 28 (5). 1941 Bom 41 (46, 48) [A I R V 28]: ILR (1941) Bom 42 (DB).

[5] The petitioners deposited a sum of money with their employer as security for due performance of their duties. The employer became insolvent and the petitioners claimed that the employer with regard to the sum deposited, must be treated as a trustee and, therefore, this amount should be paid to them in preference to the claims of the creditors of the insolvent. *Held*, that there was no object of the trust and the employer was not expected to carry out any trust; it was a simple case of deposit by an employee with his employer as security for his good behaviour. Therefore, the depositors must be deemed to be the creditors and the depositee as the debtor, and the relationship of beneficiaries and trustee did not exist in their case. 1937 Lah 444 (445) [AIR V 24].

[6] Where the dominating purpose and intention of the testator in executing the will was to provide for the members of his family and the maintenance and conduct of the charity was only of subsidiary importance — *Held*, that the properties covered by the will were not properties absolutely dedicated to a trust but were only properties burdened with a trust. The properties therefore would vest in the official receiver for the benefit of the creditors and could be sold by the official receiver. 1928 Mad 190 (193) [A I R V 15] (DB).

[7] Insolvency petition admitted— Prior to adjudication insolvent to avoid sale depositing amount under O 21, R 89 Civil P. C. after obtaining money from third person — Third person advancing money only to help relative debtor and not for special purpose only —*Held* no trust was created and deposit vested in receiver. 1943 Cal 555 (558) [A I R V 30]: ILR (1943) 2 Cal 397 (DB).

[8] When an advocate put in a claim to the official assignee for ascertained monies due to him by an insolvent for the work done for the insolvent in a probate litigation in respect of a will of which the insolvent was the executor and the legatee, and he claimed it from the estate of the testator, *held*, that the Insolvency Court was not competent to make an order against the estat of the testator inasmuch as the only estate which was vested in the official assignee was the estate of the insolvent. 1932 Mad 256 (257) [AIR V 19]: 55 Mad 455 (DB).

[9] *A* sold certain properties to *B* reserving the price with *B* for payment of his debts, including a sum of Rs. 800 due to *C*. *A* was adjudicated insolvent and the official receiver claimed the sum of Rs. 800. *C* contended that there was a trust in his favour and he was entitled to the sum in preference to the official receiver —*Held*, (*i*) that there was no trust in favour of *C*; (*ii*) that even if there was a trust, it was open to *A* or the official receiver to revoke the same as it had not been communicated to *C* and the amount was part of the insolvent's assets. 1932 Lah 66 (67) [A I R V 19] (DB).

[10] In a property held by an insolvent wholly in trust for another person he has no beneficial interest and therefore such property cannot be one of his assets liable to distribution upon his own insolvency. 1956 Cal 188 (189) [(S) AIR V 43 C 65] (DB).

23. After-acquired property — Sub-section (4). — [1] All property acquired by an insolvent subsequent to the date of adjudication and before his discharge vests in the official receiver the moment the acquisition is made. The word "forthwith" in S. 28 (4) leaves no room for any other interpretation. No actual intervention by the official receiver is necessary. 1941 Mad 713 (714, 715) [AIR V 28]: ILR 1941 Mad 824 (DB) ✣ 1935 All 675 (676) [AIR V 22 : 58 All 132 (FB) ✣ 1922 All 448 (448) [AIR V 9]: 44 All 617 (DB). Receiver can sue for mere declaration without claiming possession .✣1936 Bom 164 164 [AIR V 23]: 60 Bom 141 (DB) ✣ 1934 Lah 809 (811) [AIR V 21]: 16 Lah 392 (DB) ✣1935 Mad 694

Section 28 — Note 23 *(contd.)*

(695) [AIR V 22] * 1926 Rang 179 (179, 180) [AIR V 13]: 4 Rang 125 (DB).

[**But see** 1924 Mad 223 (224) [A I R V 11] (DB) * 1927 Nag 16 (17) [AIR V 14] * 1917 Nag 147 (149) [AIR V 4] * 1929 Pat 97 (98) [AIR V 16]: 8 Pat 478 (DB).]

[2] The provisions of S. 28 (4) exclude the application of the doctrine in (1890) 25 Q. B. D. 262 that the property acquired by the insolvent after the order of adjudication and before the discharge does not vest in the receiver unless and until the receiver intervenes. 1937 Sind 306 (308) [A I R V 24]: 31 Sind L R 506 (DB).

[3] The effect of the insertion of the word "forthwith" in S. 28 (4) has been to sweep away the Court's attempt to postpone the vesting. 1938 Nag 408 (408) [A I R V 25]: I L R (1939) Nag 530 (DB) * 1936 Bom 164 (164) [AIR V 23]: 60 Bom 141 (DB).

[4] Where no receiver is appointed, the future property which devolves upon the insolvent after the date of the application vests in the Court. 1942 Pat 307 (308) [AIR V 29] (DB).

[5] The alternative in the section applicable to vesting in the Court is inserted to provide for the case of a receiver not being appointed at the same time as the adjudication of insolvency and to foreclose an argument that vesting is suspended until the actual appointment of a receiver. The Court only acts through a receiver, and any estate acquired by or devolving on an insolvent is vested in him as from the date of acquisition or devolution whatever the date of the receiver's actual appointment. 1927 P C 108 (109) [AIR V 14]: 54 Ind App 190: 54 Cal 595.

[6] Section 28 (4) refers to property which the insolvent acquires by his own efforts, such as his wages or salary, or to property which devolves on him by rule of law, such as by inheritance. It is not intended to apply to a case where property which does not come under the section is sold by some one who has a right to sell it. On such sale the price does not become the property of the insolvent nor does it vest in receiver. 1935 All 279 (280) [AIR V 22].

[7] The words "is acquired by or devolves on" in S. 28 (4) are very wide words obviously intended to cover all the ordinary ways in which the estate of the insolvent may be increased from time to time during his insolvency and therefore cover the passage of property by survivorship. 1946 Mad 503 (504) [AIR V 33 C 257]: ILR (1947) Mad 44 (DB).

[8] A decree for costs obtained by an insolvent after the order of adjudication vests in the official receiver under S. 28 (4) and the insolvent is not competent to transfer or assign it. 1941 Mad 713 (718) [A I R V 28]: ILR (1941) Mad 824 (DB).

[9] Sums periodically falling due under a right already acquired. such as an annuity or an allowance or instalments due on an instalment bond or decree can hardly be treated as after-acquired property in respect of instalments falling due after the insolvency. The right under which such payment is claimed is acquired before the insolvency though some of the instalments fall due after it. 1932 Mad 250 (252) [AIR V 19] (DB).

[10] Insolvent acquiring property under will — It is available for distribution among his creditors—Mere fact that order of adjudication which was passed under the old Act was passed on single application presented by three debtors, namely, insolvent, his father and brother, makes no difference. 1939 Pat 18 (18) [AIR V 26] (DB).

[11] Debtor adjudged insolvent in 1915—Receiver taking possession of his estate, declaring final dividend and concluding insolvency by sending papers relating to insolvency to District Court — Debtor in subsequent years making acquisitions, purchasing property and selling it to another person—Conduct of creditors and receiver amounted to representation that insolvency ended and they were estopped from challenging sale by insolvent made in subsequent year. 1939 Mad 273 (274) [AIR V 26] (DB).

[12] The plaintiff who was adjudicated insolvent in 1919 had not obtained his discharge by 1929 when, on a widow's death, her husband's estate devolved on him as next reversioner. Subsequently, he was granted an absolute discharge on August 15, 1931. No creditors, however, came forward to prove their debts or take any steps between 1919 and 1929, nor did the official receiver take any steps. After absolute discharge in 1931, the plaintiff instituted a suit against the widow's alienees for possession of properties —*Held*, that the plaintiff was entitled to maintain the suit. 1941 Mad 345 (350) [AIR V 28] (DB).

[13] Where under misapprehension the official receiver made a report to the District Judge that the insolvent's assets were completely disposed of and the order of discharge was passed, but in fact certain property had devolved on the insolvent before the order of discharge — *Held*, that the report of the receiver did not affect his right to deal with such property as it had vested in him before the order of discharge. 1937 Lah 87 (88) [AIR V 24] : 17 Lah 775.

[14] Once a receiver in insolvency intervenes in regard to an after-acquired property of an undischarged insolvent that property vests in him and he cannot by withdrawing his intervention, divert himself of the property and revest it in the insolvent. 1938 Mad 420 (421) [A I R V 25] : ILR (1938) Mad 578 (FB).

[15] Property acquired before discharge lost after adjudication — Right to sue trespasser — Insolvent has right to possession against all world except official assignee—His suit against trespasser held maintainable. 1955 N U C (Assam) 2809 [AIR V 42].

[16] Once it is established that the suit relates to after-acquired property it must be held that the suit by the insolvent cannot be maintained irrespective of the question whether the Receiver intervenes or not. 1955 Nag 47 (49) [(S) AIR V 42 C 14] : ILR (1955) Nag 970.

Section 28 — Note 23 *(contd.)*

[17] By reason of the vesting under S. 28 (4) the judgment-debtor becomes completely divested of any interest or title in the property which consists of his salary. By operation of law, the title of the Court or the receiver in insolvency is absolute and the judgment-debtor is no longer the owner of his own salary. In these circumstances, although the insolvency Court has chosen to realise only a small portion of the salary of the judgment-debtor, it is not open to the decree-holder to attach the remaining portion of the attachable part, though his debt came into existence after the date of the order of adjudication. The vesting which is mentioned in sub-s. (2) of S. 28 of the Provincial Insolvency Act is necessarily a vesting againt the whole world and in the second part of that sub-section a limited right is given to creditors whose debts are provable under the Act to pursue their remedy in the ordinary Court with the leave of the insolvency Court. No such exception has been made in favour of creditors whose debts are not provable before the insolvency Court. 1959 Cal 160 (161) [AIR V 46 C 41] (DB). (AIR 1925 Oudh 668, *Dissented from.*)

[18] Pronote devolved on insolvent on his wife's death—Suit brought by insolvent—Receiver not impleaded — Suit is not maintainable—Permission to implead receiver beyond limitation cannot be granted—Rule of English law that insolvent can take action himself before intervention of Receiver not applied in India. 1953 Nag 227 (227, 228) [AIR V 40 C 89]. (A I R 1924 Mad 223, *Dissented from.*)

[19] The prohibition contained in sub-s. (2) of S. 28 is only in respect of independent legal proceedings being taken by the ordinary creditors of the insolvent against his property after it has become vested in the Court or in the Official Receiver as a result of the order of adjudication. There is no provision barring the insolvent from commencing or continuing any legal proceeding against his debtors. On the other hand sub-s. (4) of S. 28 clearly indicates that no such prohibition is contemplated by the Legislature. The acquisition of property by the insolvent after the date of the adjudication order could very well be by instituting or continuing the necessary legal proceedings in that direction. His liberty to commence or continue such legal proceedings cannot cause any prejudice to the insolvency proceedings against him, because any property acquired by him as a result of the proceedings commenced or continued by him will forthwith vest in the Insolvency Court or the Official Receiver. 1957 Trav-Co 241 (243) [AIR V 44 C 90] : I L R (1956) Trav-Co 575 (DB).

24. Property exempted under Civil P. C. —Sub-section (5). — [1] House of agriculturist-insolvent does not vest in the official receiver. 1933 Lah 1010 (1010) [AIR V 20].

[2] Clause (5) cannot be construed as meaning that it is not the whole property but only the property which is liable to attachment and to sale, under the first clause of section 60, C. P. Code, which vests in the official receiver. The first clause of section 60, C. P. Code, does not refer to property liable to attachment but liable to attachment and to sale. 1925 Sind 18 (20) [A I R V 12] : 17 Sind L R 334 (DB).

[3] Large-landed proprietor is not entitled to claim exemption from attachment and consequent vesting in the official receiver of a large building used for his residence, which is not necessary for effective cultivation, though he may have no other source of income except agriculture. 1926 Mad 350 (350, 351) [AIR V 13] : 49 Mad 227 (DB).

[4] Where the residential house of the insolvent was not exempt from attachment and sale at the time when it became vested in the official receiver but before the Official Receiver proceeded to sell it S. 60 (1) (ccc), C. P. Code, as amended by the Punjab Act, XII of 1940, came into force the insolvent would be entitled to the exemption of his residential house from attachment and sale under S. 60 (1) (ccc), C. P. Code, as amended by Punjab Act, XII of 1940, and the receiver's power to sell it would subsist no longer. 1943 Lah 19 (21) [AIR V 30] : ILR (1943) Lah 242 (FB).

[5] On an insolvency of a lawyer, his books can be taken possession of by the official receiver. 1937 Oudh 177 (177) [AIR V 24] : 13 Luck 64.

[6] Suit for damages for wrongful appropriation of crops—Plaintiff becoming insolvent—Right of action does not vest in official assignee. 1933 Nag 6 (9) [AIR V 20] : 28 Nag L R 340.

[7] A *wasika* allowance is a political pension within S. 60, Civil P. C., and as such does not vest in the receiver. ('09) 12 Oudh Cas 323 (331) (DB).

[8] An insolvent cannot be ordered to pay a certain amount monthly out of pension received by him from Government for past services, to the receiver. ('36) 164 Ind Cas 747 (748) (DB) (Cal).

[9] To determine whether the salary which has been ordered to vest in the receiver is excluded by the terms of sub-s. (5) of S. 28, it must be seen whether on the date of the order of adjudication the salary was liable to attachment and sale in execution of a decree assumed to subsist on that date. Where therefore, an adjudication order was made on April 3, 1937, the extent of the salary to be excluded from vesting in the receiver shall be determined according to S. 60, Civil P. C. as it stood on that date and not according to S. 2, Civil P. C. (Amendment) Act (IX of 1937). 1938 Cal 325 (326) [AIR V 25] (DB).

[10] Clause (h) of S. 60, Civil P. C. read with S. 28 (5), Provincial Insolvency Act must be held to exempt the insolvent's salary, when it is less than Rs. 100 per month. Consequently, it is not open to the Insolvency Court to attach a rider to the order of adjudication that the insolvent should pay a part of his salary into Court every month, where the salary is below Rs. 100 per month. 1942 Pat 194 (195) [AIR V 29] : 20 Pat 866 (DB). (In

Section 28 — Note 24 *(contd.)*
view of subsequent amendment of S. 60, Civil P. C. reference to clause (h) must now be understood as being to clause (i) of that section.)

[11] Money of insolvent in Government Provident Fund — Official assignee cannot compel insolvent to place same at his disposal for creditors' benefit. 1933 Rang 148 (149) [AIR V 20] : 11 Rang 93.

[12] Provident fund money paid over to insolvent vests in receiver — It ceases to be compulsory deposit within Provident Funds Act (1925), S. 3. 1946 Oudh 11 (13) [AIR V 33 C 6] (DB) ✣ 1935 Bom 396 (397) [AIR V 22] : 59 Bom 517 (DB) ✣ 1938 Nag 408 (409) [AIR V 25] : ILR (1939) Nag 530 (DB) ✣ 1927 Oudh 22 (23) [AIR V 14] : 1 Luck 313 : 29 Oudh Cas 278 (DB).

[13] Where, under Workers Provident Fund Rules, the contract between the Company and its employee contemplates that at all times during the twelve years' employment, the amount contributed by the employee be within the disposal of that contributor, such money, on the making of the order of adjudication of the employee, vests under S. 28 (2) in the receiver. But so far as any money which the Company might have right to claim against the insolvent under R. 18 of Workers Provident Fund Rules, it would be necessary to give effect to that lien before the amount is handed over to the receiver. 1935 Pat 211 (213, 214) [AIR V 22] (DB).

[14] Civil P. C. (1908), S. 60 (1) (e) — Protection under, can be waived—Property held did not fall under S. 60 (1) (c) and even if it fell, protection was waived. 1948 Nag 392 (394) [AIR V 35 C 135] : I L R (1948) Nag 530 (DB).

[15] The property which is granted to a maintenance holder merely in lieu of maintenance with control over the power of disposition thereon, and which property is relinquished in favour of the grantor or his heirs or successors in lieu of payment of maintenance is not subject to attachment and cannot vest in the Official Receiver having regard to the provision in S. 28 (5), Provincial Insolvency Act read with S. 60 (1) (n), Civil P. C. The mere fact that future maintenance accrues by lapse of time, and becomes, as it were, maintenance due, would not make it liable for attachment, as what is exempted under the Civil Procedure Code is property or right. The prinoiple on which exemption is granted in regard to the rights of future maintenance is that a person who is depending on that right for her maintenance should not be deprived of that maintenance, as such deprivation would result in starvation. The general policy underlying exemption in S. 60 clearly indicates the anxiety on the part of the Legislature to ensure a certain minimum income or property to the person concerned, so as not to interfere with what is needed for his existence in this world. 1960 Andh Pra 353 (354) [AIR V 47 C 112]. (AIR 1954 Mad 946, *Dissented from.*)

25. Property exempted under other enactments — Sub-section (5).—[1] Occupancy holding under Agra Tenancy Act cannot be dealt with by Insolvency Court. 1921 All 13 (15) [AIR V 8] : 43 All 510 (FB) ✣ 1938 All 198 (198) [AIR V 25] (DB) ✣ 1922 All 74 (75) [AIR V 9] : 44 All 296 (DB) ✣ 1917 All 10 (11) [AIR V 4] : 39 All 120 (DB).

[2] Occupancy rights under S. 6, Punjab Tenancy Act, cannot vest in the receiver on the adjudication of the occupancy-tenant as insolvent. 1936 Lah 502 (503) [AIR V 23] ✣ 1937 Lah 782 (783) [AIR V 24]. (The duami rights can vest in the official receiver only if they are occupancy rights under S. 5, Tenancy Act or are rights held under some peculiar tenure, outside the Act and are liable to attachment or sale in execution of a decree or order of a Court.)

[3] Under C. P. Tenancy Act no right in insolvent's occupancy holding vests in the receiver. 1937 Nag 242 (242) [AIR V 24] : ILR (1937) Nag 484 ✣ 1934 Nag 231 (232) [AIR V 21]. (Occupancy land cannot be leased out by Insolvency Court even for one year.) ✣ 1917 Nag 197 (197) [AIR V 4] : 13 Nag L R 215.

[4] In the Central Provinces if an owner of sir land is adjudged insolvent and order is passed vesting his property in the receiver, he no doubt loses his right to proprietary rights in the sir land but by the vesting order he becomes the occupancy tenant of the sir land and is entitled to possession of the land. 1929 Nag 338 (339) [AIR V 16] : 26 Nag L R 46.

[5] Palampat land does not pass to the Court on insolvency but its income does so pass, income being property within S. 28. 1942 Nag 83 (84) [AIR V 29] : ILR (1942) Nag 714 (DB).

[6] Under S. 18, Punjab Colonization of Government Lands Act, none of the rights or interests vested in a tenant from Government land to which the Act applies can be attached or sold in execution of a decree or order of a Court. Consequently the receiver in insolvency cannot lay hands on such lands for any purpose whatever. ('40) 42 Pun L R 144 (144).

[7] Service (masjid service) inam lands are inalienable and do not vest on the insolvency of the holder in the official receiver. 1943 Mad 72 (73) [AIR V 30] : ILR (1943) Mad 349 (DB).

[8] Where the insolvent is an ex-proprietary tenant, and holds several ex-proprietary plots, such plots are not, under S. 23, Agra Tenancy Act, attachable and saleable in execution of a creditor's decree. These ex-proprietary plots do not vest in the receiver at all. 1937 All 399 (399, 400) [AIR V 24] (DB) ✣ 1932 All 41 (42) [AIR V 19] (DB).

[9] Property of a member of agricultural tribe which is exempted by virtue of S. 16 of the Bundelkhand Alienation of Land Act (3 of 1903) from liability to be sold in execution of money decree is "exempted from attachment and sale" within meaning of S. 28 (5) and does not vest in receiver in insolvency. 1925 All 467 (467) [AIR V 12] : 47 All 952 (DB) ✣ 1937 All 699 (700, 701) [AIR V 24] (DB) ✣ 1919 All 10 (11) [AIR V 6] : 42 All 142 (DB) ✣ 1937 Pesh 57 (57) [AIR V 24] (DB) ✣ 1936 Pesh

Section 28 — Note 25 *(contd.)*
109 (110) [AIR V 23] (DB). (Case under Punjab Alienation of Land Act, S. 16, which is similar to S. 16, Bundelkhand Alienation of Land Act.)

[**But see** 1933 Lah 250 (251) [AIR V 20]. (Held under circumstances of case sale in insolvency could not be set aside.)✣1930 Lah 1034 (1037) [AIR V 17] : 12 Lah 367 (DB). (Land belonging to member of agricultural tribe liable to attachment under S. 16 — Property vests in receiver.)✣1928 Lah 734 (735) [AIR V 15]. (Do.) ✣ 1921 Lah 44 (45) [AIR V 8] : 2 Lah 78 (DB). (Do.)]

[10] Where members of a notified agricultural tribe are adjudged insolvents for the debt of their father, their land is not liable to sale in execution of a decree under S. 16, Punjab Alienation of Land Act, and because some of the debts were incurred by their father under S. 9, Punjab Debtors' Protection Act, 1936, their land would not be liable for those debts. Thus the land exempt from attachment and sale cannot be taken into account for purposes of S. 28. 1937 Lah 680 (682) [AIR V 24] : ILR (1938) Lah 120 (DB).

[11] The vesting of a debtor's property in the Insolvency Court is impossible so long as the scheme framed under S. 11 (1), C. P. and Berar Relief of Indebtedness Act, 1939, remains in force. 1946 Nag 315 (316) [AIR V 33 C 88] : ILR (1946) Nag 490.

[12] Though under the amended S. 12 (1) (c), C. P. Tenancy Act (1 of 1920) the occupancy tenants have a right to transfer their holding they cannot be directed to transfer it to the Insolvency Court so as to make nugatory the provisions of S. 12 (2) which are intended for the protection of tenants who become insolvents. ('47) ILR (1947) Nag 296 (298) (DB).

[13] Where a tenant coming within the definition of tenant in S. 5 (7), Saurashtra Rent Control Act (1951) is adjudicated insolvent during his tenancy his tenancy rights, which by virtue of S. 15 of that Act are not assignable could not vest under S. 28 (2), Pro. Ins. Act in the Court or the Receiver as property divisible among creditors of the insolvent. 1956 Sau 71 (72) [AIR V 43 C 22].

[14] An insolvent had executed a deed of gift in favour of his son of certain sir land prior to his adjudication in 1955. There was an orange garden on the land yielding a substantial income. A creditor applied under S. 53, Provincial Insolvency Act for annulment of transfer. The application was dismissed on the ground that the property was not liable to attachment and sale by virtue of the bar under S. 155, M. P. Land Revenue Code : *Held* that the bar of attachment and sale created by S. 155, M. P. Land Revenue Code is a bar which is in derogation of the normal right of a creditor to realise his debts out of the properties of his debtor, and therefore that bar must be strictly construed. When S. 155 refers to any land, it cannot possibly apply to the income or usufruct of that land, and, therefore to the extent that the orange garden yields an income from its crop, a receiver could be appointed. To that extent, therefore, that part of the property of the insolvent would under the provisions of S. 28 (2) read with S. 28 (5) of the Provincial Insolvency Act vest in the Insolvency Court and an inquiry under S. 53, so far as the gift deed is concerned, is not barred. 1960 Bom 477 (478) [AIR V 47 C 127].

26. Secured creditor—Sub-section (6).—[1] Section 28 (6) provides that no property over which a secured creditor has a legal charge shall be affected by any of the provisions in the sub-section which precede it. 1923 All 159 (160) [AIR V 10] (DB).

[2] Section 28 (4) excludes secured creditors from the doctrine of reputed ownership contained in sub-s. (3). 1923 All 159 (160) [AIR V 10] (DB) ✣ 1923 Cal 532 (535) [AIR V 10] (DB) ✣ ('13) 7 Sind L R 61 (70, 71) (DB) ✣ ('12) 6 Sind L R 97 (98).

[3] The view, that it is only after a creditor has proved in insolvency that he is a secured creditor that the provisions of S. 28 (6) apply, is clearly erroneous. A secured creditor owes this position to his security, obtained prior to the debtor's insolvency, and not necessarily to any proof in insolvency for his debt. 1930 Bom 11 (15) [AIR V 17] (DB).

[4] The holder of a rent decree is a secured creditor in Oudh. 1929 Oudh 71 (71, 72) [AIR V 16] : 4 Luck 241 (DB).

[5] Defendant depositing amount with plaintiff's pleader under Court's order — Deposit subject to result of pending action—Subsequent insolvency of defendant—Plaintiff as secured creditor is entitled to deposit in preference to general creditors. 1933 Cal 625 (626, 627) [AIR V 20] (DB).

[6] An attaching creditor has no lien or charge upon the debtor's property which he attaches and is not entitled to rank as a secured creditor. ('12) 15 Ind Cas 860 (861) (DB) (Oudh).

[7] Insolvency petition admitted—Prior to adjudication insolvent depositing amount under O. 21, R. 89 after obtaining money from third person—Third person *held* was not secured creditor. 1943 Cal 555 (559) [AIR V 30] : ILR (1943) 2 Cal 397 (DB).

[8] In an ordinary suit for rent against an insolvent tenant, the landlord is in the same position as any other creditor. ('12) 34 All 121 (122) (DB).

[9] Where by the terms of the decree a party to a money suit is a secured creditor, it is not necessary for him to prove in insolvency. 1930 Nag 17 (19) [AIR V 17].

[10] The right of a secured creditor to institute a suit or to proceed with the suit already commenced is not taken away by S. 28 by reason of the adjudication of the mortgagor as insolvent. 1925 Mad 1051 (1052) [AIR V 12] : 48 Mad 750 (DB) ✣ ('21) 63 Ind Cas 91 (91, 92) (All) ✣ 1935 Cal 460 (462) [AIR V 22] : 62 Cal 483 (DB).

[11] The power of a secured creditor to realise his security does not authorise him to secure an out and out sale of the equity of redemption in satisfaction of his own charge decree as the equity of redemption after ad-

Section 28 — Note 26 *(contd.)*

judication vests in the Court under S. 28 (2). 1939 Nag 207 (208) [AIR V 26] : ILR (1939) Nag 540.

[12] Mortgage created prior to mortgagor's insolvency discharged through fresh mortgage to third party after insolvency—Latter mortgage is enforceable. 1921 All 232 (233, 234) [AIR V 8] : 43 All 555 (DB) ✠ 1926 Nag 29 (30) [AIR V 13]. (Latter mortgagee is entitled to possession under his mortgage as against auction-purchaser in insolvency proceedings.)

[13] Section 28 (6) cannot be said to refer to the right of a mortgagee to effect private sale of property. The word "realised" must be understood in the ordinary sense of a secured creditor realising his security by a suit. 1925 Mad 1051 (1052) [AIR V 12] : 48 Mad 750 (DB).

[14] Mortgagee can execute his mortgage decree even after adjudication of the mortgagor. ('13) 7 Sind L R 184 (185) (DB).

[15] The words "otherwise deal with his security" in S. 28 (6), do cover the application of the decree-holder under O. 34, R. 6, Civil P. C. and secured creditor is entitled by this sub-section to obtain a decree under O. 34, R. 6 and to deal with the security by the method allowed by that rule. 1939 All 401 (402) [AIR V 26] : ILR (1939) All 492 (DB).

[16] Silence of mortgagee in reply to notice by the official receiver will not extinguish his security. Therefore a sale by the official receiver in such circumstances will not in any way bind the mortgagee. 1924 Mad 761 (762) [AIR V 11] : 47 Mad 605 (DB).

[17] If the receiver realizes the property the debt due to the secured creditor at the date of such realisation constitutes a charge payable to secured creditor out of the amount so realised. But his rights under S. 47 must necessarily be postponed when the legality of his alleged charge is called in question, or if he has not chosen to object to the course proposed by the receiver of realising by sale and discharging the debt due out of the proceeds. 1923 All 159 (160) [AIR V 10] (DB).

[18] A Nattukottai Chetty woman claimed that her stridhanam was a trust fund in the hands of the insolvent and that she being entitled to a charge on the total assets of the insolvent, was a secured creditor and her power of realising or otherwise dealing with her security was not affected by the debtor's adjudication — *Held* that she was not in the position of an ordinary secured creditor and could only claim to be paid in full out of the total assets of the insolvent. There being no question of realising or otherwise dealing with the security, S. 28 had no application. 1946 Mad 519 (525) [AIR V 33 C 261] : ILR (1946) Mad 429 (DB).

[19] A secured creditor of the insolvent is entitled to realise the security by filing a suit or otherwise in accordance with law without obtaining the leave of the Court in that behalf. 1935 Rang 92 (93) [AIR V 22] : 13 Rang 37 (DB) ✠ 1930 Bom 11 (15) [AIR V 17] (DB) ✠ 1935 Mad 817 (821) [AIR V 22] : 58 Mad 1032 (DB).

[20] Section 28 (6) does not mean that the secured creditor is entitled to deal with the security as though there had been no vesting in the Court or the receiver. The fact that the rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. 1927 P C 108 (109) [AIR V 14] : 54 Ind App 190 : 54 Cal 595. (Compromise in mortgage suit between mortgagee and insolvent-mortgagor is nullity. AIR 1925 Cal 785, *Reversed*.)

[21] In a suit or other proceeding by a mortgagee of an insolvent the receiver is a necessary party. A decree or decision obtained without impleading him is not binding on him. 1937 Lah 402 (403) [AIR V 24] (DB) ✠ 1931 All 159 (160) [AIR V 18] (DB) ✠ 1935 Cal 460 (462) [AIR V 22] : 62 Cal 483 (DB) ✠ 1935 Lah 316 (318) [AIR V 22] ✠ 1929 Mad 609 (611) [AIR V 16] (DB). (Execution sale — Receiver not brought on record—Sale is void.) ✠ 1927 Mad 609 (610) [AIR V 14]. (Adjudication of mortgagor — Preliminary decree without impleading receiver is not invalid — Application for final decree impleading receiver is maintainable.) ✠ 1939 Nag 128 (130) [AIR V 26] : ILR (1941) Nag 559.

[**But see** 1930 Lah 791 (792) [AIR V 17] (DB).]

[22] A creditor to whom the insolvent debtor owes secured as well as unsecured debts cannot be held to be secured creditor qua the unsecured debts. 1954 Trav-Co 419 (421, 422) [AIR V 41 C 145] : ILR (1954) Trav-Co 93 (DB).

[23] Though an Insolvency Court will not restrain a mortgagee or other secured creditor in the exercise of his legal remedies under S. 28, it has jurisdiction in proper cases to restrain him under O. 39, R. 1, Civil P. C., if there are substantial grounds for impeaching his title, with a view to safeguard the interests of the general body of creditors. 1954 Mad 12 (14, 15) [AIR V 41 C 5] : ILR (1954) Mad 360 (DB).

[24] Compromise instalment decree in mortgage suit — Mortgaged property to remain under attachment till payment of decree — Decree-holder is secured creditor — Interim receiver in subsequent insolvency of mortgagor cannot claim possession of mortgaged property from receiver in execution. 1959 Madh-Pra 420 (421, 422) [AIR V 46 C 147].

[25] Secured creditors are not affected by proceedings in insolvency and unless they realise the security or surrender or value it under S. 47 of the Provincial Insolvency Act it cannot be said that their debts are provable in insolvency. Thus if the mortgagee has no debt provable in insolvency, then the ban on the institution of the suits or proceedings for realisation of debts imposed by S. 28 (2) does not operate and the mortgagee cannot avail himself of the provisions of S. 78 (2). 1957 Andh-Pra 437 (439, 440) [(S)AIR V 44 C 136].

Section 28 — Note 26 *(contd.)*

[26] An undischarged insolvent or a discharged insolvent whose property continues to vest in the Receiver cannot apply under the Debt Redemption Act for the amendment of a mortgage-decree because the effect of such vesting is that he is not the owner of of the property. Because the debt in question is a secured debt the insolvent mortgagor does not continue under S. 28 (6), Provincial Insolvency Act to be the owner of the property so as to be entitled to apply for the relief granted by the U. P. Debt Redemption Act. The provisions in S. 28 (6) are solely for the benefit of secured creditor and they have nothing to do with the debtor. 1952 All 328 (329) [AIR V 39] (DB).

[27] A decree obtained by a secured creditor against an adjudged insolvent without impleading insolvency Court as a defendant after an order of adjudication has been passed under S. 27 but before a receiver is appointed to take charge of the insolvent's estate, is ineffective and does not bind the receiver. The mere fact that the creditor had obtained permission of the insolvency Court to file the suit is not sufficient to validate the decree. 1953 Nag 268 (270) [AIR V 40 C 114] : ILR (1952) Nag 662 (DB).

[28] Where a secured creditor has during the insolvency proceedings realised his security and there is a deficiency, the balance of the debt constitutes a debt provable in insolvency. If the creditor omits to make an application to the Official Receiver for being included in the list of creditors he cannot, after the discharge of the insolvent, recover the balance by executing his decree in execution proceeding under O. 21 of Civil P. C. 1954 Punj 180 (181) [AIR V 41 C 93] : ILR (1954) Punj 831.

27. Relation back—Sub-section (7). — [1] Section 28 (7) only enunciates the well-known doctrine of relation back in insolvency law. Under the English law and the Presidency-Towns Insolvency Act, the insolvency commences either on the date of the presentation of the petition or from the earliest act of insolvency committed within three months before the date of petition. Under S. 28 (7), however, the insolvency commences from the date of the presentation of the petition. 1938 Mad 19 (20) [AIR V 25] : ILR (1938) Mad 439 (DB).

[2] The effect of sub-ss. (2) and (7) of S. 28 read together is that the whole of the property of insolvent vests in the receiver with effect from the date of the presentation of the petition in insolvency. 1942 All 263 (264) [AIR V 29] : ILR (1942) All 421 (DB) ✠ 1936 Mad 819 (822) [AIR V 23] : 59 Mad 928 (DB). (Executing Court ordering property to be sold—Interim receiver appointed by Insolvency Court applying for possession of property — Sale should be stopped and possession given to receiver.) ✠ 1925 Mad 328 (329) [AIR V 12] (DB) ✠ 1940 Pesh 36 (37) [AIR V 27].

[3] The effect of the Provincial Insolvency Act is that the insolvent as from the date of the insolvency petition is civilly dead and cannot after the petition enter into any transaction in respect of his property which will bind the official receiver or his creditors. Any person dealing with the insolvent after that date does so at his peril. 1939 Lah 384 (385) [AIR V 26] : ILR (1940) Lah 50 (FB).

[4] The official receiver can challenge a sale in execution of a decree against the insolvent held after the date of petition. 1942 All 263 (264) [AIR V 29] : ILR (1942) All 421 (DB). (AIR 1934 All 252, *Overruled.*)

[*See* 1939 Nag 207 (209) [AIR V 26] : ILR (1939) Nag 540. (Transfer by insolvent pending insolvency proceedings is void and inoperative.)]

[5] Charges whether created by decree or otherwise after the date of the petition cannot be held binding against the receiver, though they may bind the insolvent himself. 1928 Lah 738 (740) [AIR V 15].

[6] By the operation of S. 28 (7) the title of the auction-purchaser who purchases the property of the debtor after the admission of the insolvency petition but before the order of adjudication is not absolute but contingent on the insolvency application being dismissed. If the insolvency application is dismissed, he gets an indefeasible title. But if the order of adjudication is made he cannot claim any title as against the receiver. There is an exception, however, in the case of a purchaser in good faith. 1935 Cal 612 (614) [AIR 22] : 63 Cal 176 (DB) ✠ 1944 Mad 278 (280, 281) [AIR V 31]: ILR (1944) Mad 779 (DB) ✠ 1935 Mad 907 (908) [AIR V 22].

[7] Any payments made by debtors of the insolvent to him subsequent to the date on which the insolvency application is presented are void as against the official receiver unless the debtors prove that they had made the payments *bona fide* and without knowledge of the insolvency petition having been filed in the Court. 1932 Sind 62 (63) [AIR V 19] (DB) ✠ 1925 Mad 328 (329) [AIR V 12] (DB).

[8] Property acquired or devolving upon the insolvent after the date of presenting the application but before adjudication vests in the Court or receiver under sub-s. (2) read with sub-s. (7). 1936 Bom 164 (164) [AIR V 23] : 60 Bom 141 (DB).

[9] Judgment-debtor filing insolvency petition — Before adjudication judgment-debtor obtaining money from relative and depositing it in Court under O. 21, R. 89, C. P. C. for setting aside sale in execution of decree passed against him—Money advanced by relative by way of gift—Upon adjudication, money held vested in receiver under S. 28 (7). 1943 Cal 555 (558, 559] [AIR V 30] : ILR (1943) 2 Cal 397 (DB).

[10] Where on an adjudication of a Hindu father the property vests in the official receiver the property passes out of the hands of the insolvent from the date of the application and a son born subsequent to the date of application is in no better position with regard to that property than he would have been with regard to an alienation made before he was born. 1947 Mad 372 (372) [AIR V 34 C 192].

[a][28A. Insolvent's property to comprise certain capacity.

The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been

Section 28 — Note 27 *(contd.)*

[11] Although S. 28 enacts that an order of adjudication shall relate back to and take effect from the date of the presentation of petition, it does not state that the date of adjudication shall be the same as the date of the petition. 1930 All 461 (461) [AIR V 17].

[12] The clear enactment that an order of adjudication shall relate back to and take effect from the date of presentation of the petition must affect the order of adjudication for all purposes unless otherwise expressly enacted. Hence S. 28 (7) governs S. 34. 1939 Lah 384 (386) [AIR V 26] : ILR (1940) Lah 50 (FB).

[**But see** 1937 Rang 50 (50) [AIR V 24] (DB). (Doctrine of relation back is not to be incorporated in S. 34.)]

[13] Although for all purposes of the insolvency Act an order of adjudication relates back to the presentation of the petition, outside those purposes it has no place and the filing of a suit prior to the adjudication may be regarded outside the purpose of the Insolvency Act with reference to the provisions of S. 28 (2). 1927 Mad 693 (695) [AIR V 14]. (Defendant adjudicated insolvent after filing of suit — There is no limitation governing the impleading of receiver as a party.)

[14] Section 28 (2) of the Provincial Insolvency Act excepts from its operation the other provisions of the Act including S. 51 and it is therefore clear that the official receiver's title to the property of the insolvent does not extend to the assets realized in the course of execution levied against the property of the insolvent before the date of the admission of the insolvency petition. 1941 Mad 575 (576) [AIR V 28].

[15] The doctrine of relation back is subject to the exception enacted in S. 51 (3) of the Act. 1938 Mad 906 (907) [AIR V 25].

[16] Where a transfer made before the petition for adjudication of the transferor as insolvent is found to have been fictitious and fraudulent and hence void as against the receiver by virtue of S. 28 (7), the property vests in the receiver from the date of the presentation of the petition. 1935 Lah 368 (369) [AIR V 22] : 16 Lah 1013 (DB).

[17] The Privy Council decision in A I R 1943 P C 130 which follows (1878) 10 Ch D 3 applies to orders of adjudication under the Presidency-Towns Insolvency Act alone and cannot be applied to orders of adjudication under the Provincial Insolvency Act as the relevant provisions of the two Acts, namely, Ss. 116, 51 and 56, Presidency-Towns Insolvency Act, and Ss. 30, 28 (7) and 54, Provincial Insolvency Act are different. 1945 Mad 66 (67) [AIR V 32]: ILR (1945) Mad 541 (FB).

[18] The principle underlying the law of insolvency is that interest ceases to run when adjudication takes place. An order of adjudication relates back to and takes effect from, the date of the presentation of the petition on which it is made. Therefore interest should run up to the date of the presentation of the petition in an insolvency case and upto the date of presentation of winding up petition in the case of an insolvent company. 1954 All 129 (131) [AIR V 41 C 79].

[19] Adjudication relates back to date of petition of insolvency—Suit by plaintiff who had applied to be adjudicated insolvent, dismissed for default — Restoration application by official receiver as interim receiver—Plaintiff adjudicated insolvent—Restoration application by interim receiver must be treated as one by official receiver. 1949 All 433 (435) [AIR V 36 C 164] : ILR (1949) All 746 (DB).

[20] The effect of sub-s. (7) of S. 28 is that the adjudication is deemed to have taken place on the date of the presentation of the petition for adjudication and from that date the property vests in the receiver. Therefore, transactions entered into by the insolvent at any time between the commencement of the insolvency and the date of the adjudication order will not prevail against the receiver whose title by relation back dates from the commencement of the insolvency. 1957 Pepsu 22 (23) [AIR V 44 C 6].

[21] An *ex parte* decree was passed on 30-6-1952 against *A* for specific performance of an oral agreement to execute a mortgage deed in favour of *B*. On 14-7-1952, *C*, another creditor of *A*, filed an insolvency petition and *A* was adjudged insolvent on 16-12-1952. Meanwhile on 22-10-1952, *B*, in execution of his decree, got the mortgage executed by the Court, as *A* defaulted to comply with the terms of the decree. *D*, the prior mortgagee of *A* filed a petition for declaration that the mortgage executed in favour of *B* was not binding on the estate of *A*. *Held*, that the mortgage executed in favour of *B* was not binding on the estate of *A* or on the official receiver. It may be that under S. 28 the property vested in the Court. Even so, the mortgage was executed by the Court not as the Custodian of *A's* properties in the insolvency but only as representing him under the decree. By that time *A* had become divested of the estate by reason of the operation of S. 28 (7) under which the order of adjudication related back to the date of the presentation of the petition. 1958 Mad 126 (127) [A I R V 45 C 33].

Section 28A — Note 1

[1] The "pith and substance" of the Provincial Insolvency (Amendment) Act, 1948, is clearly within the scope of Item 12 of List III ("Bankruptcy and Insolvency") of Sch. VII of the Government of India Act, 1935. The fact that it incidentally infringes on some other items in the Provincial list does not affect its validity. The non-exclusion of agricultural lands from Item 12 of List III is an indica-

exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge :

Provided that nothing in this section shall affect any sale, mortgage or other transfer of the property of the insolvent by a Court or receiver or the Collector acting under section 60 made before the commencement of the Provincial Insolvency (Amendment) Act, 1948 which has been the subject of a final decision by a competent Court :

Provided further that the property of the insolvent shall not be deemed by reason of anything contained in this section to comprise his capacity referred to in this section in respect of any such sale, mortgage or other transfer of property made in the State of Madras after the 28th day of July, 1942, and before the commencement of the Provincial Insolvency (Amendment) Act, 1948.]

[P. T. I., 1909—S. 52 (2) (b).]

[a] *Inserted* by the Provincial Insolvency (Amendment) Act, 1948 (XXV of 1948), S. 2 [12-4-1948].

OBJECTS AND REASONS

"As a result of the decisions of the Privy Council in *Sat Narain* v. *Behari Lal*, (I. L. R. 6 Lah. 1) and *Sat Narain* v. *Shri Kishen Das*, *Same* v. *Bank of Upper India*, (I. L. R. 17 Lah. 644) the right of a Hindu father to sell family property to discharge family debts and his son's interests therein to discharge his personal debts lawfully incurred cannot be deemed to be property within the meaning of S. 2 (e) or of S. 17 of the Presidency-towns Insolvency Act, 1909, and therefore does not devolve upon the Official Assignee under S. 17 of the Act. The Judicial Committee held, however, that the power of the father to sell his son's property to discharge his own lawful debts does devolve upon the Official Assignee by reason of S. 52 (2) (b) of the Act.

While the Provincial Insolvency Act contains in S. 2 (d) and S. 28 (2) provisions identical with those embodied in Ss. 2 (e) and 17 of the Presidency-towns Insolvency Act, there is in the Provincial Insolvency Act, 1920, no

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Section 28A — Note 1 *(contd.)*

tion that the Legislature used the words 'bankruptcy and insolvency' in respect of argicultural lands also. Accordingly, the Provincial Insolvency (Amendment) Act of 1948 is intra vires the Dominion Legislature. 1952 Mad 27 (31) [AIR V 39] (DB).

[2] Section 28-A is intra vires the Dominion Legislature and the power to sell the entire joint family property including the shares of the sons vested in the Official Receiver on the insolvency of the father of a Mitakshara joint family. 1957 Andh Pra 609 (610) [AIR V 44 C 203] (DB).

[3] Section 28A gives the section retrospective operation and applies to all transfers which may have been effected by the receiver on an adjudication of the father or the managing member of a joint Mitakshara Hindu family under the Act. The fact that the decree of the trial Court had been passed already and the amendment was made during the pendency of an appeal, does not affect the applicability of S. 28A. 1951 Cal 210 (211) [AIR V 38 C 39] (DB).

[4] Under the new S. 28-A the powers of a father under the Mitakshara law to alienate the joint family property including the interest of his sons in the same for discharge of an antecedent debt not contracted for illegal or immoral purposes vests in the Receiver on the adjudication of the father as an insolvent. Section 28-A has retropective operation. 1953 S C 370 (372) [AIR V 40 C 83] : 1953 S C R 894. (AIR 1946 Mad 434, *Reversed.*) ✠ 1959 Ker 141 (144) [AIR V 46 C 46] : ILR (1958) Ker 1039 (DB) ✠ 1951 Cal 210 (211) [AIR V 38 C 39] (DB).

[*See also* 1949 Mad 216 (217) [AIR V 36 C 95]. (Section 28-A is retrospective.)]

[5] The power of the father to alienate the interests of his sons for the satisfaction of his antecedent debts passes to the receiver as 'property' within the meaning of the Provincial Insolvency Act. Once it has so passed by virtue of S. 28A, S. 28(2) of the Act debars any creditor from having any remedy over the property of the insolvent which property includes the property defined under S. 28-A. 1960 Andh Pra 131 (133) [AIR V 47 C 44]. (AIR 1951 Mad 713 and AIR 1951 Mad 1010, *Dissented from.*)

[6] A person acquires at the sale by the Official Receiver in the insolvency proceedings not merely the interest of the insolvent in the joint family estate (as would be the case under the Full Bench : AIR 1942 Mad 682) but also the interest of the sons as well by reason of Act 25 of 1948 which (as pointed out in AIR 1949 Mad 886) has altered the law as laid down in the Full Bench and altered with retrospective effect. 1950 Mad 691 (691) [AIR V 37 C 290] (DB).

[7] The effect of S. 28-A is to alter the law laid down in ILR (1943) Mad 83 and the provision is retrospective in its operation. Hence where some of the members of a joint Hindu family are declared insolvents and their rights vest in the official receiver, the official receiver must be deemed to have been vested also with the powers of the insolvents to sell their sons' share for the family debts. 1949 Mad 886 (888) [AIR V 36 C 399] : ILR (1949) Mad 904 (DB).

[8] The power of the manager or the father as the case may be, under S. 28-A can vest in the Official Receiver. As the whole of the property of the insolvent can vest in the Court or in the receiver at the commencement of the insolvency, along with the entire property,

provision corresponding to S. 52 of the Presidency-towns Insolvency Act. In consequence a conflict of opinion has arisen among the High Courts as to whether, in the case of an adjudication under the Provincial Insolvency Act, the power of the father to sell his son's interests in the family estate to meet his own legitimate debts devolves upon the Official Receiver as it does under the Presidency-towns Insolvency Act.

In the course of a Full Bench decision reported in I. L. R. 1943 Mad. 83 the Madras High Court suggested that Central legislation should be promoted to bring the Provincial Insolvency Act into line with the Presidency-towns Insolvency Act in the relevant respect. The Government of India, who postponed consideration of the matter pending the termination of the war, have now consulted Provincial Governments and High Courts on this suggestion which has received virtually unanimous support and to which effect is given by this Bill."

—S. O. R., Gaz. Ind., 1947, Pt. V, p. 268.

STATE AMENDMENT

SECTION 28B

MADRAS

In its application to the State of Madras, after section 28-A *insert* the following section, namely,—

"**28-B.** *Section 28-A to apply to the merged territory of Pudukottai from 1st April, 1949 with certain modifications.* — Section 28-A shall, with effect on and from the 1st day of April, 1949, be deemed to have applied to the merged territory of Pudukottai, subject to the following modifications, namely,—

(i) in the first and second Proviso, for the words, brackets and figures 'before the commencement of the Provincial Insolvency (Amendment) Act, 1948' the words and figures 'before the 7th day of May 1947' shall be *substituted*;

(ii) in the second Proviso, for the figures, letters and words '28th day of July 1942' the figure, letters and words '29th day of August 1944' shall be *substituted*."

—Mad. Act VIII of 1953, S. 2 [27-5-1953].

Section 28A — Note 1 *(contd.)*

his powers mentioned in S. 28A also vest in the receiver. Pending the insolvency the insolvent might get some properties or powers by devolution or otherwise. Such properties or powers also would vest in the receiver. 1952 Mad 27 (31) [AIR V 39] (DB).

[9] The insolvency of the father of a joint Hindu family under the law as it now stands, after the introduction of S. 28-A of the Provincial Insolvency Act in April, 1948, which has retrospective effect, vests not only the share of the father but also the power of the father to dispose of the properties of the sons in the Official Receiver. But where actually the Official Receiver has sold only the father's interest in the property and has not exercised the power of the father: by bringing to sale the share of the son also, S. 28 does not prevent the decree-holder from proceeding in execution of the decree against the son's share notwithstanding the vesting of the power to dispose of the property in the Official Receiver. That vesting does not take away the power of the son to sell the property in his own right and much less prevent the execution creditor from proceeding with the sale of the son's share. As under the law there is no bar preventing the decree-holder from executing the decree against the son, there will be nothing to prevent running of limitation for execution of the decree against the son. It is wrong to think that S. 28-A by recognising restrospectively the power of the Official Receiver in the case of insolvency of the father to dispose of the son's share in the right of the father, saves the bar of limitation against the son. 1951 Mad 1010 (1011) [AIR V 38 C 350].

[10] The question whether in a particular case the Official Receiver has exercised the power of father to sell sons' share and conveyed the entire interest in the property including the sons' share must be decided on the facts of that case. It is true that the mere fact that the order of adjudication vests in the Official Receiver not only the share of the father but also the power of disposition possessed by the father over the sons' shares would not by itself convey to the purchaser the shares of the sons unless there is indication in the deed of sale or in the sale proceedings which preceded the sale, that the Official Receiver purported to exercise that power of sale and did in fact sell the sons' shares also. It is sufficient if the Official Receiver in fact exercises the right of the father to sell the share of the sons and convey the entire interest in the property to the purchaser. The Official Receiver need not purport "to exercise the right to sell the right of the father to sell the son's share as well, whatever this might mean." It is sufficient if he sells the absolute interest in the property. There is no doubt a difference between the existence of a power and its actual exercise and the mere existence of power may not be sufficient to show that in any particular case that it was exercised. At the same time the deed of sale executed by the Official Receiver need not specifically recite that he was exercising the power of sale vested in him under Ss. 28 and 28-A of the Act. It will be sufficient if he purports to convey the entire interest in the property and not merely the share of the insolvent father. 1957 Andh Pra 609 (611) [AIR V 44 C 203] (DB).

[11] Although on first impression, in view of the definition of the word 'property' it appears that the receiver in insolvency is invested with not only the property belonging to the insolvent but also property over which the insolvent had a dispos-

Section 28A — Note 1 *(contd.)*

ing power which he may exercise for his own benefit it has been held that the capacity of an insolvent to dispose of joint family property for his own benefit, having regard to the fact that what vests in the receiver is property which is to become divisible among the creditors, is not property within the meaning of S. 28 (2). In view of such judicial pronouncements the legislature amended the Act by adding S. 28-A and since that amendment the property of the insolvent comprises and always has been deemed to comprise also the capacity to exercise and to take proceedings for exercising all such powers in relation to property as might have been exercised by the insolvent for his own benefit. A Hindu father has the power or capacity to dispose of for his own benefit the interest of his sons in joint family property and therefore by the operation of S. 28-A such capacity may be exercised by the receiver. But when the manager of a joint Hindu family, who is not the father, exercises his power of disposing of property for the benefit of the joint family for purposes of legal necessity, he does not exercise the power for his own benefit. Therefore such a capacity is not comprised in the expression 'property' in S. 28-A and hence it does not vest in the receiver. 1959 Bom 229 (230, 231, 232) [AIR V 46 C 69] : ILR (1959) Bom 13.

[12] The mere fact that the order of adjudication vested in the Official Receiver not only the share of the insolvent father but also his power of disposition of the son's share would not by itself convey to the auction-purchaser the share of the son, unless there is indication in the document or in the sale proceedings that the Official Receiver in fact purported to exercise that power of sale and did in fact sell the son's share as well. Where the sale-deed executed in favour of the auction-purchaser shows that what was conveyed by the sale was the interest notified to be sold and it is seen from the notice that what was notified to be sold was the right, title and interest of the insolvent in the properties described in the schedule and there is no indication in the notice or the sale-deed that the insolvent's son's share was intended to be or was sold by the receiver it is not possible to hold that the insolvent's sons' share was also conveyed. The interest obtained by the purchaser must be limited to the insolvent's share in the property sold. 1957 Ker 144 (146) [AIR V 44 C 78] : ILR (1957) Ker 808 (DB).

[13] On the insolvency of a member of a undivided Hindu family governed by the Mitakshara law the joint family property does not vest in the Court or the receiver, whatever power the receiver may exercise by virtue of the provisions of S. 28A to have the joint family properties sold to meet debts binding on the family. Hence after adjudication the *ad interim* receiver appointed before adjudication cannot be given possession of the joint family property. By virtue of S. 28A certain power vests in the receiver but in the case of an *ad interim* receiver nothing vests in him by operation of law and he can take possession of only such properties as belong to the debtor. 1954 Pat 459 (463) [AIR V 41 C 159] : 33 Pat 185.

[14] Where the father in a joint Hindu family, consisting of himself and his sons, is adjudicated an insolvent, the position after the introduction of S. 28A in 1948 is, that the Official Receiver, when he takes possession of the property, is entitled, in the right of the father and manager of the joint family, to take possession of the entire joint family property and also collect rents and profits for applying them for the discharge of the debts of the father which are not tainted by illegality or immorality. The position, however, is different after the institution of a partition suit by the sons. A suit for partition by the sons brings about the disruption of the status of the family and terminates the power of the father to alienate the shares of the sons for the discharge of his own debts on the basis of the pious obligation theory. The Receiver collecting the rents from the shares of the sons, after the institution of the suit for partition, cannot therefore be said to collect them in the exercise of the power of the father and for the purpose of applying them for the discharge of the debts of the father. A creditor, therefore, would be entitled to attach the sons' share of the income in the hands of the Receiver, collected since the institution of the partition suit. 1949 Mad 216 (217) [AIR V 36 C 95].

[15] The words "for his own benefit" refer only to a father manager of Hindu joint family and not to a manager other than father. Hence S. 28A has no application to the insolvency of a manager other than father of a Hindu joint family. 1950 Mad 770 (771) [AIR V 37 C 326] : ILR (1951) Mad 449.

[16] "Final decision by a competent Court" can only mean the decision of the Court which ultimately disposes of the suit. If an appeal has been filed against the judgment of the subordinate Judge, it is impossible to treat his judgment as final within the meaning of the proviso. 1952 Mad 27 (32) [AIR V 39] (DB).

[17] A preliminary decree passed on 2-2-1943 by which the plaintiff's share has been declared as two-third in the entire property belonging jointly to him and his insolvent father and which preliminary decree has received confirmation by the appellate Court and finally by the High Court on 1-8-1946 is not a final decision by a competent court within the meaning of the first Proviso to S. 28-A holding that the word decision is synonymous with decree. For, the mere declaration of the rights of the plaintiff by the preliminary decree would not amount to a final decision. 1956 Mad 413 (414) [AIR V 43 C 132] : ILR (1956) Mad 1133 (DB).

[18] See the objects and reasons given after S. 28 as regards the legal position obtaining before the enactment of S. 28A.

29. Stay of pending proceeding.

Any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made against him under this Act, either stay the proceeding, or allow it to continue on such terms as such Court may impose.

[P. T. I., 1909—S. 18 (3).]

Section 29 — Note 1

[1] Decisions of English Courts on questions of stay of action owing to insolvency are not sure guides for Courts in India. 1921 Lah 270 (271) [AIR V 8]: 2 Lah 95 (DB).

[2] Provincial Insolvency Act (1920), S. 29— Under S. 18, Presidency-Towns Insolvency Act a Judge of High Court sitting in insolvency has no power to stay proceedings pending in respect of the same debtor in a District Court under the Provincial Insolvency Act. 1928 Cal 782 (784) [AIR V 15]: 56 Cal 712 (FB).

[3] Provincial Insolvency Act does not authorise an Insolvency Court to stay every pending litigation; and Court can only issue an injunction if the circumstances enumerated in O. 39, R. 1, Civil P. C. are proved to exist. Under O. 39, R. 1, Court has no jurisdiction to issue injunction upon a person who is not a party before it. An Insolvency Court can therefore only issue an injunction upon the debtor and the creditor who are parties to the insolvency proceeding. 1918 Pat 214 (215) [AIR V 5]: 3 Pat L Jour 456 (DB).

[4] Section 29 only refers to proceedings which are pending at the time of adjudication, that is, instituted before the order of adjudication or else simultaneously with it. 1940 Rang 289 (292) [AIR V 27]: 1940 Rang L R 544 (DB).

[5] Under S. 28, Provincial Insolvency Act vesting only takes place upon adjudication, and under S. 29 it is not till then that a Court, in which proceedings are pending against a debtor, is bound to stay proceedings against the insolvent. 1926 Mad 432 (433) [A I R V 13] (DB).

[6] Sections 28 and 29 deal with the effect of the order of adjudication and Ss. 51 and 52 deal with the effect of an order admitting the petition for adjudication. Under S. 52, the material point of time is not the date of the adjudication order, but the date of the admission of the insolvency petition. The point of difference is that whereas under S. 29 on mere proof that an order for adjudication has been made, the executing Court's power is checked but under S. 52 no such result automatically follows from the mere fact that the notice of the admission of an insolvency petition has been given to the Court. There must be an application to the Court for delivery of the property. 1936 Mad 819 (821, 822) [A I R V 23]: 59 Mad 928 (DB).

[7] Insolvent's property sold in execution of decree after adjudication — Insolvency Court can declare the sale invalid — Separate suit by receiver is not necessary. 1921 Mad 204 (208, 209) [AIR V 8]: 44 Mad 524 (DB).

[8] Leave to continue the suit filed after order of adjudication without leave of the Insolvency Court cannot be granted subsequently under S. 29. 1937 Mad 667 (671) [AIR V 24]: ILR (1937) Mad 841 (DB).

[9] An insolvent is entitled to sue for damages for defamation. Though in such a suit, a part of the claim refers to injury to the insolvent's estate, the insolvent may still carry on the suit as the right of action for the injury to his character and reputation remains vested in him. 1932 Sind 33 (33) [AIR V 19]: 26 Sind L R 21.

[10] Suit for maintenance praying for charge on defendant's properties—Defendant adjudged insolvent during suit — Decree can be passed making maintenance a charge on defendant's estate. 1927 Mad 403 (404) [AIR V 14].

[11] Suit for arrears of rent pending against tenants at the time they are adjudicated insolvents— Matter brought to the notice of Court but the Court continuing with the proceedings — *Held*, Court must be deemed to have allowed them to continue without specifying any terms and there was no bar for passing a decree for arrears of rent. ('36) 1936 All W R 485 (486) (DB).

[12] The adjudication of a person as insolvent vests the property of the insolvent either in the receiver or in the Court and deprives him of any saleable interest in it, and the Court has no jurisdiction to sell the property, and no question of continuing the execution proceedings under S. 29 can arise and in the absence of notice under O. 21, R. 22, Civil P. C. execution proceedings are nullity against the Insolvency Court. 1933 Nag 28 (29) [AIR V 20]: 28 Nag L R 317.

[13] *N* obtained a decree against *K* and in execution thereof attached according to *A*, *A*'s property. During pendency of *A*'s objection to attachment *K* was adjudged insolvent. The Court dismissed the objection holding that its jurisdiction had ceased —*Held* that in view of S. 29 the order dismissing the objection was incorrect. The Court may stay proceedings for time being till adjudication was annulled and then proceed with it. 1929 Nag 356 (357) [AIR V 16].

[14] Where in execution of a decree the property of the judgment-debtor is attached and while that attachment is pending, the judgment-debtor is adjudged insolvent, the order of adjudication merely makes the attachment ineffective so long as the property is in the hands of the receiver. The order of dismissal of the pending execution petition would not automatically raise the attachment. When adjudication is annulled, the property will revest in judgment-debtor with all the burdens which existed upon it at the time of adjudication. Hence the attachment that was pending at the time of adjudication would still be existing. 1940 Mad 129 (130) [AIR V 27].

30. Publication of order of adjudication.

Notice of an order of adjudication stating the name, address and description of the insolvent, the date of the adjudication, the period within which the debtor shall apply for his discharge, and the Court by which the adjudication is made, shall be published in the Official Gazette and in such other manner as may be prescribed.

[P. I., 1907—S. 16 (7); P. T. I., 1909—S. 20.]

Proceedings consequent on Order of Adjudication

31. Protection order.

(1) Any insolvent in respect of whom an order of adjudication has been made may apply to the Court for protection, and the Court may on such application make an order for the protection of the insolvent from arrest or detention.

Section 29 — Note 1 *(contd.)*

[15] There is nothing in S. 29 to indicate that in cases where a person has been declared an insolvent, the official receiver has to be impleaded in his place. 1958 Andh Pra 438 (439) [AIR V 45 C 127].

[**See however** 1926 Mad 1145 (1145) [A I R V 13]. (It is desirable to ask other party to bring official receiver on record — If latter is unwilling to join, Court may go on with suit on terms it may impose.)]

[16] "Stay" does not operate to end suit. Suit may be continued unless further final order is passed after hearing parties. Court has to consider request of creditor to continue suit stayed though no application is made. 1929 Sind 204 (205) [AIR V 16] (DB).

[17] When once there is an order of a court which absolutely on its terms prohibits a party from executing the decree, the mere fact that the Court has the power to modify such an order does not make it any the less an order staying the execution of a decree. Hence it cannot be held that as it was open to the decree-holder to apply to have the order of stay under S. 29, Insolvency Act modified or set aside, it is not such an order of absolute stay as is contemplated by S. 15, Limitation Act. 1955 Mad 547 (548) [(S) AIR V 42 C 153].

[18] Proceedings pending against a person are not stayed automatically as a result of his adjudication. Until an order is made by the court in which the proceedings are pending, staying the proceedings, the proceedings continue and are not stayed automatically. (1957) 1957-3 All E R 241 (242).

[19] In order to exercise discretionary power under S. 29, Provincial Insolvency Act, it is incumbent upon the Court to consider whether there are special circumstances to justify the continuance of the suit. Where the insolvent is the only defendant and the claim relates to a debt there is greater reason than not to stay the suit since the debt is provable in the insolvency. But where besides him another person is also sued and the claim is laid in the alternative the continuance of the suit is more desirable than its stay because if the suit is totally stayed the plaintiff's chance to obtain a decree against a defendant who is not adjudicated an insolvent is also withheld. It is no doubt relevant to consider as to whether the insolvent or his estate should be exposed to further costs for continuing the suit. The Court may permit the continuance of the suit subject to the condition that the insolvent or his estate would not be liable for any further costs incurred by the plaintiff. 1961 Madh Pra 199 (200) [AIR V 48 C 66]. (Trial Court staying the suit merely by observing that stay was necessary for avoiding further complications, but did not even mention what were likely further complications—Order held involved material irregularity in the exercise of jurisdiction.)

Section 30 — Note 1

[1] Neither the validity of the order of adjudication nor of the proceedings subsequent to it, depend on the publication of the notice of the order of adjudication in the local official Gazette. The object of the publication is to provide conclusive evidence in all legal proceedings of an order of adjudication having been duly made and its date. Want of notice is a mere irregularity and cannot vitiate the proceedings. 1939 Nag 103 (104) [A I R V 26] : ILR (1939) Nag 478 ('01) 5 Cal W N 91 (103) (DB).

[2] This decision of the Privy Council in AIR 1943 P C 130 which follows the decision in (1878) 10 Ch. D. 3, applies to orders of adjudication under the Presidency-Towns Insolvency Act alone and cannot be applied to orders of adjudication under the Provincial Insolvency Act as the relevant provisions of the two Acts, namely, Ss. 116, 51 and 56 of the Presidency-Towns Insolvency Act and Ss. 30, 28 (7) and 54 of the Provincial Insolvency Act are different. 1945 Mad 66 (67) [AIR V 32] : ILR (1945) Mad 541 (FB).

[*See also* 1951 Trav-Co 55 (58) [A I R V 38 C 20] : 1950 Trav-Co L R 707 (DB). (Same difference exists between Presidency-Towns Insolvency Act and Insolvency Act in Travancore.)]

[3] Adjudication order cannot be annulled for failure to deposit costs of publication under S. 30. It can only be annulled under S. 35 or S. 43. Where costs are not deposited the only remedy of the Court is under R. 277 (3) framed by Chief Court, to recover the costs from the insolvent's property, if the property is sufficient for the purpose or to remit the costs, if the property is insufficient. 1930 Oudh 53 (1) (53) [AIR V 17] : 5 Luck 479 (DB).

Section 31 — Note 1

[1] *Grant of protection order.*—Adjudication does not automatically operate as a protec-

(2) A protection order may apply either to all the debts of the debtor, or to any of them as the Court may think proper, and may commence and take effect at and for such time as the Court may direct, and may be revoked or renewed as the Court may think fit.

(3) A protection order shall protect the insolvent from being arrested or detained in prison for any debt to which such order applies, and any insolvent arrested or detained contrary to the terms of such an order shall be entitled to his release :

Provided that no such order shall operate to prejudice the rights of any creditor in the event of such order being revoked or the adjudication annulled.

(4) Any creditor shall be entitled to appear and oppose the grant of a protection order.

[P. T. I., 1909—S. 25.]

Section 31 — Note 1 *(contd.)*

tion against execution upon the person of the insolvent. 1935 Rang 415 (417) [A I R V 22] : 13 Rang L R 623 (DB).

[2] *Discretion of Court.*—Discretion is granted to the Court either to make a protection order, or make a limited order or not to make a protection order at all. 1932 All 188 (190) [A I R V 19] : 34 Cri L Jour 18 : 54 All 416✣ 1933 All 591 (592) [A I R V 20]. (The discretion is not to be exercised arbitrarily but with due regard to the circumstances of each case. If a debtor who has been adjudged insolvent, has placed all his assets at the disposal of the Insolvency Court without concealing any material facts relating to his pecuniary position and has not been guilty of any fraud or dishonesty in relation to his creditors or his estate, an order of protection should ordinarily be granted.)✣1929 Bom 135 (135) [AIR V 16] (DB).

[3] The Court should not refuse protection to the insolvent under S. 31, where prima facie the insolvent has no means at all having been stripped of all his property which has become vested in the Official Receiver, and there is no proof that he has concealed assets, merely on the ground that the insolvent after his discharge would still be liable for the debt due to the State in respect of income-tax. 1952 Cal 251 (Pr 8) [AIR V 39] (DB).

[4] Where the Court wrongly refuses to pass a protection order in favour of the insolvent in the exercise of its discretion under S. 31 it would be difficult for the High Court to exercise its powers of revision under S. 115, Civil P. C. unless it can be said that the jurisdiction has not been exercised judicially. But the High Court can and should interfere under Art. 227 of the Constitution of India when the refusal to pass the order would result in real injustice to the insolvent. 1952 Cal 251 (Pr 9) [AIR V 39] (DB).

[5] *Second application.*—Previous order refusing protection to an insolvent is not a bar to a protection order being made at a subsequent stage. Lapse of time and the fact that no misconduct can be attributed to the insolvent in the meantime are circumstances which may justify a Court to grant an order of protection which has been previously refused. 1933 All 591 (591) [AIR V 20].

[6] *Interim protection order.* — Protection order can only be issued after an order of adjudication has been passed. Consequently, where the Court orders that the applicant-debtor be protected from being arrested in execution of a decree or detained in prison for any debt pending the disposal of the application to be declared insolvent, order is a pure nullity. 1932 Rang 51 (51) [AIR V 19]: 33 Cri L Jour 435 : 10 Rang 71✣('32) 36 Cal W N 345 (347) (DB)✣1931 Lah 121 (122) [AIR V 18]. (Executing Court should give benefit of O. 21, R. 40, Civil P. C. to insolvent.)✣1934 Lah 113 (2) (114) [AIR V 21]✣ 1924 Mad 893 (1) (893) [AIR V 11] (DB). (Insolvent is not entitled to apply for protection before adjudication unless he has been actually arrested in execution of decree.)

[*See* 1926 Cal 1011 (1012) [A I R V 13] (DB). (Even if Court has jurisdiction to make an order of this description in the exercise of its inherent powers, the refusal by Court to pass an ad interim protection order does not bring the order in question within the ambit of S. 115, Civil P. C. and no revision therefore is maintainable against such refusal.)]

[**But see** 1925 Mad 170 (171) [AIR V 12] (DB). (Section 5, Provincial Insolvency Act, empowers the District Judge to grant ad interim protection to a person who has applied for being adjudged an insolvent. Where the District Judge in the exercise of his discretion has refused to grant interim protection, unless the discretion has been wrongly exercised, High Court will not interfere.)]

[7] *Absence of protection order.* — Under the Act the creditor can proceed to arrest the judgment-debtor as if no adjudication had taken place unless there is a protection order in his favour. 1927 All 418 (419) [AIR V 14] : 49 All 201 (DB).

[8] Adjudication under old Act — No liability to arrest under new Act even if no protection order is taken. 1923 Oudh 36 (36, 37) [AIR V 10].

[9] *Sub-section (2).*—Wording of S. 31 is very wide and protection order can be obtained by the debtor even when a debt is incurred after the adjudication. 1933 Lah 261 (261) [AIR V 20].

[10] Under S. 31, a protection order may apply either to all the insolvent's debts or to some of them. It draws no distinction between classes of debts, that is, debts due to the State or to Corporation or Municipalities

32. Power to arrest after adjudication.

At any time after an order of adjudication has been made, the Court may, if it has reason to believe on the application of any creditor or the receiver that the debtor has absconded or departed from the local limits of its jurisdiction with intent to avoid any obligation which has been, or might be, imposed on him by or under this Act, order a warrant to issue for his arrest, and on his appearing or being brought before it, may, if satisfied that he was absconding or had departed with such intent, order his release on such terms as to security as may be reasonable or necessary, or if such security is not furnished, direct that he shall be detained in the civil prison for a period which may extend to three months.

[P. T. I., 1909, S. 21.]

33. Schedule of creditors.

(1) When an order of adjudication has been made under this Act, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under this Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof, and the Court shall, by order, determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts, and the amount of such debts, respectively, and shall frame a schedule of such persons and debts :

Provided that, if, in the opinion of the Court, the value of any debt is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt shall not be included in the schedule.

Section 31 — Note 1 *(contd.)*

or private persons. The section, therefore, applies to debts due to the State. 1952 Cal 251 (Prs. 5, 6) [AIR V 39] (DB).

[11] Though S. 31 applies to debts due to Crown, nevertheless in view of the fact that even an order of discharge does not release insolvent from debts due to Crown it would be improper to make order in respect of such debt. Hence a person under arrest by order under S. 45, Burma Land Revenue Act, but illegally released by an Insolvency Court, gets no advantage of protection order. 1928 Rang 81 (83) [AIR V 15] : 5 Rang 806 (DB).

[12] *Sub-section (3).— Held*, that effect of protection order is to render insolvent immune from arrest or detention on account of debts in schedule. 1930 Lah 1070 (1072) [AIR V 17].

[13] Arrest or detention must mean arrest or detention in pursuance of an order of a Civil Court passed in execution of a decree of such Court. It does not include arrest or detention in execution of Criminal Court process. 1933 All 253 (253, 254) [AIR V 25] : ILR (1938) All 486 : 39 Cri L Jour 553.

[14] *Sub-section (3).—Proviso*—Apart from the provisions of S. 78, a decree-holder will, if he applies promptly after the cessation of the protection order, be entitled to the exclusion of the period during which the protection order was in force. 1930 All 580 (2) (582) [AIR V 17].

[15] *Sub-section (4).*—A protection order of the insolvency Courts, on appeal, though in general terms must be limited to the debts due to the creditors who had been impleaded as respondents and against whom the order of the first Court refusing to grant protection was set aside. As between them and the insolvent alone it is operative. But it does not apply to other creditors who were not impleaded as respondents in the Court of appeal and who had no opportunity of contesting the grant of the protection order. As regards them, the order of the Court of first instance refusing protection, which was made after the issue of notice to all creditors becomes final and hence any one of the creditors can in execution of his decree against insolvent apply for his arrest and imprisonment. 1932 All 385 (386) [AIR V 19] (DB).

[16] *Liability of surety.* — Fact that judgment-debtor had got protection order does not absolve surety of his duty to produce judgment-debtor on adjourned date. 1926 Mad 958 (2) (959) [AIR V 13].

SECTION 33 — SYNOPSIS

1. **Framing of schedule.**
2. **Enquiry into debt.**
3. **"In respect of debts provable under the Act."** — See S. 34.
4. **Sub-section (1), proviso—Debt incapable of being estimated.**
5. **Who may prove debts.**
6. **Limitation for tender of proof.**
7. **Right to contest.**
8. **Amendment of proof.**

1. Framing of schedule. — [1] Framing of schedule is not a mere piece of empty formality; the legislature intended the Court to perform a judicial act. There should be either a formal order proving the debts or any proceedings which by necessary implication are tantamount to such order. 1932 Lah 173 (174) [AIR V 19] (DB).

[2] Before entering in or deleting from schedule names of creditors, Court is bound to

(2) A copy of every such schedule shall be posted in the Court-house.

(3) Any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act, and not entered in the schedule, and the Court, after causing notice to be served on the [a][receiver] and the other creditors who have proved their debts, and hearing their objections (if any), shall comply with or reject the application.

[P. I., 1907—S. 24; P.T.I., 1909—S. 46 (4) Proviso; Sch. II, R. 1.]

[a] *Substituted* for "insolvent" by the Provincial Insolvency (Amendment) Act, 1926 (XXXIX of 1926), S. 2.

Section 33 — Note 1 *(contd.)*

come to judicial finding. 1926 Cal 160 (161) [AIR V 13] (DB).

[3] The framing of the schedule of creditors is an act of Court and the fact that on materials it could not frame any schedule would not preclude the Court from framing it when necessary. ('49) 54 Mys H C R 261 (265) (DB).

[4] Framing of schedule is duty of Court and not of the receiver—Court to decide claim on evidence, though report of receiver may assist the Court. 1921 Cal 376 (378) [A I R V 8] (DB).

[5] The insolvent is not entitled to have a particular person scheduled as a creditor when that person does not desire that he should be scheduled and more so when he gives cogent reasons for not desiring to be scheduled. 1946 Nag 119 (120) [AIR V 33 C 31] : I L R (1946) Nag 39.

[6] Some form of proof must be supplied by a creditor who wishes to have his debt considered, and a mere admission of the debt due on the bond by the debtor in his petition for adjudication does not amount to proof under the Insolvency Act and therefore, does not save limitation under S. 78 (2). 1938 Oudh 8 (9) [AIR V 25] (DB).

[7] When proofs are tendered to the receiver, it is his duty to place them before the Court for necessary action. If a creditor tenders proof, he has done his duty and he cannot be penalised for the failure of the Court to perform the duty imposed upon it by S. 33, namely, the framing of a schedule. 1947 Pat 161 (162) [AIR V 34 C 59] : 25 Pat 447 (DB).

[8] Creditor has duty to prove claim before official receiver — Duty of official receiver to examine proof filed and reject if he finds claim not proved. 1933 Sind 313 (1) (313) [A I R V 20] (DB).

[9] Though it is obligatory on a creditor to tender proof of his debt, there is nothing to prevent the Court from admitting the debt relying on the admission of the insolvent. Formal proof may be dispensed with if, in view of Court, the debt has otherwise been sufficiently established. 1942 Mad 474 (476, 477) [AIR V 29].

[10] Debt proved does not cease to be so by reason of creditor's not wishing to be recorded as a scheduled one. ('35) 18 Nag L Jour 145 (148).

[11] A transferee can challenge the genuineness of debt of a sole creditor who challenges his transfer. 1940 Nag 393 (395) [AIR V 27] : ILR (1940) Nag 564.

[12] An order that creditor is "suspended" from the schedule along with two others, on allegation of receiver that debts are not fully binding on him and the creditors must, therefore, prove how they got their decrees, does not mean that the creditor's claims were either finally rejected or that he was finally excluded from the schedule in the insolvency proceedings. 1943 P C 98 (101, 102) [A I R V 30] : 70 Ind App 83 : I L R (1943) Nag 669 : ILR (1943) Kar (PC) 109.

[13] Schedule of creditors—Proof of debt—Unregistered mortgage — Possession delivered to mortgagee—Insolvency of mortgagor — In proving debt, benefit conferred by S. 53-A, T. P. Act, is available to mortgagee as against Receiver in whom interests of mortgagor vest. 1960 Punj 604 (Pr 3) [AIR V 47 C 212].

2. Enquiry into debt. — [1] Creditors' affidavits should not be accepted without question—Where several affidavits are filed in proof of debts by different creditors before the official receiver, it is his duty to inquire into the matter and to determine uniform rate for the purpose of making fair estimate of the debts. ('11) 5 Sind L R 249 (252).

[2] Creditor filing affidavit in time specifying amount and particulars of decretal debt—Affidavit returned for representation along with copy of decree — Affidavit represented along with copy of decree when final dividend was declared and distributed among creditors—Creditor's name omitted from schedule of creditors—Application by creditor for including his name in schedule—*Held*, creditor must be deemed to have proved his debt within the meaning of S. 49, and was entitled to dividend—Court can order redistribution after calling back the amount distributed. 1948 Mad 500 (501, 502) [AIR V 33 C 255].

[3] A presumption of receipt of full consideration, arising from a debtor's signature on a promissory note, can only be invoked against the debtor personally but not against the official receiver or a creditor in insolvency proceedings. 1928 All 380 (381) [A I R V 15] (DB).

[4] It is open to the Insolvency Court to enquire into the judgment-debt. 1928 All 380 (381) [AIR V 15] (DB) ✠ 1932 Bom 253 (254) [AIR V 19] (DB). (The Court will not as a matter of course inquire into the validity of judgment-debt except when there is evidence that the judgment has been obtained by fraud or collusion or there has been some miscarriage of justice. It is not necessary that fraud

Section 33 — Note 2 *(contd.)*
or collusion should be shown. It is sufficient if it can be shown that there ought not to have been judgment.) ✣ 1933 Rang 268 (269) [AIR V 20] (DB). (Will ordinarily exercise its discretion to do so when the judgment had been obtained by fraud or collusion.) ✣ 1938 Mad 947 (948) [AIR V 25].

[5] Although a Hindu insolvent governed by the law of the Mitakshara admitted a certain debt to be a good debt, his sons can attack a decree as benami on their own behalf as coparceners with their father, and it is the duty of the Insolvency Court to adjudicate as to whether the debt is, as a matter of fact, a good debt or not. 1926 Cal 982 (983) [A I R V 13] (DB).

3. "In respect of debts provable under the Act."—See S. 34.

4. Sub-section (1), proviso — Debt incapable of being estimated. — [1] Deferred dower debt should not be entered in schedule of creditors. 1930 All 580 (1) (580) [A I R V 17] : 52 All 560 (DB) ✣ 1919 Lah 139 (140) [AIR V 6]. (Case under old Act.)

[2] Purchasing shares of company and making certain payment on allotment and call — Insolvency of *A* and unconditional discharge— Company going in liquidation — Balance of money due upon shares, held could not be recovered in liquidation—Whether debt can be fairly estimated or not can be decided by Insolvency Court alone and High Court has no jurisdiction. 1940 Lah 304 (305, 306) [AIR V 27] : ILR (1940) Lah 458 (DB).

[3] See also S. 34.

5. Who may prove debts.—[1] A partner in a firm against which a commission of bankruptcy issues shall not prove in competition with the creditors of the firm, who are in fact his own creditors and shall not take part of the fund to the prejudice of those who are not only creditors of the partnership, but of himself; but it is essential for application of this rule that there should be some creditors proving under the bankruptcy for debt or debts in respect of which the present or former partners, whose proof is excluded, and the bankrupt, were jointly liable. 1937 Nag 410 (410, 411) [AIR V 24] : I L R (1940) Nag 242.

[2] Assignee of debt due by insolvent is entitled to be placed on schedule of creditors. 1930 Lah 235 (235) [AIR V 17].

[3] *'Any creditor' in S. 33 (3)* — The words of S. 33 (3) are sufficiently wide to include person who has already proved one or more debts, but wishes to prove a further debt which for some reason or other he has omitted. 1926 Cal 1210 (1210) [AIR V 13] (DB).

[4] Transferees whose tranfers have been set aside under S. 53 as being without valuable consideration, cannot prove their debts as regards the unproved consideration. 1939 Lah 145 (145) [AIR V 26].

[5] Where a sale effected by an insolvent is held to be fraudulent and is annulled, but a part of the sale consideration is found to have been actually paid by the alienee in satisfaction of a decree against the insolvent, the debt is a just antecedent debt and the alienee steps into the shoes of the decree-holder and is entitled to prove his debt. 1933 Lah 211 (211, 212) [AIR V 20].

[6] Transferee of property subjected to charge is person interested in payment of debt charged under S. 69, Contract Act and such payment is debt provable in insolvency. 1930 Oudh 266 (268) [AIR V 17] (DB).

[7] For further cases whether transferee whose transfer has been set aside under sections 53 and 54 can prove his debt, *see also* under S. 53.

[8] *A* drawing money from bank by deposit of title deeds—*B* paying money to bank and taking back title deeds—Adjudication of *A* as insolvent—*B* can be subrogated to the bank. 1933 Lah 416 (417) [AIR V 20] (DB).

[9] Muhammadan Law—Muhammadan heir becoming insolvent subsequent to decree against estate of his ancestor in his hands — No lien or charge exists on property in official receiver's hands and so creditors must prove as ordinary creditors. 1929 Mad 609 (611) [AIR V 16].

6. Limitation for tender of proof. — [1] The words "any creditor may, at any time before the discharge of the insolvent, tender proof of his debt" are not restrictive but merely directory—Non-compliance with them does not in any way deprive any creditor of his right or limit his right. 1924 Mad 163 (165) [AIR V 11] : 47 Mad 120 (DB).

[2] Fixing of some time for proof of debts at the time of passing an order of adjudication is only for the convenience of parties. No period of limitation is prescribed in the Insolvency Act during which a creditor should apply for proof of his debt. But this right of creditor to prove his debt is subject to the condition that he (creditor) should apply for proof of debts before the insolvent is granted an unconditional order of discharge and his assets are realised and distributed and the surplus, if any, is paid to the insolvent. 1957 Mys 3 (Prs 9, 10) [AIR V 44 C 2] : ILR (1956) Mys 209 (DB).

[3] No period of limitation is fixed by Act for application to be brought on to the schedule of creditors — It depends on discretion of Court — Failure of creditor to prove debt within time fixed by court and for nnmber of years afterwards—No explanation for delay — He was not allowed to come in and prove his debt at time when execution of decree in which debt had become merged had become long time-barred. 1927 Rang 263 (264, 265) [AIR V 14] : 5 Rang 384 (DB).

[4] So long as there are assets of the insolvent and the insolvent is not discharged, any creditor can apply and prove his debt. Insolvency proceedings do not trminate till final and unconditional order of discharge is granted to the insolvent, his assets are realised and distributed to the creditors and the surplus, if any, is paid to the insolvent. ('49) 54 Mys H C R 261 (264, 265) (DB).

[5] Provisions of sub-ss. (1) and (3) of S. 33 are mandatory. Creditor must tender proof

34. Debts provable under the Act.

(1) Debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be provable under this Act.

(2) Save as provided by sub-section *(1)*, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act.

[P. I., 1907—S. 28 (2); P. T. I., 1909—S. 46 (1), (3)].

Section 33 — Note 6 *(contd.)*

of his debt before the discharge. He cannot do so after the discharge. It is for the Court to decide whether to accept that proof and enter the debt in the schedule or not to do so. Obviously, if such an application has been made before the discharge, no Court would discharge an insolvent before such an application is decided. The mere fact that there has been a discharge either by mistake or otherwise would not take away the right of the creditor to be entered in the schedule of creditors, provided he had tendered proof of his debt and provided the receiver had money in hand. Acceptance of proof and determination of creditors may be done after discharge. 1949 All 645 (Prs 4-8) [AIR V 36 C 243] : I L R (1949) All 686 (DB).

[6] Section 33 (3) is only directory and creditor can come and prove at any time before dividends are distributed and administration is complete. 1936 Cal 434 (437) [AIR V 23] : ILR (1937) 1 Cal 127.

[7] The discharge mentioned in S. 33 (3) is the final discharge and not a conditional order of discharge. A creditor is entitled under the law to prove his debt at any time so long as there were assets available for distribution, so as not to disturb the distribution of any dividend already declared. 1936 Cal 807 (808) [AIR V 23] (DB).

[8] Proof after final discharge is not possible and legal. 1936 Rang 393 (396) [AIR V 23] : 14 Rang 529 (DB) ✣ 1942 All 344 (347) [AIR V 29] : ILR (1942) All 848 (DB). (Section 64 is subject to S. 33 (3)).

[9] Discharge contemplated by S. 33 (3) is not conditional discharge. Where the lower Court granted the insolvent a conditional discharge, the condition being that he should, subject to his right to an allowance of Rs. 25 per month for maintenance of himself and his family place at the disposal of the Court all property he might afterwards acquire, such an order of discharge does not debar a creditor from proving his debt afterwards. 1924 Mad 163 (164) [AIR V 11] : 47 Mad 120 (DB).

[10] The order of discharge contemplated under S. 33 (3) is one made on the application of the debtor. It does not contemplate a case where the insolvent dies without filing an application for discharge. Hence the death of the insolvent does not bring about automatic discharge of the insolvent and the insolvency proceedings do not terminate thereby. The creditors are, therefore, entitled to prove their debts even after the death of the insolvent till the unconditional order of discharge is passed. 1957 Mys 3 (Pr 13) [AIR V 44 C 2] : I L R (1956) Mys 209 (DB).

[11] Where the Judge, admitting insolvency petition, orders summary administration under S. 74, a creditor may come at any time before the Court before any dividend has been distributed and prove his claim for a share. ('37) 1937 Mad W N 1160 (1161) (DB).

[12] Creditor of insolvent cannot enforce claim as schedule creditor against property acquired by insolvent after discharge, unless schedule of creditors has been prepared before discharge. ('13) 35 All 402 (404) (DB).

[13] A debt which is not barred at the commencement of the insolvency does not become barred by lapse of time for the purpose of insolvency. 1926 Oudh 621(621) [AIR V 13] : 2 Luck 261 (DB).

7. Right to contest.—[1] Representatives of insolvent should be permitted to cross-examine claimants and witnesses, and rebut evidence. 1921 Cal 219 (220) [AIR V 8] : 48 Cal 87 (DB). (Case under Act of 1907.)

[2] When application is made by creditor of insolvent-debtor under S. 33 (3) to be included in schedule of creditors, other creditors who have proved their debts have right to be heard against application. ('12) 34 All 442 (445) (DB).

8. Amendment of proof. — [1] Insolvency Court has same inherent power as ordinary Courts to correct clerical mistakes etc. But where the Insolvency Court has made a formal order upon creditor's application entering certain amount as appeared to it as correct upon the sworn testimony of the creditor the order becomes final and is conclusive and thereafter the Court becomes functus officio to entertain any further application under S. 24 (old Act of 1907) read with S. 152 Civil P. C. 1919 All 264 (264, 265) [AIR V 6] (DB).

SECTION 34 — SYNOPSIS

1. **"Debts incapable of being fairly estimated" — Claim for maintenance.**
2. **"Claims arising otherwise than out of contract".**
3. **Provable debts.**

1. "Debts incapable of being fairly estimated." — Claim for maintenance. — [1] Claim for maintenance or residence being capable of valuation as much as annuity is

Section 34 — Note 1 *(contd.)*
provable debt. 1933 Lah 901 (905) [A I R V 20] : 15 Lah 9 (DB). ((1885) 15 Q B D 239, *Distinguished.*) ✣ 1940 Mad 951 (952) [AIR V 27] ✣ 1939 Mad 183 (184) [A I R V 26]. (Decree awarding dower and maintenance—S. 34 (1) does not apply to part of debt incurred before adjudication.)

[*See* 1916 Sind 53 (53) [A I R V 3] : 10 Sind L R 28. (A claim for maintenanoe ordered to a wife by a decree of the Court is not debt provable in insolvency, reason being that the amount is variable and may be altered by the Court in accordance with the means of the husband and that it might be determined any time by the husband and wife resuming cohabitation. (1885) 15 Q B D 239, *followed.*)]

2. "Claims arising otherwise than out of contract." — [1] Transferee of property subjected to charge is person interested in payment of debt charged within meaning of S. 69, Contract Act and such payment is debt provable in insolvency. 1930 Oudh 266 (268) [AIR V 17] (DB).

[2] Where transfer by way of sale by the insolvent is annulled as fraudulent, but it is found that the alienee paid a sum of money towards the satisfaction of a prior decretal debt, the alienee may be allowed to prove in insolvency as an unsecured creditor to the extent of the prior debt discharged by him. 1933 Lah 211 (211, 212) [AIR V 20].

[3] The petitioner claimed that though the decree ran against three persons it was only the insolvent that was really liable and that he, the petitioner, having paid the entire decree amount was entitled to recover the same from the insolvent. *Held*, that claim did not fall within either category mentioned in subs. (1) of S. 34. The claim in contribution was not a claim in damages. The claim of the petitioner was not a debt which is not provable under the Act. 1947 Mad 338 (338) [A I R V 34 C 170].

[4] Where the monies advanced by a person to the bankrupt to set up a business, represented the person's contribution to the capital of the business in which he had an interest himself inasmuch as when the money was advanced it was not intended to constitute a loan at all, he is no more entitled as against the ordinary creditors of the business to prove in respect of his contribution than the proprietor was entitled to prove in respect of his. The result was that he was not entitled to claim repayment in competition with the creditors of the bankrupt. (1951) 1951-2 All E R 168 (174).

3. Provable debts. — [1] The expression 'debts provable' in the Act means debts whose proof is offered with a view to entitle the creditors to be included in the schedule with a view of their participating in the assets of the insolvent and not the proof for any other purpose. 1960 Andh Pra 257 (Pr 3) [A I R V 47 C 79] (DB).

[2] Applicability of S. 34 (2) to all debts inclusive of judgment-debt, applies to insolvent companies. 1935 Oudh 451 (452) [A I R V 22].

[3] Damages for use and occupation are of the nature of unliquidated damages and would therefore, come within the provisions of S. 34 (1). Where such damages are claimed for the period subsequent to the defendant's adjudication as insolvent, they are not, within the meaning of S. 34 (2), debts and liabilities to which the debtor was subject when he was adjudicated an insolvent nor are they debts to which he became subject before his discharge by reason of any obligation incurred before adjudication. 1945 Mad 239 (240) [AIR V 32].

[4] Absence of a decree under O. 34, R. 6 will not in law debar creditor from proving his debt in insolvency proceedings. 1925 Pat 438 (440) [AIR V 12] : 4 Pat 128 (DB).

[5] After adjudication insolvents proposed scheme for composition — Scheme rejected— Representation by insolvents that creditors had accepted half their respective dues in full satisfaction — Creditors induced to accept by fraudulent misrepresentation — *Held*, under Ss. 28 and 38 (of Act 1907) transaction could not be recognised in insolvency proceedings and that creditors were entitled to prove claims. 1921 Cal 376 (378) [AIR V 8] (DB).

[6] Decree against legal representative of deceased person — Decree can be proved in insolvency. 1935 Mad 1058 (1059) [AIR V 22].

[**But see** 1923 Nag 142 (142) [AIR V 10].]

[7] Secured creditor not realising, abandoning or valuing his security before insolvent's discharge —There is no provable debt — Creditor is entitled to personal decree against insolvent even after his unconditional discharge. 1942 Mad 273 (274) [AIR V 29] : ILR (1942) Mad 448. (A I R 1942 Mad 151 (151, 152), *Overruled*).

[8] Case under Act of 1907 — Mortgagee of factory obtained mortgage-decree, judgment-debtor applied to have receiver to work for decree-holder. Receiver worked for two years when judgment-debtor was adjudged insolvent. Factory was sold in execution of plaintiff's decree and profits had been paid to a certain association. This money was attached by holders of money decrees against judgment-debtor. Plaintiff sued to recover amount from creditors and impleaded receiver as party. *Held* that S. 16 of old Act had no application as money claimed by plaintiff was not debt provable under Act but was property of plaintiff. 1917 All 266 (268, 269) [AIR V 4]: 39 All 204 (DB).

[9] Case under Act of 1907 — Creditor wilfully omitting to prove his debt against principal debtor in insolvency proceedings can nevertheless proceed against surety of insolvent. ('11) 7 Nag L R 122 (124). (In such case contingent liability of surety is debt provable by him in insolvency proceedings of principal debtor.)

[10] Where in spite of a mortgage, which is set aside under Ss. 53 and 54, and a suit and a decree therein for the first instalment due under the mortgage, there has been no substantial part performance of the fraudulent intention to prefer some of the creditors to others under the mortgage and no harm has been actually done and the parties have

Section 34 — Note 3 *(contd.)*

virtually been put back to their original position by the cancellation of the deed, the intended fraudulent transaction will not prevent the mortgagee from proving in insolvency the debts covered by the mortgage as an unsecured creditor. 1952 Mad 504 :(2) (Pr 11) [AIR V 39] (DB).

[11] The mere fact that a mortgage is declared void under Ss. 53 and 54 does not make the debt included in it void. Though the mortgage deed is annulled under Ss. 53 and 54, the mortgagee thereunder can rely on the debt included in the mortgage deed and prove the debts in insolvency as an unsecured creditor. The mortgagee need not plead any fraud for proving these debts as for proving the mortgage. 1952 Mad 504 (2) (Pr 12) [AIR V 39] (DB).

[12] *Obligation incurred before adjudication.* — Debt provable must accrue before adjudication; if accrues after adjudication and before discharge it is provable only if obligation in giving rise to debt was incurred before adjudication. 1930 Cal 459 (461) [AIR V 17] (DB) ✠ 1930 All 104 (105) [AIR V 17] : 52 All 439 ✠ 1923 Nag 142 (142) [AIR V 10]. ("Obligation incurred" refer to obligation incurred by insolvent.)

[*See* 1935 Mad 1058 [AIR V 22].]

[13] Suit on obligation incurred by insolvent after adjudication is maintainable as it is not debt provable in insolvency under S. 28. Suit is not governed by S. 16 (2). 1918 Nag 197 (2) (197) [AIR V 5] ✠ 1925 Oudh 668 (668) [AIR V 12].

[14] Insolvency of monthly tenant — Rent due subsequent to adjudication but before discharge is debt 'provable'—Rent is payable by reason of an obligation which arises on date on which monthly tenancy is created which is before date of adjudication. ('50) I L R (1950) 1 Cal 628 (630).

[15] Arrears of rent due after adjudication is not provable debt. 1937 Lah 790 (791) ✠ 1922 Oudh 73 (75) [AIR V 9].

[16] Decretal debt including costs is provable if suit in which the decree is passed is filed before adjudication. 1937 Mad 725 (726, 727) [AIR V 24].

[17] Certain sum deposited by the plaintiff with a firm before date of the latter's adjudication is a "debt provable under the Act" within the meaning of S. 34. 1936 Oudh 236 (237) [AIR V 23] : 11 Luck 731.

[18] *F* joined *H* as a partner in a business and contributed certain amount. Soon after when he withdrew from the business, *H* gave him a promissory note for his amount. *H* was adjudged insolvent. The debts which led to his insolvency were incurred before *F* became his partner. In insolvency proceedings the question arose as to whether *F* could prove his debt — *Held* that *F* was entitled to prove his debts. On withdrawal by *F* from the firm there was dissolution of the firm and *F* could prove his debt to the extent of amount found due to him after settling accounts by mode prescribed by S. 48, Partnership Act. 1937 Nag 410 (411) [AIR V 24] : I L R (1940) Nag 242.

[19] Promissory note debt incurred by insolvent after presentation of his petition and before adjudication—It is a post insolvency debt since date of adjudication relates back to the date of presentation of petition — It is not provable in insolvency. 1954 Mad 508 (Pr 6) [AIR V 41 C 188] : I L R (1954) Mad 484 (DB).

[20] Member of co-operative society adjudged insolvent and discharged, is not released from his statutory liability under the Co-operative Societies Act, 1912, to contribute to the assets of the society on its dissolution subsequent to his discharge. 1949 Lah 167 (Pr 15) [AIR V 36 C 31] : Pak L R (1949) Lah 192 (DB).

[21] *Certain or contingent liability.* — It is open to a creditor to appear in the bankruptcy proceedings and prove the whole of the liability from the defendant to him, even if it is a liability in futurity or even a contingent liability. Where a creditor stands surety for payment of a debt incurred by the insolvent and becomes liable to pay the debt by instalments by reason of his being a surety, he must prove the liability of insolvent to him during the insolvency proceedings. ('35) 39 Cal W N 563 (566).

[22] Claims on forward contracts are contingent debts capable of being fairly estimated and can be proved under the Act before due dates for performance of contracts have arrived. ('11) 5 Sind L R 249 (251).

[23] Damages may be claimed before official receiver on insolvency of party, they being in the nature of contingent debts, contingent on non-performance of contract by official receiver. The receiver should act as Court assessing damages. In arriving at rates of future date of delivery important factor will be rate at which at time of receiver's valuation future contract for that date could be made. ('12) 6 Sind L R 187 (190, 191, 192, 193). (Case under old Act of 1907.)

[24] Person purchasing shares of company making certain payment on allotment and call —Purchaser adjudged insolvent and unconditionally discharged — Subsequent liquidation of company — Balance of money due upon shares held was contingent liability and as such provable. 1940 Lah 304 (305, 306) [AIR V 27] : I L R (1940) Lah 458 (DB).

[25] The liability of a member of a co-operative society to contribute to the assets of the society in the event of its being dissolved before or during insolvency is provable debt." 1942 Lah 237 (238) [AIR V 29] : I L R (1943) Lah 553 (DB). (AIR 1940 Lah 280, *Reversed.*)

[But see 1939 Lah 275 (276) [AIR V 26]. (Society dissolved—Certain members adjudged insolvents — No liquidator appointed until after discharge of insolvents — Their liability as members was not provable.)]

[26] The liability of an insolvent to indemnify his surety though contingent is one which is provable under the Act and consequently, under S. 44 (2). an order of discharge absolves the insolvent from that liability also. 1942 Mad 745 (745) [AIR V 29].

Annulment of Adjudication

35. Power to annul adjudication of insolvency.

Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication [a][and the Court may, of its own motion or on application made by the receiver or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section *(2)* of section 10, not entitled to present such petition].

[P. I., 1907—S. 42 (1); P.T.I., 1909—S. 21].

[a] *Inserted* by the Insolvency (Amendment) Act, 1927 (XI of 1927), S. 5.

Section 34 — Note 3 *(contd.)*

[27] Creditor's right to benefit of contracts in insolvency does not extend to that not available in suit. 1943 Sind 190 (192) [AIR V 30] : I L R (1943) Kar 238 (DB).

[28] *Debt to which insolvent is subject when he is adjudged insolvent.* — Section 34, is governed by S. 28 (7) of the Act. A debt within time on date of presentation of petition, though barred on the date of adjudication is provable. 1939 Lah 384 (386) [AIR V 26] : I L R (1940) Lah 50 (FB) ✣ 1959 Mad 394 (Pr 2) [AIR V 46 C 125] : I L R (1958) Mad 908 ✣ 1933 Lah 688 (689) [AIR V 20] : 14 Lah 730 (DB) ✣ 1937 Mad 577 (577) [AIR V 24] : I L R (1937) Mad 679 (DB) ✣ 1924 Mad 163 (168) [AIR V 11] : 47 Mad 120 (DB).

[*See also* 1936 Bom 130 (131) [AIR V 23] : 60 Bom 444 (DB). (Case under Presidency-Towns Insolvency Act which follows Lahore view.)]

[See however 1921 Cal 456 (457) [AIR V 8] (DB). (Bar of time ceases to run after adjudication, as the effect of the bankruptcy is to vest the property of the bankrupt in the trustee for the benefit of the creditors, and all personal remedies against the bankrupt are also thereafter stayed.) ✣ 1932 Mad 287 (288) [AIR V 19] : 55 Mad 630 (FB). (Case under Presidency-Towns Insolvency Act.) ✣ 1938 Oudh 206 (207, 208) [AIR V 25] : 14 Luck 164 (FB) ✣ 1926 Oudh 621 (621) [AIR V 13] : 2 Luck 261 (DB) ✣ 1924 Oudh 351 (352) [AIR V 11] (DB) ✣ 1925 Pat 438 (440) [AIR V 12] : 4 Pat 128 (DB). (Personal liability of mortgagor insolvent can be proved in insolvency though relief under C. P. C., O. 34, R. 6 is barred by limitation provided unrealised balance was not barred at time of adjudication.) ✣ 1937 Rang 50 (51) [AIR V 24] (DB) ✣ 1919 Low Bur 1 (1) [AIR V 6] (DB). ("Date of such adjudication" mean date on which actual adjudication is made and not date on which petition is presented.)]

[But see 1932 Bom 511 (512) [AIR V 19].]

[29] There is a close analogy between the insolvency law and the Companies Act and since under the insolvency law, a debt, which is provable on the date of the filing of the application for insolvency is to be deemed a provable debt within the meaning of S. 34 (2), Provincial Insolvency Act, it must be held that the same rule would apply to cases under the Companies Act. A debt, therefore, which was recoverable and provable on the date of the filing of a winding up petition but becomes barred by time before the order of winding up is made, is a debt which can be proved under the provision of the Companies Act. 1961 Punj 84 (Prs 2, 11) [AIR V 48 C 27] : I L R (1961) 1 Punj 7 (DB). (AIR 1958 Punj 341, *Reversed.*)

[30] Sale set aside under S. 54—Transferee cannot prove cash consideration for sale and seek his name to be included in Schedule of creditors — But antecedent debt included in consideration for transfer can be proved by alienee as unsecured creditor. 1947 Bom 392 (Prs 5, 6) [AIR V 34 C 111] : I L R (1947) Bom 156.

[31] A decree obtained against the judgment-debtor is not binding on the receiver in insolvency for it might be collusive or fictitious. 1923 All 33 (33) [AIR V 10] (DB).

SECTION 35 — SYNOPSIS

1. Scope.
2. "Where debtor ought not to have been adjudged insolvent".
3. "Where debts have been paid in full."
4. Who can apply.
5. Annulment suo motu.
6. Effect of annulment.
7. Practice and procedure.

1. Scope. — [1] Benefit of Act should not be extended to traders who fail to keep proper accounts or who deal extravagantly and contract debts recklessly without any reasonable prospect of being able to pay them. ('12) 15 Ind Cas 276 (276) (DB) (Rang).

[2] Where application of creditor is dismissed under S. 25 (1) there can be no order of annulment under S. 35. 1931 Nag 109 (110) [AIR V 18].

[3] Proceedings under Ss. 35 and 38 are not allied — Rejection of application under S. 35 not bar to application under S. 38. 1936 All 102 (103) [AIR V 23] : 58 All 655 (DB).

[4] The mere fact that proceedings were contemplated under S 43 is not enough to show that the order of adjudication is annulled. 1916 Mad 1088 (1089) [AIR V 3].

[5] Only when appeal against adjudication has been made under S. 75 (1) or when application is made by person interested under S. 35 that Court has authority to annul or set

Section 35 — Note 1 *(contd.)*

aside order of adjudication. ('30) 1930 Mad W N 651 (652).

[6] It is doubtful whether Court could refuse annulment where one or more of the circumstances specified in the section were proved to exist. 1916 Cal 178 (179) [AIR V 3] (DB).

[7] Court should be very chary about annulling insolvency proceedings if there are pending proceedings under S. 53 or S. 54. 1940 Nag 4 (5) [AIR V 27] : I L R (1941) Nag 500 (DB).

2. "Where debtor ought not to have been adjudged insolvent." — [1] Under S. 35 annulment can be made on ground that debtor could not be adjudged and that adjudication order is invalid at its inception. 1937 Cal 158 (159) [AIR V 24]: ILR (1937) 1 Cal 628 (DB)✣ 1916 Lah 455 (456) [A I R V 3]. (Subsequent misconduct on the part of insolvent should not lead to annulment of adjudication.) ✣ 1940 Mad 375 (377) [A I R V 27] : ILR (1940) Mad 441 (FB). (The fact that debtor does not object to adjudication is no bar to its annulment)✣ 1928 Mad 609 (610) [AIR V 15]. (Section 35 says nothing about abuse of powers of Court)✣1926 Mad 1159 (2) (1160) [AIR V 13] (DB). (It must be proved that act of insolvency on which order was based did not really exist.)✣1916 Pat 181 (181) [AIR V 3] (DB). (Case under Act of 1907.)

[2] Power of annulling adjudication on ground that it ought not to have been made is more restricted under this Act than under the Presidency-Towns Insolvency Act. In such cases AIR 1916 P C 64 must be followed. It cannot therefore be said that a person ought not to have been adjudged insolvent where the petitioner had fulfilled all the conditions required by the Act to enable him to present petition. 1928 Mad 394 (397, 398) [AIR V 15] (DB).

[3] Ex parte order of adjudication is liable to be annulled. 1940 Pat 58 (59) [A I R V 27] (DB).

[4] Where the decree on which adjudication was made does not represent a real debt but has been obtained by fraud or collusion, the adjudication would be set aside. 1933 Rang 268 (269) [AIR V 20] (DB).

[5] Fictitious debts included in petition for insolvency—Sale of properties under fictitious transfers by insolvent — Assets exceeding liabilities — Adjudication held should be annulled. 1938 Pat 368 (369) [AIR V 25] (DB).

[6] Adjudication on petition of creditor—Debt found not genuine—Adjudication cannot be annulled — After adjudication all other creditors became interested—In order that adjudication could be annulled it must be established that the debtor did not owe any other debts or that the debtor was not really insolvent when adjudication was made. 1940 Mad 151 (152) [AIR V 27].

[7] When the debtor was not personally liable for the debt due to the petitioning creditor and when there is no evidence of any other debt being in existence when the sale deed (alleged to be an act of insolvency) in favour of the vendee was executed, it can on no account be treated as an act of insolvency. 1952 Trav-Co 234 (Pr 7) [AIR V 39] (DB).

[8] If on the materials before the Court at the time the order of adjudication was passed it is clear that the Court had no jurisdiction to pass the order, S. 35 clearly empowers the Court in revision to annul the adjudication. 1938 Mad 898 (899) [AIR V 25] : ILR (1939) Mad 24 (DB).

[9] Order adjudicating person insolvent cannot be annulled for failure to deposit costs of publication under S. 30. 1930 Oudh 53 (53) [AIR V 17] : 5 Luck 479 (DB).

[10] Public officer on being arrested in execution adjudged insolvent on his petition—Condition that he should pay one-fourth of his salary, which amounted to Rs. 25 into Court, pending disposal of other property—Failure to comply with condition—Adjudication annulled — Annulment held not proper, condition imposed being without jurisdiction. 1914 Cal 1 (2) [AIR V 1] (DB).

[11] Adjudication cannot be annulled on ground (i) of misconduct of petitioner subsequent to the adjudication (ii) that the petitioner could subsequently pay his debts in full out of his assets (iii) that a part of his property is subject to the Punjab Alienation of Land Act (iv) that the debtor since his adjudication has not been giving any produce of his lands to his receiver, or (v) that he has not made over all his assets to the receiver. 1916 Lah 455 (456) [AIR V 3].

[12] Where an insolvent held a decree and transferred it to another person but it was admitted that he did not possess that decree at the time of the adjudication but had already transferred it — *Held* that it was open to the Court to consider whether the transfer of the decree was voidable as against the receiver under the provisions of S. 53 but it was not open to the Court to annul the adjudication in respect of the matter alleged in reference to the decree. 1928 Oudh 404 (404) [AIR V 15] : 3 Luck 323 (DB).

[13] The facts that the conduct of the insolvent has been dishonourable or dishonest or fraudulent or that he is a scoundrel and does not deserve the assistance of the Court are not sufficient grounds for annulling an order of adjudication. 1928 Mad 394 (396, 397) [A I R V 15] (DB).

[14] Court cannot refuse to make order for adjudication or annul any adjudication already made, merely on ground of there being no available assets. 1917 Lah 112 (113) [AIR V 4]✣1916 Pat 181 (181) [AIR V 3] (DB).

[15] Dishonesty in his dealings that he had no assets and had destroyed account books or recklessness in entering into transactions and debts — No ground for annulment. 1931 All 331 (332) [A I R V 18] : 53 All 476 (DB).

[16] When conditions of the section are not complied with, the fact that the receiver of the insolvent's property has been unable to satisfy the debts nor the fact that the opposing creditor is proved to have at one time consented to a composition nor even the consent of all the creditors is sufficient ground to annul the adjudication. 1916 Cal 178 (179, 180) [A I R V 3] (DB).

Section 35 *(contd.)*

3. "Where debts have been paid in full."—[1] Payment in order that it may discharge the insolvent's debt in full within the meaning of S. 35 must be a complete payment of the debts up to date, as if there was no bankruptcy. Onus is on the insolvent to establish that independent of insolvency law he has satisfied his debts in their entirety. The provisions made in Part III of the Act for distribution of assets of the insolvent are wholly irrelevant for determination of the amount due to the creditors and payable to them in order to invoke the relevant provision of S. 35. The creditors cannot claim interest as provided in S. 61 (6) when their contractual rate is less than that mentioned in the section. 1947 Oudh 202 (Pr 3) [AIR V 34 C 69] : 22 Luck 478.

[2] Fact that payments of debts were not made through official receiver is no justification for refusing to grant annulment. Petitioner should be put to proof of allegations made by him. 1920 Mad 890 (1) (890) [A I R V 7] (DB).

[3] When the debt due on a creditor's decree has not been paid, the consent of the creditors or even an unconditional discharge by the creditors does not entitle the Court to annul the adjudication unless the debts have been actually paid in full in cash. ('35) 18 Nag L Jour 145 (148) ✠ 1926 All 289 (290) [AIR V 13] : 48 All 272 (DB). (Unconditional discharge.) ✠ 1930 Mad 112 (112) [AIR V 17] (DB). (Admission of complete discharge).

[4] Debt due to one creditor only paid, others remaining unpaid—Adjudication cannot be annulled. ('26) 3 Oudh W N (Sup) 296 (299) (DB).

[5] Where a majority in number and three-fourths in value of all the creditors, whose debts were proved, do not resolve to accept a scheme of composition, a Court would be justified in dismissing an application by the insolvent under Ss. 35 and 38 of the Provincial Insolveney Act. 1950 Mad 800 (801) [AIR V 37 C 337] : ILR (1951) Mad 237 (DB).

4. Who can apply. — [1] If the order of adjudication itself is challenged as a nullity, a purchaser of the property after the application for adjudication is presented can certainly maintain an application under S. 35, and, if he succeeds in proving that the order of adjudication ought not to have been made, he will be certainly a person "interested" within the meaning of that section. ('48) ILR (1948) 1 Cal 131 (132, 133) (DB).

[2] Where the order of adjudication based upon a certain transfer as an act of insolvency is passed without notice to the transferee the order is not conclusive against him and he as transferee cannot be considered as person "aggrieved" by the order of adjudication within the meaning of S. 75 and therefore simply because he does not appeal against the order and get it set aside, he cannot be regarded as bound by it. Consequently the transferee is entitled to apply for the annulment of adjudication. 1948 Nag 385 (Pr 10) [AIR V 35 C 132]: ILR(1948) Nag 523.

5. Annulment suo motu. — [1] Court has no power to annul adjudication *suo motu* without an application in that behalf. 1933 Mad 631 (634) [AIR V 20] (FB).

6. Effect of annulment.—[1] Annulment puts an end to legal character of insolvent—He is no longer an insolvent. 1941 Mad 22 (23) [AIR V 28].

[2] It is doubted whether annulment of adjudication *ipso facto* will put an end to insolvency proceeding. 1929 Mad 480 (481) [AIR V 16].

[3] Suit by widow of deceased insolvent to recover part of husband's estate impleading official receiver — Adjudication subsequently annulled—Suit to recover item within time at time of annulment is maintainable. 1941 Mad 84 (87) [AIR V 28].

[4] When an adjudication is annulled under S. 35, no vesting order should be made under S. 37 except to the extent that any special circumstances render such vesting necessary. 1945 Mad 257 (258) [AIR V 32] : I L R (1946) Mad 54 (DB).

[5] Suit instituted by receiver of an insolvent's estate against debtor of insolvent does not cease to be maintainable by reason of annulment of adjudication. 1918 All 21 (22) [AIR V 5] : 41 All 200 (DB).

[6] Effect of annulment relates back to date of order of adjudication to revest property in insolvent from that date. 1937 Mad 717 (718) [AIR V 24].

[7] Where an adjudication is annulled under S. 35 and no vesting order is made under S. 37 the property does not merely revest in the insolvent but it reverts to him, The effect of the annulment relates back to the date of adjudication and the insolvent must be deemed to have had a saleable interest in that property for the purpose of being treated as an agriculturist entitled to the benefits of the Madras Agriculturists' Relief Act. 1955 Andh 152 (Pr 3) [(S) A I R V 42 C 55] (DB). (A I R 1951 Mad 63 (FB) and AIR 1954 Mad 604 (FB), *Followed.*)

[8] Alienation made by the insolvent during the pendency of the insolvency is not validated by the order of annulment of the adjudication. 1951 Nag 241 (Pr 28) [AIR V 38 C 61] : ILR (1951) Nag 12.

[9] See also under S. 37.

7. Practice and procedure. — [1] When it is alleged that a judgment had been obtained by fraud or collusion, it is the duty of the Insolvency Court to hold an inquiry and come to a finding as to whether the decree represented a real debt or not and if it concluded that the decree had been obtained by fraud or collusion, to annul the adjudication under the provisions of S. 35. 1933 Rang 268 (269) [AIR V 20] (DB) ✠ 1935 Rang 276 (277) [AIR V 22] (DB).

[2] Order of annulment should be very carefully worded. 1940 Nag 4 (5) [AIR V 27]: ILR (1941) Nag 500 (DB).

[3] *Burden of proof* — The person seeking annulment must produce *prima facie* proof before he can hope to succeed, but having done so, the attitude of the other side is of the

36. Power to cancel one of concurrent orders of adjudication.

If, in any case, in which an order of adjudication has been made, it shall be proved to the Court by which such order was made that insolvency proceedings are pending in another Court against the same debtor, and that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or stay all proceedings thereon.

[P. I., 1907—S. 17; P. T. I., 1909—S. 22].

37. Proceedings on annulment.

(1) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or receiver, shall be valid; but, subject as aforesaid, the property of the debtor

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Section 35 — Note 7 *(contd.)*

utmost importance in judging the truth of his story and his good faith. 1938 Nag 216 (218) [AIR V 25] : ILR (1940) Nag 526.

[4] Where an application for annulment challenges the debt, whole stock and barrel and when the creditor's eligibility to lay the application in insolvency is founded upon that debt, it is for him to show that the debt was not only genuine, but also one for the non-payment of which the debtor could have been personally proceeded against. 1952 Trav-Co 234 (Pr 4) [AIR V 39] (DB).

[5] *Notice to debtor.*—Fresh notice of annulment upon insolvent is not provided for by Act. 1928 Pat 338 (339) [AIR V 15] : 7 Pat 375 (FB).

[6] *Review.* — Insolvent got himself fraudulently and collusively adjudicated by arranging with a bogus creditor—Later on original creditor dropped out to have his remedy in suit—Another creditor stepped in to continue proceedings and put in his proof of claim before official receiver who rejected it—Appeal by him to District Judge for reversal of receiver's order and for his inclusion in schedule of creditors—Appeal dismissed and order of adjudication annulled—Petition by another creditor under O. 47, R. 1 for review of order annulling adjudication — Petition dismissed on ground of want of power to review it—*Held* that the District Judge had power of review as he acted wrongly in annulling adjudication *suo motu* when nobody had asked for it under S. 35. 1933 Mad 631 (635) [A I R V 20] (FB).

[2] The Chief Court of Oudh cannot pass an order of stay of a case pending in the Court of the Insolvency Judge, Cawnpore, unless the direction of the Chief Court is confirmed by the Allahabad High Court. 1938 All 555 (556) [AIR V 25] : ILR (1938) All 800.

[3] Where there is a prior bankruptcy or insolvency in another country the Court has a discretion to allow or refuse an adjudication. ('04) 31 Cal 761 (769).

[4] Insolvency proceedings started at *R* on application of debtors and subsequently at *D* on application of creditors — Creditors at *D* having to realize more amount than creditors at *R* and to contest alienation of property at *D* by debtor — Creditors at *R* agreeing to accept part payment of debts out of sale proceeds of property at *R*—Both Courts should continue proceedings—Which should annul its order of adjudication should be decided by them. 1928 Lah 848 (849) [AIR V 15].

[5] Statements recorded in an inquiry by the official receiver cannot be treated as evidence by a Court in proceedings before it under S. 36 of the Act. 1917 Mad 838 (839) [AIR V 4] (DB).

[6] Prior order of adjudication by Court *A* —Subsequent order of adjudication by Court *B*—Assets in hands of *A* Court can only be transferred to *B* Court on a letter of request under S. 77 by *B* Court to *A* Court—Application for transfer of such assets by the Official Assignee of *B* Court made directly to *A* Court is not sustainable under S. 36. 1957 Andh Pra 649 (Pr 3) [AIR V 44 C 208] (DB).

Section 36 — Note 1

[1] Where there are successive adjudications in insolvency by two Courts, all the property of the insolvent vests in the Official Assignee appointed by the Court in which the prior adjudication was made and it will not be divested from him by the subsequent adjudication by the other Court. It will not be just or equitable to allow the proceedings in both Courts to go on concurrently leading to a most undesirable conflict of jurisdiction. The proper procedure in such a case would be for one of the Courts either to annul the adjudication or to stay all proceedings thereof as provided by S. 22 of the Presidency-Towns Insolvency Act or S. 36 of the Provincial Insolvency Act. 1957 Andh Pra 649 (Pr 3) [AIR V 44 C 208] (DB).

SECTION 37 — SYNOPSIS

1. Scope and applicability.
2. Section 37 and section 39.
3. Section 37 and section 43.
4. Sales, dispositions and payments made and acts done by Court or receiver.
5. Vesting of property in the insolvent.
6. Vesting order.
7. Powers and duties of an appointee.
8. Effect of annulment.
9. Powers and duties of Court.
10. Transfers by insolvent subsequent to annulment but prior to the vesting order.

1. Scope and applicability. — [1] Annulment of any kind irrespective of the ground

who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interests therein on such conditions (if any) as the Court may, by order in writing, declare.

(2) Notice of every order annulling an adjudication shall be published in the Official Gazette and in such other manner as may be prescribed.

[P. I., 1907—S. 42 (2) (3); P.T.I., 1909—S. 23].

Section 37 — Note 1 *(contd.)*

on which it is made will attract the operation of S. 37. 1943 Cal 133 (136) [AIR V 30] : ILR (1943) 1 Cal 5 (DB).

[2] The scheme of S. 37 is to enable an orderly distribution of assets of the insolvent and to place these assets at the disposal of all those creditors who would be able to proceed against the debtor if the property had reverted to him and a creditor who holds a debt which came into existence subsequent to adjudication may also share in the distribution. 1935 Mad 931 (934) [AIR V 22]: 58 Mad 1014 (DB).

[3] The object of S. 37 is to restrict the ex-insolvent's activities by investing the Court with discretion to hand back the properties without any condition or with conditions so as to afford opportunity to the creditors to enforce their claims by ordinary process of law or to vest the estate in some person for a reasonable period, so that the creditors by acting thereafter with reasonable diligence could liquidate any decree they might obtain against the debtor, by attachment or otherwise of the assets of the debtor in the hands of the appointee. 1936 Rang 284 (286) [AIR V 23] : 14 Rang 254 (FB) ✣ 1936 Cal 573 (574) [AIR V 23] : ILR (1937) 1 Cal 264 ✣ 1931 Mad 10 (11) [AIR V 18]. (While in the meanwhile it avoids the debtor being called an insolvent.)

[4] Section 37 refers to the vesting of the properties of the insolvent after an order of annulment is made. 1936 Pat 112 (113, 114) [AIR V 23] (DB). (Unliquidated debt due to debtor brought to sale before adjudication—Sale by Court without knowledge of pendency of insolvency proceedings—The rights of creditors *inter se* would be governed by S. 51 and the creditor who received the sale proceeds should under S. 28 read with S. 51 make it over to the receiver when called upon to do so—S. 37 does not apply to the case.)

[5] Where property vests under S. 37 or 39 of this Act S. 6 (a) of the Transfer of Property Act does not govern the case. 1925 Sind 159 (162) [AIR V 12] : 19 Sind L R 286.

[6] Sections 37 and 43 cannot be interpreted in such way as to favour insolvent. 1941 Lah 316 (320) [AIR V 28] : ILR (1942) Lah 330 (DB).

[7] Proviso to S. 78 refers only to debts proved between date of order of adjudication and date of order of annulment and not subsequently—S. 37 cannot give creditor benefit of S. 78 (2). 1949 Mad 683 (Prs 4, 7) [AIR V 36 C 303].

2. Section 37 and section 39.—[1] The provisions of S. 37 are applicable to composition schemes by virtue of S. 39 of the Act. 1934 Lah 394 (395) [AIR V 21].

[2] Annulment of adjudication on the acceptance of scheme of composition — Annulment does not operate as in the case of discharge to wipe out all debts provable in insolvency. 1929 Mad 157 (164) [AIR V 16] (DB) ✣ 1933 Lah 187 (187) [AIR V 20]. (Creditor in whose name debtor has issued a cheque before adjudication is entitled to recover the amount due on the cheque.)

[3] Section 39 expressly provides that the Court has to make an order annulling the order of adjudication and that provision is mandatory. Where therefore although the Court gave sanction to the composition, there was admittedly no order made by the Court annulling the order of adjudication, S. 37 will not apply. And if S. 37 does not apply, it is obvious that the insolvency continues. 1956 Bom 262 (Pr 7) [AIR V 43 C 111] (DB).

[4] See also notes under S. 39.

3. Section 37 and section 43. — [1] Section 37 although applicable to annulment only its principles would apply to the case of discharge of the insolvent. 1944 Mad 208 (209) [AIR V 31] ✣ 1943 Mad 26 (27, 28) [AIR V 30] : ILR (1943) Mad 213 (DB). (Insolvent granted discharge on the ground that no creditor had proved his debt — Court ordering sale of property on an application made seven years later by one of the creditors of official receiver — *Held* that the receiver had no power to bring the properties to sale for by reason of the principles underlying S. 37 (though section itself was not applicable in terms to the case) the absolute order of discharge brought the administration of the insolvency to an end.)

[2] Failure of insolvent to apply for discharge within time fixed—Court *suo motu* annulling order without issuing notice to insolvent and the creditors—*Held* that the order was bad and so should be set aside—Proper procedure in such a case would be to extend the time for applying for discharge. 1931 Mad 10 (11) [AIR V 18].

[3] When an adjudication is annulled on the ground that the insolvents had not fulfilled their duty by applying for the discharge within the time fixed by the Court it would not be proper exercise of discretion for the Court to revest the properties in the insolvents, for that would be allowing the insolvents to take advantage of their own default. 1946 Mad 388 (389) [AIR V 33 C 199] (DB).

[4] Order of discharge under S. 43 — Revesting of property in the discharged debtor cannot take place through operation of S. 37. 1940 Lah 304 (307) [AIR V 27] : ILR (1940) Lah 458 (DB).

[5] Annulment under S. 43 — Order under S. 37 vesting properties in the official assignee

Section 37 — Note 3 *(contd.)*

for the benefit of creditors is valid. 1930 Mad 520 (526) [AIR V 17] (DB)✣ ('28) 112 Ind Cas 768 (768) (Lah).

[6] Omission to pass order under S. 37 while annulling adjudication under S. 43 — *Held* Court could add it at a later stage. 1934 Lah 468 (470) [AIR V 21] : 15 Lah 698 (DB).

4. Sales, dispositions and payments made and acts done by Court or receiver. — [1] Section 37 (1) is an express provision saving the intermediate sales, disposition of property and payments duly made or acts done before the annulment order whether made by the Court or the receiver. This provision would be unnecessary if the reverter is not to .be given retrospective effect. If retrospective effect is to be given it must date back to the date of the insolvency petition. 1945 Mad 388 (390) [AIR V 32].

[2] The words "all acts theretofore done" mean all acts done with a view to making sales and dispositions of property including setting aside of transfers made by the insolvent with a view ultimately of making sales of property so recovered for the benefit of creditors. 1935 Rang 328 (330) [AIR V 22]: 14 Rang 63 (DB).

[3] What are saved under S. 37 are 'sales and dispositions of property and payments duly made' and the 'acts' done by the Court or Receiver could not be any act done at any time by the Court or Receiver but must be acts done by the Court or Receiver which will have a relation to the sales and dispositions of property and payments duly made. In this view, the 'acts' in S. 37 (1) could not include the act of ordering the setting aside of the sale by insolvent prior to his adjudication, the effect of annulment being to restore the prior state of things. It must therefore be taken that the order setting aside the sale has ceased to have any effect with the annulment of the adjudication. 1956 Mad 341 (Prs 3, 4, 5) [AIR V 43 C 105]. (AIR 1930 Mad 278, *Dissented from.*)

[4] Sale by official receiver with the approval of Court — Adjudication subsequently annulled — Sale deed executed and registered after annulment — *Held* sale was valid. 1939 Oudh 55 (56) [AIR V 26] : 14 Luck 404.

[5] Section 37 only means that the order of annulment will not invalidate acts theretofore done by the Court or official receiver and not that those acts acquire finality and immunity from attack by way of appeal where they could not have possessed such a characteristic had there been no order of annulment. 1935 Mad 433 (434) [AIR V 22].

[6] Proceedings started before annulment by official receiver to set aside mortgage under S. 54 must be deemed to be pending, and, can be continued after annulment. 1930 Mad 278 (281) [AIR V 17] : 52 Mad 648 (DB) ✣ 1932 Mad 731 (732) [AIR V 19]. (Annulment under S. 43 — Section 37 permits continuation of proceedings started under S. 53 or 54 with permission of Court — But where a creditor was maintaining a petition under S. 53 the creditor must obtain special permission to continue the proceedings after the annulment.)

[7] Adjudication annulled soon after petition by receiver to set aside a transfer was dismissed — *Held* no appeal from the order of dismissal was competent either by the receiver or creditor. 1935 Rang 498 (499) [AIR V 22] (DB).

[8] Expiry of time for applying for discharge—Court is not bound to vest property in insolvent, but may vest in receiver for the benefit of creditors and sale by receiver cannot be questioned by insolvent. 1933 Lah 1008 (1008) [AIR V 20].

5. Vesting of property in the insolvent. — [1] The phraseology of S. 37 clearly indicates that on passing an order annulling the adjudication, the Insolvency Court must pass an order vesting the property of the insolvent in a person appointed by it and in the absence of such an order the properey reverts to the insolvent. 1936 Lah 568 (569) [AIR V 23].

[2] The words "Court may by order in writing declare" in S. 37 govern the vesting of the property in the debtor only and mean that it shall so vest subject to any condition which the Court may declare. But it is not necessary that any condition should be imposed at all and where it is not declared the vesting in the debtor is unconditional. 1933 Pat 84 (86) [AIR V 20]:12 Pat 163 (DB)✣1925 Rang 301 (301) [AIR V 12] : 3 Rang 201 (DB).

[3] The conditions that may be imposed by the Court in passing a vesting order under S. 37 relate to the property of the debtor and not to the property of any other person. 1933 Rang 223 (224) [AIR V 20]:11 Rang 287 (FB).

[4] When there is no appointee in whom the property is vested, it reverts to the debtor, but only to the extent of his right or interest therein and that means the right or interest as it existed on the date of his adjudication. 1935 Rang 328 (330) [AIR V 22] : 14 Rang 63 (DB) ✣ 1942 Mad 371 (372) [AIR V 29].

[5] Where under S. 37 no vesting order is made when the adjudication order is annulled, the property of the debtor must be deemed to have reverted to him, and the Insolvency Court has no jurisdiction over him or over his property except for a limited purpose under the section. 1949 Nag 39 (Pr 10) [AIR V 36 C 19] : ILR (1948) Nag 284.

[6] When an adjudication is annulled the property revests in the judgment-debtor with all the burdens which existed upon it at the time of adjudication. 1940 Mad 129 (130) [AIR V 27]. (Attachment of property before adjudication — Execution petition dismissed on adjudication—On annulment of adjudication the attachment which was on it but made ineffective by adjudication comes into force.)

[7] Adjudication annulled subject to vesting under S. 37 — No specific order vesting property in Official Receiver — Property reverts to debtor—There is no Official Receiver in whom property continues to vest—Execution proceedings against insolvent judgment-debtor—Official Receiver is not a party. 1955 N U C (Mad) 2435 [AIR V 42].

Section 37 — Note 5 *(contd.)*

[8] Where the adjudication order is annulled but the Insolvency Court does not make any order under S. 37 vesting property in the Official Receiver, the position is that the situation becomes as before the adjudication and the quondam insolvent gets back his property saddled with all the debts. But if he does not take back the possession which still remains with the Official Receiver, the possession of the latter does not become adverse to the quondam insolvent. He holds the property on behalf of the rightful owner. If the Receiver sells the property the possession of the purchaser however becomes adverse to the quondam insolvent from the date of the sale, but his suit for possession filed within 12 years is not barred. 1952 Mad 179 (Pr 3) [AIR V 39] (DB).

[9] Annulment of adjudication without vesting order — Insolvent gets back the property in his original right—No transfer from receiver to insolvent is needed — Nor would there be an interregnum when the insolvent had no right — Term "revert" instead of "revest" makes the position clear. 1955 Trav Co 241 (Pr 5) [(S) AIR V 42 C 99] : ILR (1955) Trav-Co 68 (DB).

[10] Order vesting only realised assets in the Court — Unrealised assets are not available for distribution — The unrealised assets revert to the insolvent from before the date of annulment unconditionally in the absence of any condition prescribed by the Court, as if he had never been adjudicated as insolvent. 1960 Pat 176 (Prs. 12, 15)[AIR V 47 C 59] (DB).

[11] Death of insolvent—Court not passing any order under S. 17 for realization of property—Properties revert to debtor. 1954 Mys 52 (Pr 3) [AIR V 41 C 25] : ILR (1954) Mys 95 (DB).

[12] Adjudication of *A* annulled—Property vested in official receiver for one year — Execution petition by creditor before expiry of year — Notice to *A* but not to official receiver — Property sold after expiry of year—Sale, held could not be set aside at instance of *A*. 1943 Mad 260 (261, 262) [AIR V 30].

[13] Court annulling adjudication and ordering sale of property in receiver's hands—No vesting order — Reverter held was subject to condition to distribute proceeds among creditors. 1939 Nag 203 (204) [AIR V 26]:ILR (1941) Nag 410 (DB).

6. Vesting order. — [1] Alienation of property which has not been set aside—Till it is so set aside an order for vesting the property in the creditor cannot be made. Under S. 37 only admitted properties of the insolvent debtor can be vested. 1931 Mad 10 (11) [AIR V 18].

[2] Order under S. 43 (1) annulling adjudication — Direction to official receiver to deal with the properties — Absence of clear words to show that the official receiver was made appointee under S. 37 — Still the order must be taken to have been passed under S. 37 vesting properties in him. 1943 Cal 133 (134) [AIR V 30] : ILR (1943) 1 Cal 5 (DB).

[3] An order under S. 37 does not continue the insolvency proceedings for all purposes. The Court's control is retained only for the purposes of giving directions as to the realisation and disposal of debtor's assets. 1935 Mad 826 (832, 834) [AIR V 22] : 58 Mad 908 (FB).

[4] When the Court approves of a composition a vesting order can be made and in such cases there is continuance of the bankruptcy proceedings though in another form. The proceedings in those cases are to be moulded in the terms of the composition under the direction of the Court. 1943 Cal 133 (136) [AIR V 30]:ILR (1943) 1 Cal 5 (DB).

[5] Where an adjudication is annulled under S. 35, no vesting order should be made under S. 37 except to the extent that any special circumstances render such vesting necessary. 1945 Mad 257 (258) [AIR V 32]:ILR (1946) Mad 54 (DB).

[6] Order of vesting properties with creditor carrying on proceedings against debtor is irregular. 1931 Mad 10 (11) [AIR V 18].

[7] No vesting order made at time of annulling adjudication under S. 43—Property of insolvent which may have vested in Receiver reverts to the debtor automatically — Court cannot thereafter divest the debtor of the property and revest it in another person. 1954 Mys 52 (Pr 2) [AIR V 41 C 25] : ILR (1954) Mys 95 (DB).

[8] Vesting of debtor's property when ordered later, does not relate back to the date of annulment. When no vesting order was made when the adjudication was annulled and no conditions declared by the Court, the property of the debtor must be deemed to have reverted to him. This means that the property does not vest in the appointee retrospectively and it vested either in the creditor who realized the amount or in the insolvent and in either case it is doubtful whether the vesting order subsequently passed can affect them or the property which vested in them. The power to pass a vesting order subsequently depends upon the jurisdiction which the insolvency Court retains in it after the order of annulment. 1949 Nag 39 (Pr 10) [AIR V 36 C 19] : ILR (1948) Nag 284 ✠ 1941 Mad 588 (589) [AIR V 28]. (Adjudication annulled without condition — Creditor realising amount by attachment of debtor's property—*Held* vesting order subsequently made could not affect the proceeds realised by attachment.)

[See however 1947 Pat 199 (201) [A I R V 34 C 73] (DB). (An order under S. 37, vesting the property in an appointee need not be made simultaneously with the order of annulment. It may be made subsequently.) ✠ 1938 Mad 752 (753) [AIR V 25] ✠ 1936 Cal 573 (574) [AIR V 23] : ILR (1937) 1 Cal 264].

[9] Attachment before revesting order does not create any charge and hence cannot prevent the property from being available to the official receiver in whom it has been vested. 1943 Mad 94 (96) [AIR V 30] (DB).

[10] When a vesting order is made the whole of that property in the hands of the receiver passes to the appointee if there is one.

Section 37 — Note 6 *(contd.)*
1935 Rang 328 (330) [AIR V 22] : 14 Rang 63 (DB).

[11] Where at the time of annulment of an adjudication, the Court has passed an order under S. 37 vesting only the realised assets in the Court and has not passed an order vesting certain property (unrealised assets) of the insolvent in the Court for distribution amongst the creditors, that property cannot be available to that Court for such distribution. The unrealised assets revert to the insolvent from before the date of annulment unconditionally, in the absence of any condition prescribed by the Court, as if he had never been adjudged insolvent. 1960 Pat 176 (Prs 12, 15) [AIR V 47 C 59] (DB).

[12] The contention that the orders passed by Insolvency Court while passing an order of annulment, directing only the assets realised to remain vested in the Court for payment to the creditors are against the provisions of S. 37 itself and are bad in law, and that the appropriate order should have been that the properties of the insolvent remained vested in the Court for the purpose referred to above, cannot be raised after the orders have become final and binding, no appeal having been preferred against it. 1960 Pat 176 (Pr 10) [AIR V 47 C 59] (DB).

7. Powers and duties of an appointee.— [1] An appointee under S. 37 is in the position of a trustee for the creditors and has the power and is under duty of administering the assets vested in him fairly and equally amongst all the creditors guided by the rules of administration contained in the Insolvency Act. 1936 Cal 573 (576) [AIR V 23] : ILR (1937) 1 Cal 264.

[2] The persons in whom property vests under S. 37 have full power to deal with the property vested in them. 1941 Lah 316 (320) [AIR V 28] : ILR (1942) Lah 330 (DB). (He can distribute the estate.) ✣ 1928 Lah 453 (454) [AIR V 15].

[But see 1936 Rang 284 (285, 288) [AIR V 23] : 14 Rang 254 (FB).]

[3] The person appointed under the section has such powers as are necessarily implied by the vesting order and as may be necessary for carrying out the directions of the Court in connection with the realisation and distribution of the debtor's property in accordance with the Act. 1947 Pat 239 (242) [AIR V 34 C 85] : 25 Pat 286 (DB). (Entitled to ask the Court for possession of the property when delivery of possession is obstructed by other persons.) ✣ 1944 Bom 72 (73, 75) [AIR V 31] (DB). (Can continue an application made by the receiver under Ss. 53 and 54.)✣ 1944 Mad 318 (319) [AIR V 31]. (Receiver appointed on annulment — Can sell the properties without permission of Court.) ✣ 1943 Mad 266 (267) [AIR V 30]. (Might sell and distribute property without reference to Court as such power is implied in the order vesting the property in him.) ✣ 1935 Mad 826 (832, 834) [AIR V 22] : 58 Mad 908 (FB). (Persons appointed under S. 37 do not have the powers which the receiver has under the Act. He can continue, if he is the official receiver, proceedings started by him under S. 53 or 54 of the Act before annulment but cannot initiate them.)

[4] Where certain properties are vested in a receiver under S. 37, his powers in respect of such properties need not be expressly conferred by the order made under S. 37; they may be such as are necessarily implied by the vesting order, and the receiver will have in respect of such properties the powers he had in respect of the insolvent's properties generally before the date of the annulment. 1949 Mad 19 (Pr 10) [AIR V 36 C 11] (DB).

[5] Where adjudication is annulled and order is made vesting property in official assignee, official assignee should proceed to divide amounts in his hands amongst creditors whose claims have been admitted and entered in schedule. He has no power to proceed under S. 64 and R. 24 (2) and issue notices calling for claims. 1931 Sind 31 (32) [AIR V 18] : 25 Sind L R 367.

[6] An appointee is in the nature of a bailee and can take all steps for safeguarding estates in his hand. 1935 Rang 328 (333) [AIR V 22]: 14 Rang 63 (DB).

[7] The word 'property' not only includes the things which is the subject-matter of ownership but also the dominion or right of ownership or of partial ownership. The right to collect money is property within the meaning of S. 37 and it vests in the appointee who can take necessary steps to realise the amount. 1935 Rang 328 (330) [AIR V 22] : 14 Rang 63 (DB).

[8] The officer of Court who has been vested with the properties has the power to bring before the Court facts which show that the persons appearing in the list of creditors are not in fact creditors. 1936 Mad 125 (126) [AIR V 23] (DB).

[9] Sale without impleading an appointee under S. 37 is null and void. 1942 Mad 371 (372) [AIR V 29] ✣ 1936 Rang 338 (339) [AIR V 23] (DB). (Appointee not a necessary party to suit.)

[10] One of creditors filing suit and obtaining decree subsequent to an order of vesting under S. 37 — Application by receiver to expunge the debt and order for refund of money recovered by the creditor—High Court rejecting application for expunging debt in appeal —*Held* that prayer for refund also should be deemed to have been rejected and that the decision of the High Court against receiver was binding on all the creditors. 1941 Mad 753 (758, 759) [AIR V 28].

[11] Right of contribution arising after annulment of adjudication under S. 43—Receiver appointed under S. 37 can enforce it—Nature of the right, explained. 1949 Mad 19 (Prs 6, 8) [AIR V 36 C 11] (DB).

[12] Receiver entitled to commission only on realisations, as his remuneration — He is not entitled to anything if no realisations are made, no matter what amount of labour he might be put to — Voluntary payment by creditors privately after annulment, is of no avail, for S. 37 does not continue insolvency —Appointee under S. 37 has no longer by

Section 37 — Note 7 *(contd.)*
mere fact of appointment powers which he had as receiver—He cannot even claim anything by way of compensation on principle of quantum meruit,which can be invoked only when there is no express contract — Such an implied promise to compensate can be inferred during his period of his appointment as appointee after annulment — Therefore when the appointee (original receiver) was unable to sell the property due to obstructive tactics of the debtor, the appointee is entitled to compensation for his labour on the principle of quantum meruit. 1948 Nag 92 (Prs 2-6) [AIR V 35 C 35] : ILR (1947) Nag 397.

8. **Effect of annulment.** — [1] Effect of S. 37 is to remit party whose insolvency is annulled to his original position. 1931 Pat 70 (72) [AIR V 18] : 9 Pat 945 (DB)✣1945 Mad 388 (389, 390) [AIR V 32]✣1942 Mad 523 (525) [AIR V 29] (DB). (Debtor ceases to be an insolvent.)✣1938 Rang 335 (339) [AIR V 25]: 1938 Rang L R 468 (DB). (Banker declared insolvent—Creditor who had current account with him proving his debt — Annulment of adjudication—Appointee making payment of dividend to creditor — Creditor suing for balance—*Held*, that on the order of annulment the claim made by tender of proof of debt to share equally and proportionately in the assets was also annulled except in so far as any payment towards the claim had been made — *Held*, also that time did not run against the creditor when the property was in the hands of the appointee.)✣1936 Rang 284 (285) [AIR V 23] : 14 Rang 254 (FB). (Effect of annulment is that there is no longer any insolvent before the Court.)

[2] Annulment of adjudication relates back to the date of the adjudication and the effect is as if no adjudication had taken place except as regards the acts of the Court and the Officil Receiver which are validated by S. 37. 1951 Mad 63 (Prs 9, 11) [AIR V 38 C 8]: ILR (1951) Mad 555 (FB).

[3] Suit against insolvent after date of filing of petition for adjudication—Suit decreed after adjudication without objection on part of insolvent—Subsequent annulment of adjudication unconditionally—Effect is that there was no adjudication at all at any time — Decree in suit filed without leave is valid — Since debt was incurred prior to filing of petition for adjudication, the mere fact that decree was passed after adjudication would not make it a debt incurred after adjudication —Debt being provable debt (and which was in fact proved), the decree-holder would be entitled to benefit of S. 78 (2). ('47) 1947-2 Mad L Jour 572 (573).

[4] Adjudication annulled — Vesting order not passed—Situation becomes as before adjudiction — Quondam insolvent gets back his property saddled with all the debts — Official Receiver still continuing in possession of property after annulment — Possession is not adverse to quondam insolvent. 1952 Mad 179 (Pr 3) [AIR V 39] (DB).

[5] Where the order of adjudication is annulled unconditionally, the property reverts to the insolvent retrospectively. Therefore where an insolvent brings a suit for recovery of money and the order of adjudication is annulled pendente lite, but before the hearing of the appeal, the suit cannot be dismissed by the appellate Court on the ground that the insolvent's property vested in the receiver. 1955 Nag 47 (Prs 12, 13) [(S) AIR V 42 C 14] : ILR (1955) Nag 970.

[6] It is not correct to say that after order of annulment, insolvency proceeding comes to an end ipso facto. 1933 Pat 84 (86) [AIR V 20] : 12 Pat 163 (DB)✣1936 Cal 573 (574) [AIR V 23] : ILR (1937) 1 Cal 264. (Vesting order can be made subsequently also.) ✣ 1944 Mad 49 (50) [AIR V 31]. (Annulment — Proceedings in insolvency do not cease for the purpose of what the Court may order.)✣1929 Mad 157 (160, 161) [AIR V 16] (DB). (Per *Wallace J.*—Although the annulment of an adjudication puts an end to insolvent's status of insolvency it does not in cases where the Court still retains control of the insolvent's assets put an end to the insolvency proceedings within the meaning of S 28.)

[7] When an insolvent has obtained an order of discharge he is by virtue of S. 44 released from payment of provable debts, except in the four classes of cases specified therein. An order of annulment in itself does not release an insolvent from the payment of his debts. 1947 Mad 300 (301, 302) [AIR V 34 C 146] : ILR (1947) Mad 798 (FB).

[8] Annulment of adjudication does not necessarily revest the property in the debtor as the Court can under S. 37 give directions in whom the property should vest pending further orders. 1928 Mad 265(268) [AIR V 15]: 51 Mad 839 (DB).

[9] When on annulment the Court does not make any provision for the vesting of the properties, the official receiver ceases to have any right to deal with the debtor's properties thereafter. 1936 Mad 915 (915) [AIR V 23] ✣ 1935 Rang 152 (153) [AIR V 22] (DB). (Where he is appointed to receive the property he becomes a mere appointee with reference to it.)

[10] Where the Insolvency Judge has annulled the adjudication no further proceedings can be taken by the official receiver for the sale of insolvent's leasehold rights. 1939 Lah 536 (537) [AIR V 26] : ILR (1939) Lah 275.

[11] Official receiver cannot distribute the property of proposed insolvent after annulment but must hold it for the benefit of the latter. ('26) 1926 Mad WN 950(950, 951) (DB).

[12] Where the property is by the order under S. 37 vested in the official receiver or other appointee in the interests of the general body of creditors, there is a statutory trust created by virtue of the order in favour of the creditors. 1941 Mad 753 (758) [AIR V 28].

[13] Official receiver in whom property is vested under S. 37 acting in an execution proceeding in the belief that he held the properties for the benefit of the insolvent—*Held*, any order passed against him will not bind the creditors as he did not act in a representative capacity for the creditors. 1941 Mad 753 (760) [AIR V 28].

Section 37 — Note 8 *(contd.)*

[14] Receiver or creditor or Court cannot either institute or continue proceedings under S. 53 or 54, once adjudication has been annulled. 1938 Nag 312 (313) [AIR V 25] : ILR (1940) Nag 204 (DB).

[15] On the annulment of an adjudication against a Government servant the creditor has the right to proceed against his salary. 1936 Lah 761 (762) [AIR V 23].

[16] Annulment of adjudication—No vesting order under S.37—Property reverts and revests in insolvent—Annulment relates back to date of adjudication—Insolvent must be deemed to have saleable interest in the property for purpose of being treated as agriculturists entitled to benefits of the Madras Agriculturists' Relief Act, 1938. 1955 Andh 152 (Pr 3) [(S) AIR V 42 C 55] (DB).

[17] Per Full Bench—A debtor who was an insolvent on 1-10-1937 and 22-3-1938 (Crucial dates for determining the applicaoility of the Madras Agriculturists Relief Act, 1938), but whose adjudication is subsequently annulled has saleable interest in the property on those dates even though his property had remained vested in the Official Receiver on those particular dates. Hence if the property is agricultural property he would be entitled to relief under the Madras Agriculturists' Relief Act, 1938. 1951 Mad 63 (Prs 9, 11) [AIR V 38 C 8]: ILR (1951) Mad 555 (FB).

[18] Applicant under S. 10, Mad. Agriculturist' Relief Act insolvent — Property in hands of Receiver on relevant date — Subsequent annulment of adjudication — Applicant should be deemed to have property on relevant date. 1951 Mad 581 (Pr 4) [AIR V 38 C 162] (DB).

[19] Joint Hindu family — Insolvency of father annulled — Son's share regarded in a limited sense as the property of the father—It will revert to him just for the purpose of devoting the fund to the payment of his just debts which power will be suspended by the attachment of it at the instance of the creditor — But regarded as son's property till it is utilised by the father it will revert to the son on annulment—In both cases the property will be removed from the reach of the official receiver by an attachment made before revesting order begins to operate. 1943 Mad 94 (96, 97) [AIR V 30] (DB).

[20] Where an adjudication of a Hindu father is annulled but there is no reverter of the estate to the insolvent, the official receiver remains the legal owner of the property as from the date of the application and a son born subsequent to that date acquires no right to the property. 1947 Mad 372 (372, 373) [AIR V 34 C 192].

[21] The effect of the insolvency of a coparcener for his personal debts is that his share vests in the official assignee and is thus lost to the joint family. When under S. 37 the adjudication is annulled it reverts to the insolvent as his individual property so that if he is not alive on the date of the reversion it will go to his heir-at-law; the share that has been divested of its character as joint family property cannot regain that character when it reverts to the debtor on annulment unless he has by an unequivocal act of his own, impressed it with the said character. 1937 Mad 131 (133, 134) [AIR V 24] : ILR (1937) Mad 203.

[22] Suit on mortgage pending— Mortgagor adjudicated insolvent—Decree passed without making official receiver a party—In execution decree-holder mortgagee purchasing property —Decree and proceedings are null and void in the sense that they have no legal effect at all — Proceedings do not bind equity of redemption which is vested in official receiver —Since he was not party, property could not be validly sold — Annulment of adjudication —Effect is that property vests retrospectively in insolvent — Effect of insolvency is wiped out except to the limited extent mentioned in the section— Alienations and transfers of property by him after adjudication or during the proceedings are all restored and validated with effect from date on which insolvency petition was filed—The insolvent cannot take advantage of the defect of non-joinder of the Receiver to the mortgage suit. 1954 Mad 604 (Prs 28, 33, 34) [AIR V 41 C 220] : ILR (1954) Mad 80 (FB). (AIR 1951 Mad 63 (FB), *Approved*; AIR 1929 Mad 480, *Overruled*; AIR 1951 Nag 241, *Dissented from.*)

[**See however** 1951 Nag 241 (Pr 14, 21) [AIR V 38 C 61] : ILR (1951) Nag 12. (An order of annulment does not have the effect of validating an alienation made by the insolvent during the pendency of the insolvency. 20 Mad 452; 27 Mad 7 and AIR 1937 Mad 717, *Not Approved*; AIR 1930 Mad 278 and AIR 1937 Mad 131, *Approved*) ✣ ('37) 1937 Oudh W N 94 (96) (DB). (Annulment does not have the effect of validating a transfer made by the insolvent subsequent to adjudication.)]

[23] Whatever insolvent may do or whatever proceedings may be taken against him during the subsistence of the receivership or of the order of adjudication, will not bind the receiver or the insolvency court but by his acts and by the proceedings to which he is a party the insolvent is bound and on the disappearance of the obstacle by the accomplishment of the purpose or its becoming impossible by an unconditional order of annulment, the acts and proceedings will bind the property that reverts to him. 1955 Trav-Co 241 (Pr 5) ([S) AIR V 42 C 99] : ILR (1955) Trav-Co 68 (DB).

[24] Gift by debtor made shortly before adjudication annulled subsequently by Court —Subsequent annulment of adjudication order —Gifted properties found not necessary to be disposed of for paying off debtors—*Held* that S. 37 did not operate to confirm finally the annulment of the gift and on the annulment of adjudication any right which had accrued under the gift deed was automatically restored to the donee. 1943 Mad 453 (454) [AIR V 30].

[25] Alienations before insolvency declared not binding on Official Receiver—Subsequent annulment of adjudication—Suit for recovery of possession by heirs of insolvent — Annulment of adjudication resulted in annulling decision by which deeds were declared not

Section 37 — Note 8 *(contd.)*

binding on Official Receiver — Plaintiffs who claimed under insolvent could not take advantage of decision obtained by Official Receiver — Plaintiffs had no cause of action — Annulment does not improve position of insolvent or his heirs. 1953 Mad 620 (Pr 7) [AIR V 40 C 244].

[26] Where a sale of the properties in question executed by a Hindu insolvent on his behalf and on behalf of his minor sons, prior to adjudication, for valuable consideration to discharge antecedent debts, is set aside at the instance of the Official Receiver as offending the provisions of the Act, and the properties were not effectively sold by the Official Receiver, the effect of the annulment of adjudication is to restore the sale in favour of the alienee.

Further, so far as the minor son is concerned, it is not open to him to question the alienation even on the assumption that the order setting aside the sale at the instance of the Official Receiver continues after the annulment. In so far as the minor son is concerned, his interests had already passed to the alienee, and his interest did not vest in the Official Receiver that it reverted consequent on the annulment, the reason being that on the setting aside of the alienation it was only the insolvents' interest that vested in the Official Receiver and that that interest alone could revert to the debtor on annulment. 1956 Mad 341 (Prs 3, 4, 5) [AIR V 43 C 105]. (AIR 1930 Mad 278, *Dissented from.*)

[27] Once a person is adjudicated an insolvent, the disqualification attaching to him for election to any office of any local authority can be removed only as provided in Cl. (a) or (b) of sub-s. (2) of S. 73—Where the adjudication is annulled not under S. 35 (a) but under S. 43 and there is no order of discharge, absolute or conditional, much less any certificate from the Insolvency Court as required by the latter part of Cl. (b) of S. 73 (2), the insolvency is wiped out so far as the property right of the insolvent is concerned and it also restores back to the creditors right to proceed against the person of the insolvent. But such annulment does not restore back to him his civic or citizenship rights. Therefore for the purposes of election to the local authority he is an undischarged insolvent and is disqualified from contesting any election. ('58) ILR (1958) Ker 215 (225, 226) (DB).

[28] Decree in favour of official Receiver for debt due to insolvent—Annulment of adjudication and then setting aside of annulment—Execution by quandom insolvent could have been taken out after annulment, since there was no vesting of property in Official Receiver by order of Court — Execution not taken out after annulment—Official Receiver cannot take out execution after setting aside of annulment order, three years after the date of the order on the previous execution application. 1951 Mad 879 (2) (Pr 3) [AIR V 38 C 307] (DB).

[29] *A* alienating his property — *A* adjudicated insolvent and alienations set aside by Official Receiver—Adjudication annulled but property continuing to vest in Official Receiver — Alienees depositing in Court sufficient money to pay off creditors and asking for delivery of property to them — Insolvent also depositing sufficient money to pay off creditors and also alienees — Property held should be restored to alienees and insolvent be allowed to withdraw money deposited by him. 1949 Mad 472 (Pr 7) [AIR V 36 C 215].

[30] Execution of decree against insolvent without sanction and without receiver on record — Auction sale is valid even though adjudication which then existed had been annulled afterwards without ordering vesting of property in any person — Assignee from auction purchaser seeking redemption of mortgage with respect to property sold is entitled to a decree. 1955 Trav. Co. 241 (Prs 3, 5) [(S) AIR V 42 C 99] : ILR (1955) Trav. Co. 68 (DB).

9. Powers and duties of Court. — [1] Section 4 gives the Insolvency Court no power to decide questions of the nature therein described after the adjudication has been annulled. After that stage has been reached the powers of the Insolvency Court are limited by S. 37. 1935 Nag 246 (249) [AIR V 22] : 31 Nag L R (Sup) 36.

[2] The Insolvency Court continues to have jurisdiction even after passing an order annulling adjudication to pass a vesting order under S. 37 of the Provincial Insolvency Act, and the official receiver is the proper person to take control of the remaining estate. 1941 Lah 316 (320) [AIR V 28] : ILR (1942) Lah 330 (DB) ✣ 1933 Pat 84 (87) [AIR V 20] : 12 Pat 163 (DB).

[*See also* Note 6].

[3] The properties would automatically revert to the insolvent as soon as an unconditional order of annulment is passed. But the Court upon an application by the creditors can pass a subsequent order making the properties formerly vested in the Insolvency Court available for distribution among them. Section 78 (2) has no application to the exercise of such power by the Court. 1950 Orissa 233 (Pr 2) [AIR V 37 C 43] : ILR (1950) Cut 117 (DB).

[4] Whether the Court vests the property in the debtor or in some other person unconditionally or imposes conditions when making the order, the Court after insolvency has been annulled uuder S. 43 has no jurisdiction to pass any order affecting the property of any person other than the debtor. 1933 Rang 223 (224) [AIR V 20] : 11 Rang 287 (FB).

[5] Where bankuptcy is annulled, authority of Court will survive so far as may be necessary to complete acts which were incomplete at the date of annulment. 1939 Oudh 55 (56) [AIR V 26] : 14 Luck 404.

[6] Where the Court passes a vesting order under S. 37 restricted in a specific way, it cannot on some future date pass a fresh order removing those restrictions and providing for an entirely new scheme for the distribution. The power of the Court in respect of an order already passed is confined to giving directions

Compositions and Schemes of Arrangement

38. Compositions and schemes of arrangement.

(1) Where a debtor, after the making of an order of adjudication, submits a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, the Court shall fix a date for the consideration of the proposal, and shall issue a notice to all creditors in such manner as may be prescribed.

Section 37 — Note 9 *(contd.)*

as are necessary for carrying out the intention of the order. 1940 Mad 724 (724, 725) [AIR V 27]. (Property directed to be held for the satisfaction of one particular debt—Directions for payment towards other debts cannot be made.)

[7] Where the property of an insolvent is vested in the official receiver or any other appointee under S. 37 of the Provincial Insolvency Act, it is the Insolvency Court which retains control of it and the Insolvency Court must direct its disposal in the interests of the general body of creditors. The property comes completely under the Insolvency Court and can only be disposed of under its direction. The property can only be distributed equally among all the creditors and no one creditor has got a right to appropriate the money of the insolvent to the exclusion of other creditors. 1941 Mad 753 (758) [AIR V 28] ✣ 1935 Mad 835 (836) [AIR V 22] : 59 Mad 62 (DB).

[8] The Court has no power, after annulling adjudication, to distribute the assets of the debtor among any of the creditors. It can only return the property to the judgment-debtor himself subject to conditions or vest it in certain other person. 1940 Oudh 260 (261) [AIR V 27] : 15 Luck 471 (DB) ✣ 1933 All 117 (118) [AIR V 20] (DB). (Receiver cannot be ordered to distribute the assets.) ✣ 1931 All 71 (71) [AIR V 18] : 53 All 313 (DB).

[9] After annulment, except where there is an express provision in that behalf, the Court cannot pass orders in respect of debtor's estate in its insolvency jurisdiction. 1936 Rang 284 (285) [AIR V 23] : 14 Rang 254 (FB).

[10] Petition by creditor to set aside sale effected by receiver—Annulment of adjudication during its pendency—*Held* petition cannot be dismissed but should be proceeded with and that Court should order revesting the property in receiver if sale is set aside. 1935 Mad 433 (435) [AIR V 22].

[11] While passing an order under S. 37, though the Court should look to the language of the section and pass the order in conformity with it, yet the matter is one of substance and not of form. 1943 Cal 133 (134) [AIR V 30] : ILR (1943) 1 Cal 5 (DB).

[12] While construing S. 37 the Court ought to bear in mind the following consideration, namely, that proceedings in insolvency are creatures of statute and jurisdiction is granted to it so that the most efficacious method of disposing of the assets of the debtor is to follow the procedure laid down in the Insolvency Act. The Court has no jurisdiction apart from the Act and otherwise than under it the receiver or any other person cannot dispose of the properties except in accordance with the ordinary civil law. 1936 Rang 284 (285) [AIR V 23] : 14 Rang 254 (FB).

[13] Debts not already proved may be proved after vesting order. 1944 Mad 150 (151) [AIR V 31].

[14] So long as the order of annulment is in force, the Court has no jurisdiction to re-open the distribution of dividends at the instance of a creditor and to demand a refund of money from the other creditors to whom a dividend has been distributed. The remedy of the creditor lies in challenging the order of annulment of adjudication and so long as that order is unchallenged he has no remedy in the Insolvency Court. 1935 Nag 246 (249) [AIR V 22] : 31 Nag L R (Sup) 36.

[15] An order of an executing Court that a decree obtained by an individual creditor against the official receiver and the insolvent after a vesting order under S. 37 of the Provincial Insolvency Act is executable does not affect the power of the Insolvency Court over the fund at its disposal. The fact that the official receiver is compelled by order of an executing Court to pay moneys in his hands cannot affect the power of the Insolvency Court to make orders regarding the money in the hands of the receiver; and it is competent to the Insolvency Court to direct a refund of any sum of money taken away by a creditor, who is amenable to its jurisdiction, in excess of what he is justly entitled to. 1941 Mad 753 (761) [AIR V 28].

10. Transfers by insolvent subsequent to annulment but prior to the vesting order. — [1] Different considerations may arise if subsequent to the order of annulment and before the order vesting the property in some other person than the insolvent, the latter has made transfers of properties to a bona fide purchaser. Such a purchaser perhaps may not be affected. But the insolvent and all those persons who were party to the insolvency proceedings are bound by the order. 1933 Pat 84 (87) [AIR V 20] : 12 Pat 163 (DB).

Section 38 — Note 1

Scope

[1] Sections 38 and 39 deal essentially with procedure and prescribe procedure to be followed when an application for composition is presented to it. 1942 Mad 474 (477) [AIR V 29].

[2] Section 38 contemplates proposal for composition in satisfaction of debt and implies reduction in claim of creditors. 1936 All 102 (103) [AIR V 23] : 58 All 655 (DB).

(2) If, on the consideration of the proposal, a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader, resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors.

(3) The debtor may at the meeting amend the terms of his proposal if the amendment is, in the opinion of the Court, calculated to benefit the general body of creditors.

(4) Where the Court is of opinion, after hearing the report of the receiver, if a receiver bas been appointed, and after considering any objections which may be made by or on behalf of any creditor, that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the Court shall refuse to approve the proposal.

(5) If any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the Court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than six annas in the rupee on all the unsecured debts provable against the debtor's estate.

(6) No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent.

(7) In any other case the Court may either approve or refuse to approve the proposal.

[P. I., 1907—S. 27; P. T. I., 1909—Ss. 28 (1) to (3), 29 (4) to (7).]

OBJECTS AND REASONS

"Both section 16 (1) and section 27 of the Act of 1907 contemplate the possibility of a composition or scheme *before* adjudication. The Presidency-Towns Insolvency Act in section 28, on the other hand, only contemplates composition *after* adjudication. Under the English law a composition can be made (1) after the receiving order and prior to adjudication, or (2) after adjudication. But under the Indian law there is no receiving order procedure at all, and the order of adjudication is made on the hearing of the petition. It is very doubtful whether under the Provincial Insolvency Act the Court would have before it the necessary facts to justify it, in dealing with compositions or schemes prior to adjudication. It is therefore proposed to follow in this respect the procedure under the Presidency-Towns Insolvency Act and allow compositions and schemes only *after* adjudication."

— S. O. R.

Section 38 — Note 1 *(contd.)*

[3] A composition scheme can only be submitted after adjudication. 1933 Cal 495 (2) (496) [AIR V 20] (DB).

[*See also* 1916 Sind 73 (74) [AIR V 3] : 9 Sind L R 181. (Case decided under Act of 1907.)]

[4] A composition between an insolvent and his creditors and a sale of an insolvent's assets by the official assignee are two distinct things and should be kept distinct. When the two are combined the issue becomes necessarily doubtful. 1937 Mad 962 (964) [AIR V 24] : ILR (1938) Mad 426 (DB).

[5] Proposal in S. 38 is general proposal to satisfy debts of all creditors and not merely disputing validity of debts of particular creditors. 1926 All 361 (362) [AIR V 13].

[6] Agriculturists who were declared insolvents are 'debtors' even though their lands are exempt from sale and attachment by reason of a special enactment and therefore cannot be taken into account under S. 28 in insolvency proceedings. Therefore such person could apply to the Debt Conciliation Board set up under the Punjab Relief of Indebtedness Act for the settlement of his debts even after he is adjudicated insolvent. 1937 Lah 680 (681) [A I R V 24] : I L R (1938) Lah 120.

[7] Section 48 of the Bombay Agricultural Debtors Relief Act does not mean that all the provisions of the Provincial Insolvency Act should apply in the insolvency under the Bombay Act. An insolvency under the Bombay Act is an entirely different insolvency from an insolvency under the Provincial Insolvency Act. An insolvent under the Bombay Act has therefore no right to propose a composition scheme under S. 38 of the Central Act. ('54) 56 Bom L R 1111 (1113).

[8] Advocate who was suspended under Lahore High Court Rules and Orders on becoming insolvent applying for discharge. At the hearing petitioner offering to deposit Rs. 20 with the official receiver every month and that in default he should be disallowed from practice — Official receiver agreeing the Court passing orders in those terms — *Held* that the order was wrong and the correct procedure would have been to annul the adjudication and re-adjudge him an insolvent if he failed to carry out the terms of the compromise. 1939 Lah 495 (496) [AIR V 26].

[9] Death of debtor pending petition for adjudication — Adjudication ordered subse-

Section 38 — Note 1 *(contd.)*

quently—Legal representatives of debtor can enter into a composition with the creditors. 1941 Nag 238 (238, 239) [AIR V 28] : I L R (1942) Nag 710.

Assignment of property to trustees

[10] One method of arrangement of an insolvent debtor's affairs is an assignment of the debtor's property to a trustee for realisation and distribution of the proceeds rateably amongst all the creditors, or amongst those who assent to and take the benefit of the assignment. The assignment is the voluntary act of the arranging debtor and binds only those creditors who in writing or otherwise expressly or impliedly assent to it. 1938 Lah 769 (771) [AIR V 25] (DB) ✣ ('08) 8 Bom H C R (AC) 245 (249) (DB). (A creditor who has not signed the trust deed is also bound by it (case under the old law.))

[11] Where a trust is created by the debtor, the trustee is an agent only under a revocable authority until the deed of assignment had been executed or come to the knowledge of the creditors. When the instrument expresses that the arrangement was with the creditors generally, or with all those who assent to it, any creditor who either actually or by his conduct assents to it can take the benefit of the arrangement even though he has not signed it. The Court can allow in some cases a creditor to come in even though he did not within proper time accede to the arrangement. Any creditor who is entitled to benefit under the scheme cannot take any step inconsistent with it and on doing so will become liable to be excluded from the benefits. 1938 Lah 769 (772) [AIR V 25] (DB).

[12] A bona fide assignment by a debtor of his entire property for the benefit of his creditors divests him of any interest which can be the subject of attachment subsequently issued in execution of a decree against such debtor until the trusts of the deed of assignment have been carried out. 1927 Sind 78 (83) [AIR V 14] : 22 Sind L R 1.

[13] Official assignee who having become functus officio on the property of insolvent vesting in trustees under S. 38 withdrawing from pending suit for cancellation of a transfer — Trustees cannot claim to be made his legal representatives and ask for restoration of the suit. 1934 Pesh 89 (90) [AIR V 21] (DB).

Acceptance by creditors

[14] Unless the majority in number and three-fourths in value of all the creditors have accepted the proposal it cannot be said that the proposal has reached the stage of agreement or a composition so as to become a proposal before the Court for its consideration or acceptance. 1936 All 102 (103, 104) [AIR V 23] : 58 All 655 (DB).

[15] Even where there is consent of the creditors the Court must exercise its judicial discretion before approving a scheme. The wishes of the creditors though an important matter that should be taken into consideration are not to be taken as conclusive so as to relieve the Court of its responsibility while passing the order, approving the scheme or otherwise to see that the order is supported by evidence on record and that the scheme is for the general benefit of the creditors of the insolvent. 1931 Mad 344 (346) [AIR V 18] : 54 Mad 823 (DB) ✣ 1916 Cal 178 (180) [AIR V 3] (DB). (Case under Act of 1907.)

[16] Absence of objection by creditors to proposal by insolvent and acceptance by receiver — No presumption as to acceptance by creditors. 1926 Lah 87 (88) [AIR V 13].

[17] Before a composition scheme is sanctioned or details as to the persons who are preferential creditors settled, the preferential claims should be inquired into and decided. 1943 Sind 76 (77) [AIR V 30] : ILR (1943) Kar 506 (DB). (Debtor commission agent — Goods sold before insolvency — Owner of goods does not become preferential creditor for price.)

[18] Scheme of composition is not binding on creditor who had no notice of it. 1944 Mad 414 (2) (414, 415) [AIR V 31] : ILR (1945) Mad 184 (DB) ✣ 1944 Mad 327 (329) [AIR V 31]. (Creditor who had no notice of composition scheme has to bring his case under S. 38 (4).)

[19] A scheme of composition under S. 38 imposing an obligation upon one creditor to give up his claim against another creditor cannot under S. 39 be binding upon the creditor who did not consent to the scheme. 1942 Mad 345 (346) [AIR V 29] (DB).

[20] A secured creditor is unaffected by any composition scheme unless it is approved of by Court and consented to by him. ('21) 63 Ind Cas 895 (896) (DB) (Cal).

[21] Where a proposal for composition has not been duly accepted by the creditors under S. 38 (2), Provincial Insolvency Act, it is open to the Court to approve the proposal under S. 38 (7). 1941 Nag 355 (357) [AIR V 28] : ILR (1941) Nag 764 (DB).

[22] Scheme of arrangement proposed by insolvent can be rejected by Court, although three-fourth of creditors are in its favour. 1915 Oudh 173 (174) [AIR V 2] : 18 Oudh Cas 125 (DB). (Case decided under Act of 1907.)

[23] Receiver and secured creditors of insolvent referring matter to arbitration. Arbitrators directing receiver to sell and realise through Court ancestral and revenue paying properties of insolvent—*Held* secured creditors are not prevented from acting according to award—Better way held would be to discharge the insolvent and deal with the property outside insolvency jurisdiction — Receiver ceases to be receiver and becomes a person in whom the property is vested for the purpose of selling according to the terms of the award. 1926 All 501 (505) [AIR V 13] : 48 All 475 (DB).

Appeal

[24] Appeal against orders under S. 38—See notes on S. 75.

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39. Order on approval.

If the Court approves the proposal, the terms shall be embodied in an order of the Court, and [a][* * *] the order of adjudication shall be annulled, and the provisions of section 37 shall apply, and the composition or scheme shall be binding on all the creditors [b][so far as relates to any debt due to them from the debtor and provable under this Act].

[a] The words "the Court shall frame a schedule in accordance with the provisions of section 33" were *omitted* by the Provincial Insolvency (Amendment) Act, 1935 (X of 1935), S. 2. [b] *Substituted* for "entered in the said schedule so far as relates to any debts entered therein", *ibid.*

[P. I., 1907—S. 27 (7); P. T. I., 1909—S. 30.]

40. Power to re-adjudge debtor insolvent.

If default is made in the payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, re-adjudge the debtor insolvent and annul the composition or scheme but without prejudice to the validity of any transfer or payment duly made or of anything duly done under or in pursuance of the composition or scheme. When a debtor is re-adjudged insolvent under this section, all debts provable in other respects which have been contracted before the date of such re-adjudication shall be provable in the insolvency.

[P. I., 1907—S. 27 (8); P. T. I., 1909—S. 31].

Section 39 — Note 1

[1] Section 39 deals essentially with procedure and prescribes as to what should be done when an application for composition is presented to the Court. The section itself does not confer any right of action. Therefore since S. 39 dealt only with procedure the amended section will apply to proceedings pending at the time it came into force. 1942 Mad 474 (477) [AIR V 29].

[2] Section 39 expressly provides that the Court has to make an order annulling the order of adjudication and that provision is mandatory. Where therefore although the Court gave sanction to the composition, there was no order made by the Court annulling the order of adjudication, S. 37 will not apply and if S. 37 does not apply, it is obvious that the insolvency continues. 1956 Bom 262 (262, 263) [AIR V 43 C 111] (DB).

[3] Debtor during insolvency proceedings applying for permission to mortgage property to petitioning creditor which was given — Parties not appearing on date fixed for hearing — Court passing order filing proceedings as the parties did not appear—*Held* the order did not amount to an order of annulment under S. 39. 1930 Nag 34 (35) [AIR V 17].

[4] On acceptance of proposal by Court, it does not become functus officio, but retains control to see that composition is given effect to. 1942 Mad 474 (477) [AIR V 29] ✠ 1942 Nag 97 (98) [AIR V 29] : ILR (1942) Nag 732. (Court can execute its order without setting aside the order annulling adjudication.)

[5] Court can enforce liability of surety by passing an order for enforcing the surety bond even after annulment of the adjudication under S. 39. 1936 Mad 424 (425) [AIR V 23].

[6] The control that the Insolvency Court retains after orders under S. 39 are passed is in order to see that the composition is carried out and readjudge the debtor insolvent under S. 40 in certain circumstances. The control does not continue for all purposes excepting so far as it is necessary for the purposes of Ss. 37 and 40. The continuance of proceedings for this limited purpose cannot be said to mean that every section in the Act continues to be applicable. 1935 Mad 929 (931) [AIR V 22] (DB).

[7] A secured creditor is also bound by a composition of which the Court has approved in so far as the balance of his debt is concerned after the realisation of his security. He can realise his security at any time but when there is deficiency he can get payment only on the basis of the composition because the unsatisfied portion of the debt is 'provable' in the Insolvency Court in the absence of an unconditional order of discharge. 1947 Mad 300 (303) [AIR V 34 C 146] : ILR (1947) Mad 798 (FB).

Section 40 — Note 1

[1] On an application for re-adjudication after the annulment of the original adjudication on account of the failure of a composition scheme which intervened, it is not incumbent upon the petitioning creditors to satisfy the requirements of S. 9. 1953 Mad 375 (375) [AIR V 40 C 133].

Discharge

41. Discharge.

(1) A debtor may, at any time after the order of adjudication and shall, within the period specified by the Court, apply to the Court for an order of discharge, and the Court shall fix a day, notice whereof shall be given in such manner as may be prescribed, for hearing such application, and any objections which may be made thereto.

(2) Subject to the provisions of this section, the Court may, after considering the objections of any creditor and, where receiver has been appointed, the report of the receiver—

(a) grant or refuse an absolute order of discharge ; or

(b) suspend the operation of the order for a specified time ; or

(c) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect of his after-acquired property.

[P. I., 1907—S. 44 (1), (2); P.T.I., 1909—Ss. 38 (1); 40.]

SECTION 41 — SYNOPSIS

1. Scope and object.
2. "Shall, within the period specified by the Court, apply."
3. Notice.
4. Fresh application after refusal of prior application.
5. Absolute discharge.
6. Suspension of order.
7. Conditional discharge.
8. Effect of order of discharge.
9. Ground for refusal.
10. Appeal and revision.

1. Scope and object. — [1] The object underlying the section is that the debtor on giving up the whole of his property shall be a free man again able to earn his livelihood and having the ordinary inducement to industry. 1930 All 471 (472) [A I R V 17] : 52 All 385 (DB).

[2] If a Court, on application by the insolvent for discharge, refuses an absolute discharge under S. 41 (2) (a) it should then consider the possible application of cl. (b) or (c) or both and pass an order accordingly. It is not proper for the Court to merely refuse to grant an absolute discharge without specifying any further conditions and without settling the future position of the insolvent. 1941 Pat 285 (286) [AIR V 28] (DB) ✠ 1960 Madh Pra 204 (Pr 10) [AIR V 47 C 100] (DB) ✠ 1935 Lah 919 (920) [AIR V 22] ✠ 1934 Lah 109 (110) [AIR V 21] ✠ 1939 Oudh 129 (130) [AIR V 26] : 14 Luck 442 (DB).

[3] Insolvent spending excessively on deaths and marriages—Very small fraction of debt could be paid from sale proceeds of his estate —Although he cannot be granted absolute discharge under S. 42 (a) Court can nevertheless pass order of suspension under S. 41(2)(b) or pass conditional order under S. 41 (2) (c). 1929 Lah 281 (282) [AIR V 16].

[4] The provisions in S. 41 (2) (a), (b) and (c) are strict alternatives and a mixed order combining the kinds of order contemplated in several sub-sections is not permissible. 1944 Mad 16 (17) [AIR V 31] ✠ 1946 Nag 111 (111) [AIR V 33 C 27] : ILR (1945) Nag 878.

[But see 1917 All 435 (435) [AIR V 4] (DB). (Under S. 44 (5) of the Act of 1907 power of suspending and of attaching conditions to insolvent's discharge may be exercised concurrently—See now S. 42 (3) of the present Act).]

[5] Where an order is passed directing insolvent to pay certain amount every month and to apply for discharge after one year, the order imposes conditions but does not grant any discharge, subject to those conditions and consequently, does not come within any of the clauses of S. 41. 1933 Sind 151 (151) [AIR V 20] (DB).

[6] In application under S. 41, the Court has no power to order annulment of adjudication. 1935 Mad 646 (646) [AIR V 22] (DB).

2. "Shall, within the period specified by the Court, apply". — [1] The debtor has complete discretion to apply when he likes provided he applies within the period specified by Court. 1927 Oudh 506 (507) [AIR V 14] : 2 Luck 757 (DB).

[2] "Shall" in S. 41 imposes duty upon the insolvent, breach of which involves consequences pointed out in S. 43. 1927 Oudh 506 (507) [AIR V 14] : 2 Luck 757 (DB).

[3] Failure to file talbana by insolvent applying for order of discharge within time is no failure to apply for discharge. 1930 Oudh 474 (475) [AIR V 17] (DB).

[4] Application for discharge — Failure to give talbana to unscheduled creditors who are not necessary parties or to bring their representatives on record does not result in annulment of adjudication. 1937 Lah 752 (752) [AIR V 24].

[5] An insolvency petition which stood adjourned for hearing to 22-1-1926 was advanced to 22-12-1925 and disposed of by the Court without notice to the insolvent. The insolvent applied for discharge within six months from 22-1-26. The Court dismissed the application for discharge as out of time and annulled the adjudication. The application was subsequently restored. *Held* that the Court was not wrong in exercising its inherent

Section 41 — Note 2 *(contd.)*

power to set right a mistake made in passing the annulment order. 1934 Mad 31 (31) [A I R V 21] (DB).

[6] Time not stated in adjudication order—Addendum specifying time added—Addendum cannot be considered as part of order and no order annulling adjudication can be passed for failure to apply within time specified in Addendum. 1926 Lah 24 (25) [AIR V 13].

[7] In the case of a debtor who had been declared insolvent after his death and whose minor sons were brought on the record, the minor sons can ask the Court for a discharge. 1935 Lah 935 (935) [AIR V 22].

[8] Starting point of limitation for application for discharge is the date of order of appellate Court, if there was any appeal or of the date of order of High Court in revision if any. 1941 Oudh 308 (309, 310) [AIR V 28] (DB).

[9] As to the power of Court to extend the time fixed by it for applying for discharge. *See* Ss. 27 and 43 and notes thereunder.

[10] The provisions of S. 171, Companies Act, are very wide and though an application for discharge may not start independent proceedings, the section would require leave of the High Court even for the continuation of insolvency proceedings already taken. ('37) 39 Pun L R 717 (717).

3. Notice.—[1] The provision as to issue of notices on creditors is prescribed primarily in order to afford them reasonable opportunity to appear at time of hearing of application for discharge. 1939 Cal 490 (492) [A I R V 26].

[2] Omission to give notice as required by sub-section (1) is not an irregularity if none of the creditors had proved his debt. Notice should be given only to those creditors who have proved their debts. 1939 Nag 103 (105) [AIR V 26] : ILR (1939) Nag 478.

[3] Though under S. 41 the giving of notice to a creditor is peremptory, its absence would not invalidate the order of discharge especially when the creditor has filed a review petition against the order of discharge on the ground of absence of notice to him and that petition has been dismissed and the discharge order has become final. ('56) 1956-1 Mad L Jour 527 (529).

[4] Order suspending discharge for fixed period—Application for final discharge after expiry of fixed period—Notice to creditors is not necessary as final discharge could be granted even without application. 1931 Rang 188 (189) [AIR V 18] (DB).

4. Fresh application after refusal of prior application. — [1] Where an application for discharge made within the period specified in the order of adjudication has been refused, the insolvent is not precluded from making a further application for discharge and so remain undischarged insolvent for his life. 1930 All 471 (473) [AIR V 17] : 52 All 385 (DB) (Per *Mukerjee J* — No second application is contemplated by law.) ✠ 1939 Lah 432 (433) [AIR V 26] ✠ 1932 Lah 478 (479) [A I R V 19] ✠ 1931 Lah 672 (672) [AIR V 18] ✠ 1928 Mad 609 (610) [AIR V 15] ✠ 1925 Mad 915 (915) [AIR V 12] (FB).

5. Absolute discharge.—[1] Before ordering final discharge, examination of insolvent is necessary to enable Court to satisfy itself as to certain facts mentioned in S. 42. 1929 Cal 576 (576) [AIR V 16] (DB).

[2] Section 41 (2) (a) contemplates only an order either granting or refusing an absolute order of discharge as distinguished from conditional order and does not contemplate an order absolutely granting or refusing for ever the discharge asked so as to preclude a fresh application. Hence an order refusing discharge absolutely was *held* to be order refusing to make absolute order of discharge. 1931 Cal 392 (393) [AIR V 18] (DB).

[3] An absolute discharge can be granted when the Court is satisfied that the insolvent has placed all his property within the control of the official receiver. 1943 Mad 26 (27) [AIR V 30] : ILR (1943) Mad 213 (DB).

[4] Order granting absolute discharge—Insolvency Court cannot invoke inherent power to revoke its own order under S. 151, Civil P. C. 1940 Rang 156 (156) [AIR V 27] : 1940 Rang L R 392 ✠ 1916 Sind 70 (70) [AIR V 3] : 9 Sind L R 132.

[5] Death of insolvent is no bar to the Court suo motu granting an order of discharge of the deceased insolvent when other conditions required by the Act are fulfilled. Even otherwise automatic discharge can occur when the insolvency proceedings finally terminate. But mere death does not bring about automatic discharge and the insolvency proceedings do not terminate. Creditors can prove their debts even after the death of the insolvent till unconditional discharge order is passed. 1957 Mys 3 (Prs 12, 13) [AIR V 44 C 2] : ILR (1956) Mys 209 (DB).

6. Suspension of order. — [1] Operation of order of discharge can only be suspended after order has come into existence. 1939 Mad 890 (891) [AIR V 26].

[2] The suspension order contemplated in Cl. (b) is of an absolute order of discharge and that too is to be required to be made for specified time. 1946 Nag 111 (111) [AIR V 33 C 27] : ILR (1945) Nag 878.

[3] Order directing that insolvent's discharge should be suspended until such time as his scheduled debts are fully paid is one without jurisdiction. 1939 Lah 183 (184) [AIR V 26] : ILR (1939) Lah 429 (DB).

[4] An order postponing the discharge of an insolvent till he paid eight annas in the rupees, is not warranted by the provisions of the Provincial Insolvency Act as the discharge is not suspended for a specified time but for an indefinite length of time. 1944 Cal 63 (63 64) [AIR V 31] (DB).

[5] Period for which discharge should be suspended as punishment for insolvent's misconduct in incurring debts beyond his means is not to be measured by amount of his debts. 1926 Cal 529 (530) [AIR V 13].

[6] Order of absolute discharge though suspended for a time, has the effect of ending the insolvency proceedings on the expiry of

Section 41 — Note 6 *(contd.)*

the time and cannot be revived again. 1935 All 272 (273) [AIR V 22].

[7] Where in a case all that is alleged is rash and hazardous business and there is no allegation or proof of any dishonest conduct, and bearing in mind the object of Bankruptcy Laws that the debtor on giving up whole of his property should be a free man again able to earn his livelihood, then it is pre-eminently a case where the Court should direct suspension of the order of discharge. 1960 Madh Pra 204 (Pr 13) [AIR V 47 C 100] (DB).

7. Conditional discharge.—[1] Section 41 gives Court discretion to impose conditions for payment of balance of liabilities of insolvent which will bind the insolvent after discharge. 1928 Oudh 263 (264) [AIR V 15] : 3 Luck 588 (DB).

[2] An order of discharge subject to a condition in regard to after-acquired property gives the creditor a right to proceed against such property when acquired by the insolvent even though the insolvency proceedings are concluded by such order. 1936 Rang 2 (4) [AIR V 23].

[3] An order of discharge subject to condition that the insolvent shall pay any specified proportion of his debt is not proper. 1939 Mad 890 (890) [AIR V 26] (DB)✣ 1929 Lah 461 (461) [AIR V 16]✣ 1937 Lah 304 (305) [AIR V 24]. (Proper order to pass would be one asking him to pay a proportion of his monthly income for a fixed period and that any property acquired by him during this period shall also vest in the official receiver.)

[4] Under S. 41 (2) (c) the Court can grant an order of discharge subject to any conditions regarding earnings or income which may afterwards become due to the insolvent or as regards the after-acquired property of the insolvent. 1946 Nag 111 (111) [AIR V 33 C 27] : ILR (1945) Nag 878. (Court cannot impose condition in respect of property then vested in Court.)✣ 1932 Cal 623 (624) [AIR V 19] (DB)✣ ('11) 7 Nag L R 19 (19).

[5] While discharging an insolvent, Court can impose a condition that debtor shall hand over to Official Receiver all assets which he might inherit from his father. 1934 Lah 659 (659) [AIR V 21].

[6] An order that the insolvent should deposit in Court all his subsequent earnings should not be passed when there is no evidence to show that the insolvent has acquired or likely to acquire any property or income since his insolvency. Such order is not of any value to creditors and moreover has the effect of making the insolvent inactive. 1939 Rang 58 (59) [AIR V 26] (DB).

[7] A conditional order of discharge should be, as far as is reasonable, for the benefit of the creditors. An order directing insolvent to pay a certain sum monthly for a period of 30 years is improper. 1931 Lah 591 (592) [AIR V 18].

[8] A discharge subject to condition that the insolvent remains liable for debts incurred before insolvency defeats the object of adjudication and would amount to a refusal to grant a discharge. 1939 Bom 344 (344) [AIR V 26] : ILR (1939) Bom 493.

[9] As regards the grant of conditional discharge in favour of an insolvent where he has given up all his property for the benefit of the creditors and nothing is left with him, it is futile to impose such a condition where what the insolvent earns is barely sufficient for the maintenance of his family and practically nothing is left for payment to the creditors and there are not reasonable prospects of his coming by any property from any other source. 1960 Madh Pra 204 (Pr 11) [AIR V 47 C 100] (DB).

[10] Discharge conditional on furnishing security for deferred dower is invalid—Insolvent should be granted absolute discharge. 1919 Lah 139 (140) [AIR V 6].

[11] A conditional order of discharge does not preclude a creditor from proving his debt in insolvency so long as assets remain to be distributed and no injustice is done to third party. 1925 Pat 438 (440) [AIR V 12] : 4 Pat 128 (DB).

[12] Where Court refuses insolvent his discharge and at the same time directs him to pay certain amount to receiver until he had paid all his debts, his order is illegal. 1930 Rang 236 (236) [AIR V 17] (DB).

[13] There is no provision in the Provincial insolvency Act for annulling an adjudication in case the conditions imposed in the conditional order of discharge are not complied with, and such a provision cannot therefore be legally inserted in the conditional order of discharge. 1944 Mad 16 (17) [AIR V 31].

[14] An order of conditional discharge operates immediately but does not terminate the insolvency proceedings. Hence the Court can vary the conditions imposed by it though it has no power to revoke the order of discharge. 1942 Lah 240 (242, 243) [AIR V 29] : ILR (1943) Lah 528 (DB).

[15] The effect of the order of conditional discharge under S. 41 (2) (c) is that subject to the conditions laid down in the order the insolvents are free men after the order of discharge. They are not bound by the debts incurred by them or proved against them up to the date of discharge. But they do not get back the property which has vested in the official receiver. 1957 All 262 (Pr 8) [AIR V 44 C 77].

[16] The Court granted absolute discharge to the insolvent under S. 41 in order to enable him to take advantage under U. P. Encumbered Estates Act. The Judge, bearing in mind the interests of the creditors, ordered the insolvent to include in his application under the Encumbered Estates Act, all debts which had been proved in the insolvency proceedings and had not been discharged— *Held* that the effect of the absolute order of discharge being to release the insolvent from all the debts that were provable in the insolvency no proceedings under the Encumbered Estates Act, could properly be taken to liquidate these debts. Consequently, the order of discharge ought not to be allowed to stand. 1937 Oudh 450 (451) [AIR V 24] (DB).

Section 41 —Note 7 *(contd.)*

[17] The debtor executed a release of his share in Tavazhi properties to his sister before applying for adjudication. The Tavazhi was undivided at that time and the transfer was absolutely inoperative. The property belonged to the Tavazhi and the debtor's mother was alive on the date of the transfer so that he could not ask for partition — *Held*, even if the debtor had no transferable share in Tavazhi properties on the date of his adjudication, he would have obtained a share after the life time of his mother. In such a case it was open to the Court to make the discharge conditional and to direct that such share when acquired should vest in the Official Receiver. Further, the Madras Marumakkattayam (Amendment) Act (XXVI of 1958, Kerala) had conferred a right to enforce partition even during the mother's life-time. It was therefore clear that the debtor's share in his Tavazhi properties should vest in the Official Receiver for the benefit of his creditors. 1959 Ker 376 (Prs 2, 3) [AIR V 46 C 129] : ILR (1959) Ker 27.

8. Effect of order of discharge.—[1] An order of discharge does not necessarily put an end to the insolvency proceedings and the Insolvency Court has jurisdiction to give directions as to distribution of assets among the creditors. 1931 Lah 725 (725) [AIR V 18] ✣ 1937 Rang 276 (277) [AIR V 24] : 14 Rang 704 (DB) ✣ 1929 Rang 168 (169) [AIR V 16] : 7 Rang 126 (DB). (A I R 1925 Rang 105, *Foll.*)

[2] Ordinarily speaking, insolvency proceedings would not terminate until there has been a discharge of the insolvent, but the matter is otherwise where the insolvent is dead. In such a case there is an automatic discharge of the insolvent and where the property has been distributed prior to his death, the proceedings must automatically be held terminated. 1933 Lah 997 (998) [AIR V 20].

[3] An order of annulment does not amount to a discharge of the insolvent which has the effect of wiping off all the debts of the insolvent provable in insolvency. 1929 Mad 157 (164) [AIR V 16] (DB).

[4] An order granting absolute discharge comes into operation at once. If the discharge is suspended, then obviously it does not come into operation at once but it does automatically come into operation at the end of the specified time. 1942 Lah 240 (242) [AIR V 29] : ILR (1943) Lah 526 (DB) ✣ 1935 All 272 (273) [AIR V 22]. (Suspension of order till sale of insolvent's property — Sale held— Insolvency proceedings are terminated and cannot be revived again.)

[5] The administration of insolvency comes to an end by absolute order of discharge. 1943 Mad 26 (28) [AIR V 30] : ILR (1943) Mad 213 (DB).

[6] The granting of absolute discharge has no immediate effect upon any proceedings which may be pending under either S. 53 or S. 54 whether in the Insolvency Court itself or in Court of appeal and such proceedings can be continued unless a contrary order is passed by the Insolvency Court. 1943 Mad 644 (644, 645) [AIR V 30].

[7] The fact that a private creditor could not prove his debt on account of the failure of the Court to frame rules under S. 79 cannot override the provisions of law which exempt an insolvent from liability of his debts prior to the date of his insolvency on his obtaining a discharge. 1932 Sind 39 (40) [AIR V 19]: 25 Sind L R 422 (DB).

[8] Order of discharge does not operate to divest Official Receiver of property—Receiver closing or abandoning administration — Property may be deemed to have reverted to insolvent. 1961 Andh-Pra 219 (Pr 19) [AIR V 48 C 55]:(DB).

[9] An order of discharge does not revest property. 1937 Sind 306 (308) [AIR V 24] : 31 Sind L R 506 (DB). (AIR 1936 Cal 434, *Foll.*)

[10] Upon adjudication of a person all his property including his interest in an undivided joint family property, wherever situated, vests in the Court and unless there is an annulment order the interest does not come back to him upon his discharge and he has no right to demand partition of his interest in the joint family property. ('50) 3 Sau L R 52 (54) (DB).

[11] Mortgage by undischarged insolvent— Subsequent discharge — Property revests in mortgagor — Mortgagee can enforce mortgage by sale. 1933 All 449 (451) [AIR V 20] : 55 All 503 (DB)✣1934 Lah 809 (811) [AIR V 21]: 16 Lah 392 (DB).

[12] A discharge granted under the Bankruptcy Law of a foreign country or of British Colony such as Ceylon where the debt or liability has been contracted is valid discharge therefrom in British India. The fact that the debt is to be paid in British India does not affect its validity. 1920 Mad 934 (935, 936) [AIR V 7] (DB).

[13] See also Notes under S. 44.

9. Ground for refusal. — [1] The Court has got the power under S. 41 (2) clause (a) to refuse absolute discharge in appropriate cases. Section 42 mentions circumstances on proof of which the Court shall refuse absolute discharge. This may mean that the Court might grant discharge subject to conditions or suspend the order of discharge in appropriate cases. But from this it does not follow that the Court has no power at all to refuse absolute discharge so as to leave the insolvent an undischarged insolvent for life. 1956 Madh-B 254 (Pr 6, 7) [AIR V 43 C 98] (DB).

[2] The fact that a suit is pending against receiver should not alone prevent Court from granting application for discharge. 1931 Lah 725 (725) [AIR V 18].

[3] Absolute refusal to grant discharge on the ground that a suit had been filed to have it declared that the insolvent still owns considerable property is not justifiable. 1939 Oudh 129 (130) [AIR V 26] : 14 Luck 442 (DB).

[4] Where an insolvent who has obtained an order of unconditional discharge paying virtually nothing to his creditors although his assets were nil and there was a finding

42. Cases in which Court must refuse an absolute discharge.

(1) The Court shall refuse to grant an absolute order of discharge under section 41 on proof of any of the following facts, namely :—

(a) that the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible ;

(b) that the insolvent has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency ;

Section 41 — Note 9 *(contd.)*

that his debts were contracted recklessly, again presents an application for adjudication twenty-eight months later and it is found, he has incurred his debts recklessly, the case is one in which it is the duty of the Court to refuse a discharge. 1936 Rang 412 (412, 413) [AIR V 23].

[5] Where the conduct of the petitioner insolvent is not bona fide in that he had sold all his assets before filing the insolvency petition and had failed to produce account books and there is nothing to show that conditions if imposed will be complied with, the Court is justified in refusing to grant an absolute discharge. 1956 Madh-B 254 (Pr 9, 11) [AIR V 43 C 98] (DB).

[6] Where the Court cannot grant absolute discharge without any condition nor does it find room or justification for imposing conditions with an expectation that the same will be complied with, there is no other course but to refuse absolute discharge. 1956 Madh-B 254 (Prs 9, 11) [AIR V 43 C 98] (DB).

[7] Debtor executing release deed of his share in Tavazhi property to sister before applying for adjudication — Transfer inoperative, tavazhi being undivided — Debtor's mother being alive, debtor not competent to ask for partition — Debtor, as member of Tavazhi had definite alienable share in the property — This is a valid ground for refusing discharge. 1959 Ker 376 (Prs 2, 3) [AIR V 46 C 129] : ILR (1959) Ker 27.

[8] *See also* notes under S. 42.

10. Appeal and revision.—[1] A creditor has a right of appeal from an order of discharge. 1937 Oudh 450 (451) [AIR V 24] (DB).

[2] A creditor is not debarred from appealing against an order of conditional discharge merely because he has taken out money deposited in Court in pursuance of Court's order. 1926 Cal 529 (529) [AIR V 13] (DB).

[3] An order dismissing an application for review of an earlier conditional order allowing the insolvent's prayer for an order of discharge is not appealable. 1960 Ker 146 (Pr 1) [AIR V 47 C 68] (DB).

[4] No second appeal is competent from an order refusing discharge. 1934 Lah 198 (198) [AIR V 21].

[5] Appeal from refusal of discharge — Death of one creditor during pendency of appeal—Heirs not impleaded — Appeal abates as a whole unless the receiver in insolvency representing all parties concerned is on record. 1935 Cal 644 (644) [AIR V 22] (DB).

[6] Order refusing discharge — Appeal — Death of one creditor but his heirs not substituted — Interest of heirs not affected by such non-substitution — Appeal is not incompetent. 1939 Cal 490 (492) [AIR V 26].

[7] Where order in appeal is passed on points not taken in appeal, and is not supported by evidence, revision lies. 1934 Lah 198 (198) [AIR V 21].

[8] Assets less than eight annas in the rupee — Refusal to grant absolute discharge — Discretion of Court cannot be interfered with in revision. 1931 Lah 672 (672) [AIR V 18].

[9] The imposition of conditions being discretionary with the Court the High Court will not interfere, unless it considers that those terms were grossly unreasonable. 1944 Mad 16 (17) [AIR V 31].

[10] Conduct of the insolvent with respect to his trade or estate is mainly in the discretion of the Court. Appellate Courts will not lightly interfere with this discretion. 1934 P C 1 (2) [AIR V 21].

[11] The fact that the Courts below have passed concurrent orders of discharge is no bar to interference in revision in proper cases. 1959 Ker 376 (Pr 5) [AIR V 46 C 129] : ILR (1959) Ker 27.

[12] Conditional order of discharge — Concurrent findings of facts that conditions of discharge have not been fulfilled must be accepted in revision. 1942 Lah 240 (241) [AIR V 29] : ILR (1943) Lah 526 (DB).

SECTION 42 — SYNOPSIS

1. Scope.
2. Sub-section (1) (a).
3. Sub-section (1) (b).
4. Sub-section (1) (f).
5. Sub-section (1) (h).
6. Sub-section (1) (i).
7. Sub-section (2).

1. Scope. — [1] Court must grant absolute discharge, provided that insolvent pays eight annas in rupee and is not guilty of misconduct specified in S. 42 (*b*) to (*h*). 1939 Lah 183 (183) [AIR V 26]: ILR (1939) Lah 429.

[2] The provisions of S. 42 are imperative and the burden of proof lies on the insolvent,

(c) that the insolvent has continued to trade after knowing himself to be insolvent ;

(d) that the insolvent has contracted any debt provable under this Act without having at the time of contracting it any reasonable or probable ground of expectation (the burden of proving which shall lie on him) that he would be able to pay it ;

(e) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities ;

(f) that the insolvent has brought on, or contributed to, his insolvency by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs ;

(g) that the insolvent has, within three months preceding the date of the presentation of the petition, when unable to pay his debts as they became due, given an undue preference to any of his creditors ;

(h) that the insolvent has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditors ;

(i) that the insolvent has concealed or removed his property or any part thereof, or has been guilty of any other fraud or fraudulent breach of trust.

(2) For the purposes of this section, the report of the receiver shall be deemed to be evidence ; and the Court may presume the correctness of any statement contained therein.

(3) The powers of suspending, and of attaching conditions to, an insolvent's discharge may be exercised concurrently.

[P. I., 1907 — S. 44 (3) to (5) ; P. T. I., 1909 — S. 39.]

Section 42 — Note 1 *(contd.)*

and in the event of failure on his part to satisfy the Court in this respect, the Insolvency Court has no jurisdiction to pass an order of discharge. 1937 Nag 37 (38) [AIR V 24]: ILR (1937) Nag 461.

[3] Whether the Court shall grant or refuse an absolute order of discharge under S. 42 must be determined with reference to the terms of the said section and an application for discharge cannot be rejected on grounds not indicated in or warranted by that section. Where the Court rejected an application for absolute discharge on the ground that the insolvent had got very extensive credit and had uttered a falsehood — *Held*, that these were not grounds for refusing absolute discharge. 1936 Mad 800 (800) [AIR V 23] (DB).

[4] Insolvency Court has no jurisdiction to impose penalty on insolvent in shape of suspension from practice— Suspension is governed by rules framed by High Court — Scope of rules cannot be extended by agreement of parties or by order of Court — Court dealing with application for discharge is bound to consider matters laid down in S. 42 along with report of receiver — Court purporting to base its order on agreement between parties must follow procedure laid down in S. 38. 1939 Lah 495 (496) [AIR V 26].

[5] Where a person is adjudged insolvent and directed to apply for his discharge within certain time, the delay in so applying is not one of the grounds specified in S. 42 at all for refusing to grant an absolute order of discharge. It may be a ground for annulling the adjudication. 1941 Pat 285 (286) [AIR V 28] (DB).

[6] Though, while granting discharge, other circumstances can be taken into consideration, it would be going too far to grant an absolute discharge on grounds that at the time of the transactions, the person was a young man of 20 years of age or thereabouts and was carrying on business with his father which, in the circumstances, was under his direction and control. 1936 Lah 381 (381) [AIR V 23] (DB).

[7] Where the court cannot grant absolute discharge without any condition nor does it find room or justification for imposing conditions with an expectation that the same will be complied with, there is no other course but to refuse absolute discharge. 1956 Madh B 254 (Pr 9, 11) [AIR V 43 C 98] (DB).

[8] A Court should be very slow to interfere with the exercise by a Judge, in a matter of insolvency, of his discretion in granting an absolute discharge to the insolvent. But where the provisions of S. 42 have not been strictly followed but wrongly applied the discretion may be interfered with. 1946 Sind 156 (157) [AIR V 33 C 48]: ILR (1946) Kar 265.

[9] On the refusal of an insolvent's discharge, his property which vested on adjudication in the Court or a receiver, does not revest in the insolvent: and the insolvent can renew his application for discharge in case fresh circumstances might justify him in doing so and the leave of the Court is necessary before any suit can be brought against the insolvent. 1928 Rang 109 (110) [AIR V 15]: 6 Rang 27 (DB).

[10] Where the Court under the provisions of S. 42 refuses the discharge of the insolvent, as far as that Court is concerned the proceedings have terminated. The insolvent is liable

Section 42 — Note 1 *(contd.)*

to be arrested in execution of any decree notwithstanding S. 28 (2). 1926 Rang 2 (3) [AIR V 13]: 3 Rang 492.

2. Sub-section (1) (a). — [1] Ordinarily, when an insolvent in India whose case is governed by the provisions of this Act, has paid up 8 annas in the rupee he is entitled to be free from the disabilities of an insolvent unless it is established that his case falls under the provisions of S. 42 (*b*) to (*i*). The removal of his disabilities as an insolvent need not be accompanied by an absolute acquittance in respect of the liabilities which he has not discharged, for S. 41 gives to the Court a discretion similar to the discretion given in S. 28 of the English Act to impose conditions for the payment of the balance of the liabilities which will bind the insolvent after discharge. 1928 Oudh 263 (264) [AIR V 15]: 3 Luck 588 (DB).

[2] Absolute discharge cannot be granted where it has been found that the insolvent has no assets to meet his debts. He is responsible for incurring debts in such circumstances and the purpose of keeping him an insolvent is to make plain to the world that his credit is gone so that he cannot cause loss to creditors in the future. His credit will return to some extent when he is discharged. That time will be postponed unless he pays 8 annas in the rupee. 1942 Nag 83 (83) [A I R V 29]: I L R (1942) Nag 714 (DB).

[*See also* 1935 Lah 919 (919) [AIR V 22].]

[3] Where insolvent's assets are not of a value equal to 8 annas in rupee and insolvent, far from helping receiver to pay his debts obstructs him. *Held*, that it was improper to grant him a discharge. 1925 Oudh 112 (112) [AIR V 12].

[4] The provisions of S. 42 (1) (*a*), are imperative and it is the duty of the Court before passing a final order of discharge to satisfy itself that the insolvent whose assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, proves that it is not due to his fault that his assets do not reach that percentage. The burden of proof is on the insolvent. In the event of failure on the part of the insolvent to satisfy the Court in this respect, the Insolvency Court has no jurisdiction to pass an order of discharge. Neither can it do so in the absence of any evidence on the record. There is a statutory obligation on the debtor and unless he discharges it, no order of discharge under S. 41 can be passed. 1936 Nag 17 (17) [AIR V 23]: 31 Nag L R (Sup) 13 ✣ 1929 All 858 (859) [AIR V 16] (DB) ✣ 1934 Lah 109 (109) [AIR V 21]. (It is not necessary for the creditor to show in the first instance that the insolvent was guilty of fraud or dishonesty.)✣ 1944 Mad 16 (17) [AIR V 31] ✣ 1938 Mad 590 (591) [AIR V 25]. (There is no burden on creditors or on official receiver to show that debtor could justly be held responsible for the deficiency of assets.)✣1931 Oudh 356 (356) [AIR V 18] ✣ ('10) 5 Low Bur Rul 189 (190, 191) (DB) ✣ 1946 Sind 156 (157) [AIR V 33 C 48]: ILR (1946) Kar 265. (Generally a businessman must be held justly responsible for his business debts unless some unforeseen calamity overtakes him. But the mere fact that the petitioning creditor was a partner in business with the debtor is not in anyway sufficient to invoke the beneficial operation of S. 42 (1) (a).)

[See however 1929 All 843 (844) [A I R V 16] (DB). (Where it is true that the assets of the insolvent are less than annas eight in the rupee on the amount of unsecured liabilities but it has not been shown that this state of things has been brought about by any fraudulent act on the part of insolvent or by circumstances which he could have controlled, S. 42 (a) does not stand in the way of the insolvent procuring the discharge.)]

[5] Where insolvent has not shown that his liability has arisen from circumstances for which he cannot be held responsible and is unable to produce account books or to explain satisfactorily the alleged loss of books, Court should not grant an absolute order of discharge. 1933 Lah 812 (812, 813) [A I R V 20].

[6] If insolvent's irability to pay his unsecured creditors eight annas in rupee is due to causes directly under his own control, it is reason for refusing absolute discharge. 1935 Mad 646 (646) [AIR V 22] (DB).

[7] Merely stating in the order that there is nothing in the report of the receiver to stand in the way of the insolvent's discharge is not sufficient. The Judge must be satisfied that the assets were not of the requisite value from circumstances for which the insolvent could not be held to be justly responsible. The order is not legal in absence of such finding. 1928 Cal 843 (844) [AIR V 15] (DB).

[8] Mere fact that insolvent was unsuccessful in trade does not warrant supposition that his assets are not of value equal to eight annas in rupee due to circumstances for which he cannot justly be held responsible. Section 42 was not intended to apply to such cases. 1932 Cal 623 (624) [AIR V 19] (DB).

[9] Insolvent spending excessively on death and marriages — Very small fraction of his debt could be paid from sale-proceeds of his estate — Although he cannot be granted absolute discharge under S. 42 (a), order of discharge under S. 41 (b) or (c) can be made. 1929 Lah 281 (282) [AIR V 16].

[10] Where Court refuses to pass absolute order of discharge, there being less than eight annas assets in a rupee of the insolvent, the Court can allow the insolvent to file a fresh application for discharge, if circumstances at any subsequent time become favourable to him. The insolvent can apply for discharge at any time though it is obligatory for him to make an application in the first instance within the time fixed by the Court at the outset. 1931 Lah 672 (672) [AIR V 18].

[11] A person was adjudged insolvent on November 27, 1927 and was allowed one year's time in which to apply for discharge. In 1928, he applied for extension of time. An inquiry was ordered to be held in the matter which disclosed that during a period of

Section 42 — Note 2 *(contd.)*
nearly eight years of insolvency, the creditors had succeeded in recovering only five pies in the rupee. On January 4, 1936, he was granted a discharge on condition of his paying Rs. 1,000 to the creditors within two years. This the insolvent failed to do. On April 26, 1938, he applied for an absolute order of discharge — *Held*, that whatever be the facts, the insolvent ought to be allowed to make a fresh start after 11 or 12 years of insolvency and hence he should be granted an absolute discharge. 1939 Lah 432 (433) [AIR V 26].

[12] If "assets" is not qualified, as in "future assets" it is generally understood to mean amount actually in existence available for division among creditors of insolvent. 1939 Lah 183 (184) [AIR V 26] : I L R (1939) Lah 429.

3. Sub-section (1) (b). — [1] Where the insolvent is unable to produce account books or to explain satisfactorily the alleged loss of books the Court should not grant an absolute order of discharge. 1933 Lah 812 (812) [AIR V 20].

[2] Where the insolvents who were allowed to carry on trade and keep accounts were either reckless in carrying on business or, they had kept accounts but did not produce them, the Court should not be too ready to help them in the matter of getting their adjudication annulled. In such a case the Court would refuse to grant discharge. 1955 Madh B 79 (Pr 3) [A I R V 42 C 24] (DB). (Conditional discharge was also refused because of the behaviour of the insolvent, who was allowed to continue trade on condition that he kept accounts, in not helping the Official Receiver and not keeping the whole property at the disposal of creditors for distribution in insolvency proceedings.)

[3] Where the conduct of the petitioner insolvent is not bona fide in that he had sold all his assets before filing the insolvency petition and had failed to produce account books and there is nothing to show that conditions if imposed will be complied with, the Court is justified in refusing to grant an absolute discharge. 1956 Madh B 254 (Prs. 9, 11) [AIR V 43 C 98] (DB).

[4] It must always be borne in mind in dealing with questions of books of account even where they are false or so badly kept, as to amount not merely to negligence, but to a suggestion of dishonesty, that S. 42 itself provides and defines a *quasi* offence, with regard to the keeping of books, which, if established, is a ground for a kind of penal order, postponing the absolute discharge of the insolvent when he applies for it. 1927 All 352 (355) [AIR V 14] (DB).

4. Sub-section (1) (f). — [1] Mere speculation would not disentitle an insolvent from asking the Court for a discharge. Many people indulge in all kinds of speculations, but the one thing which debars an insolvent from claiming his discharge is rash and hazardous speculation. When the finding of the Court is not to this effect, it cannot be said that the discharge of the insolvent should be refused under the provisions of S. 42 (1) (f) on this ground. 1936 Lah 840 (840) [AIR V 23].

[2] Where insolvents, dealing in a speculative business, know that they are not in a position to bear the burden of the losses and yet go on with the transaction hoping that by some miracle there would be a windfall and being fully aware of their position of financial embarrassment continue the trade, the Court is right in refusing to grant an absolute order of discharge because a mentality such as this denotes rashness as well as great hazard. 1960 Madh Pra 204 (Pr 5) [AIR V 47 C 100] (DB).

[3] The insolvent who was a graduate of the University started the business of purchasing and selling shares sometime in 1936 with an original capital of about Rs. 4,000 and made considerable profits during the year 1936 and the earlier part of 1937. Sometime in April 1937, there was great fluctuation in the share market and he went on incurring continual losses till his liability stood at the staggering figure of Rs. 1, 71,000. The insolvent has absolutely no experience in the share business and the profits which he earned just after entering the business might have made him unduly optimistic—*Held*, that every man must be deemed to be responsible for the way in which he conducts his business and although the type of speculation into which the insolvent entered could not be said to be dangerous to society, the Insolvency Court was not wrong in saying that the speculation was of a rash and hazardous character and, therefore, under S. 42 (1) (*f*), Provincial Insolvency Act, the Judge had every right to refuse to pass an order of absolute discharge. 1944 Cal 63 (63) [AIR V 31] (DB).

5. Sub-section (1) (h).—[1] Section 42 (1) (*h*), means that there should be no discharge of an insolvent who has done one of two things, both previous to the adjudication of insolvency. One of those things is to have been previously adjudged an insolvent, and the other is to have previously made composition or arrangement with his creditors. The intention of the Act is that where a man has been relieved of his liabilities on a previous occasion by one of those methods, he is not entitled to be relieved of his liabilities a second time by the Court of Insolvency granting him a discharge after a second adjudication as an insolvent, but in such a case, he shall remain permanently as an undischarged insolvent and have the disadvantage of not being able to obtain further credit without disclosing the fact that he is an undischarged insolvent. The composition must be governed by the words "on any previous occasion" and these words must mean a composition previous to the adjudication. Where the applicants are cultivators and it appears that the failure to carry out the composition is probably due to the agricultural depression which has resulted in special legislation in the United Provinces and it is

43. Adjudication to be annulled on failure to apply for discharge.

(1) If the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, [a][the Court may annul the order of adjudication or make such other order as it may think fit, and if the adjudication is so annulled, the provisions of section 37 shall apply].

(2) Where a debtor has been released from custody under the provisions of this Act and the order of adjudication is annulled under sub-section *(1)*, the Court may, if it thinks fit, re-commit the debtor to his former custody, and the officer in charge of the prison to whose custody such debtor is so re-committed shall receive such debtor into his custody according to such re-commitment, and thereupon all processes which were in force against the person of such debtor at the time of such release as aforesaid shall be deemed to be still in force against him as if no order of adjudication had been made.

[P. T. I., 1909 — S. 41.]

[a] *Substituted* for the words and figures "the order of adjudication shall be annulled, and the provisions of section 37 shall apply accordingly" by the Insolvency Law (Amendment) Act, 1950 (III of 1950), S. 7 [18-2-1950].

OBJECTS AND REASONS

Amendment made in sub-section (1). — "In a case where the debtor fails to apply for discharge within the prescribed period under the Provincial Insolvency Act, section 43 (1) of the Act leaves no option to the Court but to annul the order of adjudication, which leads to hardship in a considerable manner of cases. It is accordingly proposed . . . . to amend this section giving the Court discretionary powers in such cases."

—S. O. R., Gaz. Ind., 1949, Pt. V, p. 496.

Section 42 — Note 5 *(contd.)*

the policy of the Legislature not to keep a burden of debt on cultivators, the order discharging them is in accordance with that policy. 1937 All 526 (526) [AIR V 24].

6. Sub-section (1) (i). — [1] Section 42 gives the Court wide authority to examine the insolvent's conduct whether before or after the insolvency. Fraudulent transfers by the insolvent prior to insolvency come within the purview of S. 42 (1) (i). But there must be some limit regarding the alleged fraudulent transfers upon which the order of discharge can be refused and the Judge ought not to take into consideration conduct which could not have had anything to do with the bankruptcy either in producing it or in affecting it in any way after its commencement. Only such conduct or affairs as may or can have had some effect upon the bankruptcy ought to be taken into consideration. But where the transfers have considerable effect upon the insolvency, then an order refusing discharge can be based on such transfers although they might have been effected long before the application for insolvency. 1939 Cal 490 (493) [AIR V 26].

[2] Court has power generally to review any questionable transactions covered by that section which are in any way relevant to the insolvency even if such transactions could not be expressly avoided under Ss. 53 and 54. 1939 Cal 490 (493) [AIR V 26].

[3] In an application by debtor for discharge, if the creditors allege that the debtor's case comes under S. 42 (1) (i) by reason of some fraudulent transfers, the onus would lie upon creditors to prove fraud, if any, in respect of transaction. 1939 Cal 490 (494) [AIR V 26].

7. Sub-section (2).—[1] Where in an application for discharge the report of the official receiver is in favour of granting a discharge, the onus is on the opposing creditors to prove the contrary. 1933 Lah 812 (812) [AIR V 20].

SECTION 43 — SYNOPSIS

1. Scope and object.
2. Annulment of adjudication.
3. Extension of time.
4. Who can apply for annulment.
5. Notice.
6. Effect of annulment.
7. Setting aside annulment.
8. Appeal.
9. Review.

1. Scope and object.— [1] Section 43 is intended to act as a deterrent to insolvents who try to avoid discharge, and this was the expressed object with which the section was introduced. Section 43 cannot be interpreted in such a way as to favour the insolvent. 1941 Lah 316 (320) [AIR V 28] : I L R (1942) Lah 330 (DB).

[2] Section 43 is penal and its object is to punish the debtor if he does not with due diligence apply for his discharge. 1943 Cal 133 (136) [A I R V 30] : ILR (1943) 1 Cal 5 (DB).

2. Annulment of adjudication.—[1] The word "annul" has not been defined in the Act. It means "to render void in law." 1937

Section 43 — Note 2 *(contd.)*
Cal 158 (159) [A I R V 24] : ILR (1937) 1 Cal 628 (DB).

[2] On default by debtor under S. 43 (1) his adjudication is not automatically annulled. The Court must make an express order annulling the adjudication. 1941 Lah 316 (321) [AIR V 28] : ILR (1942) Lah 330 (DB) ✣ 1956 Madh B 256 (Prs 2, 3) [AIR V 43 C 100] (DB) ✣1934 Lah 468 (470) [AIR V 21] : 15 Lah 698 (DB) ✣ 1933 Rang 133 (134) [AIR V 20] (DB) ✣ 1938 Oudh 122 (124, 125) [A I R V 25] : 14 Luck 40 (FB). (Debtor's failure to apply for discharge within time fixed.) ✣ 1927 All 418 (419) [A I R V 14] : 49 All 201 (DB). (Do.) ✣ 1924 Cal 777 (778) [A I R V 11] : 51 Cal 337 (DB). (Do). ✣ 1935 Lah 606 (606) [AIR V 22] (DB). (Do.) ✣ 1930 Mad 389 (389) [A I R V 17] : 53 Mad 288 (FB). (Do.) ✣ 1939 Nag 103 (104) [A I R V 26] : ILR (1939) Nag 478 (Do.) ✣ 1940 Nag 4 (5) [A I R V 27] : I L R (1941) Nag 500 (DB). (Do.)

[3] The annulment of adjudication under S. 43 is merely a continuation of the insolvency in another form and it is open to the Court to pass either a conditional or unconditional order of annulment. 1930 Mad 520 (522, 523) [AIR V 17] (DB).

[4] Insolvent, not paying large amount of his debts, applying for his discharge—Court directing him to pay certain sum monthly and to renew his application "six months hence" — Court's order is under S. 42 (1) (a) and hence if insolvent neither pays nor renews application as ordered his adjudication cannot be annulled under S. 43. 1929 Pat 184 (185) [AIR V 16] (DB).

[5] A Court should be very chary about annulling insolvency proceedings where there are proceedings pending under S. 53 and S. 54 of the Act. 1940 Nag 4 (5) [A I R V 27] : ILR (1941) Nag 500 (DB).

[6] No date fixed for hearing application of discharge — Receiver filing application under S. 53—Application for discharge to be heard after disposal of receiver's application —Order annulling adjudication and disposal of receiver's application simultaneous—Court held was wrong in annulling adjudication. 1930 Oudh 474 (475) [AIR V 17] (DB).

[7] When the debtor has applied for his discharge within the prescribed period and S. 27 does not apply, then the provision in S. 43 must apply and the order of adjudication must be annulled if thereafter the debtor does not appear on the day fixed for hearing his application for discharge. 1937 Nag 37 (38) [AIR V 24] : ILR (1937) Nag 461.

[8] The insolvent within the time fixed for his application for discharge applied for extension of that time—The Court refused extension and annulled the adjudication — *Held*, that the penalty of annulment was not intended for insolvent coming before the Court in time and submitting to the discipline of the Court. If the Court was not prepared to extend the time it could have treated the application for extension as one for discharge or should have allowed insolvent to make immediate application for discharge. The order of annulment was held not proper. 1931 Mad 325 (325) [AIR V 18] (DB).

[9] When an insolvent fails to appear on the date fixed, if there is still any considerable estate to be administered and more particularly if there are any outstanding claims with regard to property transferred before adjudication, then it would be much simpler and also work for more efficient control if the Court postpones the order of annulment instead of assuming control under S. 37. On the other hand, if there are no such outstanding disputes, the Court may find it more convenient to annul the adjudication at once, even though there is still some estate to be administered and in that case it would still have jurisdiction to exercise some control over the subsequent administration of the estate and any connected proceedings. 1941 Lah 316 (321, 322) [AIR V 28] : I L R (1942) Lah 330 (DB).

[10] See also notes under S. 37.

3. Extension of time.—[1] The Court can extend the time for making an application for discharge even after the expiry of the period originally fixed. 1930 Mad 389 (390, 392) [AIR V 17]: 53 Mad 288 (FB). (AIR 1928 Mad 265; AIR 1926 Mad 942; Opinion of Waller J. in AIR 1924 Mad 635 and opinion of Reilly J., in AIR 1930 Mad 278, *Overruled.*) ✣ 1956 Madh B 256 (Pr 2, 3) [AIR V 43 C 100] (DB). (Annulment is not automatic upon failure to apply within time—It requires order of Court —So long as the order of annulment is not passed an application to extend time is competent.) ✣ 1933 All 230 (230) [AIR V 20] : 55 All 241 (DB) ✣ 1941 Lah 316 (321) [A I R V 28] : ILR (1942) Lah 330 (DB) ✣ ('31) 132 Ind Cas 223 (224) (Lah) ✣ 1930 Mad 278 (280) [A I R V 17] : 52 Mad 648 (DB). (Per *Venkatasubba Rao J.*) ✣ 1931 Mad 10 (11) [AIR V 18]. (Insolvent's failure to apply for discharge within time fixed having effect of preventing inquiry into allegation of fraudulent conduct—Court can extend time.) ✣ 1940 Nag 4 (5) [A I R V 27] : ILR (1941) Nag 500 (DB) ✣ 1942 Qudh 97 (100) [AIR V 29] : 17 Luck 271 (DB) ✣ 1938 Oudh 122 (125) [A I R V 25] : 14 Luck 40 (FB). (AIR 1927 Oudh 506 and A I R 1928 Oudh 376, *Overruled.*) ✣ 1928 Pat 338 (340) [A I R V 15] : 7 Pat 375 (FB). (AIR 1925 Pat 355, *Overruled.*) ✣ ('28) 108 Ind Cas 803 (804) (DB) (Pat). ✣ 1931 Rang 27 (28) [A I R V 18] : 8 Rang 506 (DB). (Court can extend time on its own motion.) ✣ 1926 Sind 94 (97) [AIR V 13] (DB).

[But see ('28) 112 Ind Cas 768 (768) (Lah). (A I R 1926 Lah 370, *Followed.*) ✣ 1930 Rang 166 (169) [AIR V 17] : 8 Rang 187 (DB).]

[2] Application for extension of period fixed for making application for discharge can be made not merely by the debtor but by any person interested. 1930 Mad 278 (280) [A I R V 17] : 52 Mad 648 (DB). (Per *Venkata Subba Rao, J.*) ✣ 1930 Mad 342 (342) [AIR V 17] (DB).

[3] After annulment of adjudication under S. 43 no extension of time to the debtor for applying for his discharge can be granted. 1937 All 686 (687) [AIR V 24] : ILR (1937) All 855.

Section 43 — Note 3 *(contd.)*

[4] Where the lower Court reviews its order of annulment and grants time for applying for discharge the High Court will not interfere in revision with the discretion exercised by the lower Court, in granting extension. 1931 Mad 10 (11) [AIR V 18].

[5] In extending time for applying for discharge on the ground that another petition under Ss. 52 and 53 has to be inquired into the order should be in the following terms— "The order of annulment is set aside and the time for applying for discharge is extended upto such time as is necessary for disposal of petition under Ss. 52 and 53." 1931 Mad 10 (11, 12) [AIR V 18].

4. Who can apply for annulment. — [1] Though S. 43 (1) does not say by whom the application for annulment has to be made, a creditor who is affected by the adjudication is certainly a person entitled to apply to the Court under S. 43. 1924 Mad 635 (636) [AIR V 11] (DB).

5. Notice.—[1] Section 43 should be read with S. 27— Where a person is adjudged insolvent on a petition by his creditors and steps are apparently being taken with a view to initiate proceedings under S. 53 or 54, notice ought to be issued to the petitioning creditors before the adjudication is annulled. 1937 All 686 (688) [A I R V 24] : I L R (1937) All 855.

[2] When annulling adjudication a Court ought to give specific notice of it to a creditor as an interested party who may have instituted legal proceedings in relation to the insolvent's property. 1927 Rang 173 (173) [A I R V 14] (DB).

6. Effect of annulment.—[1] An order of annulment does not amount to a discharge of the insolvent which has the effect of wiping off all the debts of the insolvent provable in insolvency. 1929 Mad 157 (164) [A I R V 16] (DB). (Per *Thiruvenkatachariar, J.*)

[2] On annulment of adjudication under S. 43 the Court to protect creditors must order vesting of the debtor's property in some third person under S. 37. 1926 Lah 370 (370) [AIR V 13].

[3] Where adjudication is annulled under S. 43 it is not necessary that order vesting the property in a person appointed by the Court should be made simultaneously or at the time of making the order annulling adjudication. The insolvency proceedings do not terminate with the annulment, nor can it be said that the Insolvency Court loses seisin of the matter and cannot make any other order thereafter in the proceedings. The order under S. 37 is for the protection of the creditors and can be made at any time after the annulment order. 1936 Cal 573 (574) [AIR V 23] : ILR (1937) 1 Cal 264.

[See however 1954 Mys 52 (Pr 2) [A I R V 41 C 25] : I L R (1954) Mys 95 (DB). If no vesting order is made at the time of annulling an adjudication under S. 43, any property of the insolvent which may have vested in the Receiver reverts to the debtor automatically and the Court cannot thereafter divest the debtor of the property and revest it in another person.)]

[4] The order of annulment on failure to apply for discharge is intended to punish the insolvent by withdrawing from him the protection which he gets by the order of adjudication and if while passing the order of annulment the Court by some oversight or other fails to pass orders for the protection of the creditors, there is no reason why the Court cannot do so, when the mistake is pointed out to it. There is nothing in the Insolvency Act to prevent it, and it is not correct to say that after the order of annulment the insolvency proceeding comes to an end. 1933 Pat 84 (86) [AIR V 20] : 12 Pat 163 (DB).

[5] After adjudication is annulled under S. 43 the Court continues to have jurisdiction in the matter of distribution of assets of insolvent. The persons in whom the property vests under S. 37 have full power to deal with the property and can proceed to distribute the estate under the control and guidance of the Court. 1941 Lah 316 (320) [AIR V 28] : ILR (1942) Lah 330 (DB)✠1943 Cal 133 (136, 137) [AIR V 30] : I L R (1943) 1 Cal 5 (DB) ✠ 1935 Mad 826 (832, 834) [AIR V 22] : 58 Mad 908 (FB).

[6] Where no vesting order is made on annulment and no directions are given by the Court to the receiver, the estate with its liabilities reverts to the insolvent and therefore the official receiver appointed on the adjudication ceases to represent the estate of the insolvent and the receiver no longer represents the creditors. The consequences of the annulment are that the insolvent does not get back any property which has already been distributed amongst his creditors and as to such property, as still remains in hand, the Court will, to protect the creditors, make an order vesting it in such person as the Court may appoint with a view to distribute the same. That person may proceed to sell and distribute the property among the creditors then existing and not call for any future claims. He should proceed to divide the property in his hand amongst the creditors, whose claims have been admitted and entered in the schedule. 1931 Sind 31 (32) [AIR V 18] : 25 Sind L R 367.

[7] All that the Insolvency Judge can do on the annulment of the adjudication is to direct that the property of the insolvent should vest in a certain person. Even where he has passed a vesting order the receiver can only hold the property for the benefit of the creditors, and the creditors would have to enforce their claim by a proper suit. The property cannot be sold in any case by the Insolvency Court. 1939 Lah 536 (537) [AIR V 26] : I L R (1939) Lah 275.

[8] Once an order of annulment of adjudication has been passed under S. 43, there ceases to be an insolvent or any receiver. All acts theretofore done by the Court are valid and subject to that the property of the debtor vests in such person as the Court may appoint, and in default of any such appointment, in the debtor himself. Consequently, so long as the order of annulment of adjudica-

Section 43 — Note 6 *(contd.)*

tion is in force, the Insolvency Court has no jurisdiction to demand a refund of money from the creditors to whom a dividend had been distributed. 1935 Nag 246 (248) [A I R V 22] : 31 Nag L R (Sup) 36.

[9] On an annulment of adjudication without any order vesting the properties in the official receiver, the official receiver ceases to be receiver in insolvency and ceases to have any right or authority to deal with the properties of the insolvent. 1936 Mad 915 (915) [AIR V 23]+1935 Rang 152 (153) [AIR V 22] (DB).

[10] The annulment of adjudication under S. 43 does not operate so as to cause abatement of proceedings already instituted under Ss. 53 and 54. 1941 Lah 316 (321) [A I R V 28] : ILR (1942) Lah 330 (DB)+1944 Bom 72 (73, 75) [AIR V 31] (DB)+1935 Mad 826 (834) [AIR V 22] : 58 Mad 908 (FB)+1932 Mad 731 (732) [AIR V 19].

[But see 1933 Rang 223 (224, 225) [A I R V 20] : 11 Rang 287 (FB).]

[11] *A* adjudicated insolvent — One of *A's* creditors without leave of Insolvency Court filing suit, obtaining decree and purchasing *A's* property in execution of decree — Subsequently *A's* adjudication annulled unconditionally without any vesting order—Sale held valid. 1945 Mad 388 (389, 390) [AIR V 32].

[12] Where in a suit to enforce a mortgage executed by the insolvent the official receiver is impleaded but on the annulment of adjudication of the mortgagor during the pendency of the suit no steps are taken to implead the mortgagor, the decree in the suit and the sale in execution thereof cannot bind the mortgagor as after the annulment the official receiver becomes *functus officio* and cannot thereafter represent the estate of the insolvent. The revesting of the property in the insolvent during the pendency of the suit is not affected by the doctrine of *lis pendens*. 1943 Mad 381 (384, 385) [A I R V 30] : I L R (1943) Mad 702 (DB).

[13] Suit by widow of deceased insolvent pending insolvency to recover part of husband's estate impleading official receiver as a party—Subsequent annulment of adjudication—Suit held maintainable with regard to items in respect of which it was not barred by limitation at the time of annulment of adjudication. 1941 Mad 84 (87) [AIR V 28].

[14] Where an adjudication is annulled on failure of the insolvent to apply for his discharge within the time fixed by the Court it would not be proper exercise of discretion on the part of the Court to revest the properties in the insolvent for that would be allowing the insolvent to take advantage of his own default and the creditors who had already proved their debts would be seriously prejudiced by such order as under S. 61 (5) they alone would be entitled to be rateably paid out of the amount realised by the assets of the insolvent if the administration in insolvency were to continue where as if the properties were revested in the insolvent there would be nothing to prevent the other creditors who have obtained decrees subsequent to the annulment to come in under S. 73, Civil P. C. and claim rateable distribution. 1946 Mad 388 (389) [AIR V 33 C 199] (DB).

[15] The annulment of adjudication under the conditions mentioned in S. 43 is intended as a punishment to the insolvent. The protection conferred upon him by reason of his adjudication is withdrawn but it does not necessarily follow that he is to get back from the control of the Court his assets. The punishment provided in S. 43 cannot be used in favour of the insolvent. 1939 Oudh 55 (56) [AIR V 26] : 14 Luck 404.

[16] Section 37 gives the Court a wide discretion. The annulment of the adjudication does not mean that the debtor who is adjudicated is necessarily to be placed in possession of the property which is in the hands of the official receiver at the time the adjudication is set aside. The directions of the Court must depend on the circumstances in each case. 1940 Mad 375 (378) [AIR V 27] : ILR (1940) Mad 441 (FB).

[17] Person whose adjudication is annulled is not disqualified for election as a member of a Local Board as an "undischarged insolvent" under S. 55 (2) (b), Madras Local Boards Act, 1920. 1941 Mad 22 (23) [AIR V 28].

[18] Execution of decree against insolvent without sanction and without receiver being brought on record — Auction sale is valid when the order of adjudication which then existed has been annulled afterwards without ordering the vesting of property in any person —Assignee of the rights of such an auction purchaser seeking redemption of the mortgage with respect to property sold—He is entitled to a decree. 1955 Trav-Co 241 (Prs 3, 5) [(S) AIR V 42 C 99] : ILR (1955) Trav-Co 68 (DB).

[19] When the adjudication is annulled under S. 43, the insolvency is wiped out so far as the property right of the insolvent is concerned and it also restores back to the creditors the right to proceed against the person of the insolvent but it does not restore back to him his civic or citizenship rights. He cannot therefore stand for an election to any office of any local authority. The disability is not removed by annulment of the insolvency under S. 43. ('58) ILR (1958) Ker 215 (224, 226) (DB).

[20] See also notes under S. 37.

7. Setting aside annulment. — [1] An order of annulment passed under S. 43 (1) cannot be set aside under O. 9, Civil P. C. by invoking S. 5, Provincial Insolvency Act. The proper course for the debtor is to present another application for adjudication under S. 10 (2), Provincial Insolvency Act. 1926 Mad 942 (942) [AIR V 13] : 49 Mad 935 (DB).

8. Appeal. — [1] When an order of the District Court deals partly with the question of discharge of insolvent under S. 41 and partly with the annulment of adjudication under S. 43, leave for appeal is necessary. Order of High Court admitting appeal should be construed as virtually granting leave. 1928 Pat 338 (339) [AIR V 15] : 7 Pat 375 (FB).

44. Effect of order of discharge.

(1) An order of discharge shall not release the insolvent from—

(a) any debt due to the Government ;

(b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party ;

(c) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party ; or

(d) any liability under an order for maintenance made under section 488 of the Code of Criminal Procedure, 1898.

(2) Save as otherwise provided by sub-section *(1)*, an order of discharge shall release the insolvent from all debts provable under this Act.

(3) An order of discharge shall not release any person who, at the date of the presentation of the petition, was a partner or co-trustee with the insolvent, or was jointly bound or had made any joint contract with him or any person who was surety for him.

[P. I., 1907 — S. 45 ; P. T. I., 1909 — S. 45.]

Section 43 — Note 8 *(contd.)*

[2] An order of adjudication prevents an unsecured creditor from realising his debt except by receiving the dividend. He is therefore affected by the refusal to annul the order of adjudication and therefore can appeal against it as a person aggrieved within the meaning of S. 75. 1924 Mad 635 (636) [AIR V 11] (DB).

9. Review.—[1] Order of annulment of adjudication—Matters of which Court ought to have been apprised by Official Receiver not brought to its notice—Review of order should be granted. 1948 Mad 233 (Prs 2, 3) [AIR V 35 C 118] : ILR (1948) Mad 659 (DB).

SECTION 44 — SYNOPSIS

1. Scope.
2. Debt due to Government.
3. Debt incurred by fraud.
4. Fraudulent forbearance.
5. Order for maintenance.
6. Effect of order of discharge—Sub-s. (2).
7. Sub-section (3).

1. Scope.—[1] The General rule is that a discharge granted under the Indian Insolvency law is binding on all the Courts of India without regard to the place where the contract was made or was to be performed. A discharge granted in the Travancore State would certainly be an answer to a claim made subsequently in Madras State. Whether it is looked upon as an order passed by a foreign State or by any part of the Republic in India, it would be binding in Madras State. ('56) 1956-1 Mad L Jour 527 (529).

[2] Even after an order for discharge under sub-s. (2) of S. 44 the Receiver in Insolvency does not become functus officio. 1950 Cal 487 (Prs 12, 18) [AIR V 37 C 183].

[3] It is no doubt true that the provisions of S. 44, Provincial Insolvency Act, are mandatory and when a discharge order is made all debts provable under the insolvency proceedings in a way cease to exist, but this does not make a decree passed against the insolvent in respect of a debt provable in insolvency after he has obtained a discharge order altogether void. Although the Court is wrong in passing the decree, it exists and the executing Court is bound to execute it if the insolvent does not get it set aside by a higher Court or by the same Court on review. 1951 Pepsu 46 (Prs 2, 3) [AIR V 38 C 16] : 2 Pepsu L R 602. (AIR 1938 P C 98 and AIR 1940 Lah 280, *Rel. on.* ; AIR 1941 Lah 314, *Not foll.*) ✠ 1957 Raj 131 (Prs 8, 16) [AIR V 44 C 53] : ILR (1957) 7 Raj 366 (DB).

2. Debt due to Government.—[1] In S. 44, the legislature has classified debts for the purposes of priority and has accorded a favoured position to debts due to the State. The section is designed to carry out a public purpose; it operates uniformly on all persons in the State; it is applicable to all persons in like circumstances; it does not subject individuals to an arbitrary power; it does not discriminate against some and in favour of others. A statutory provision like this cannot be regarded as violative of the constitutional provision regarding to equal protection of laws. 1957 Punj 150 (Pr 5) [(S) AIR V 44 C 66] : ILR (1957) Punj 310 (DB).

[2] Where the moneys claimed by the State were monies which were due from the insolvent in respect of license fees which were to be paid by the insolvent under the provisions of the appropriate Excise Acts, it was held that the power of issuing licenses under excise laws was clearly an exercise of police powers and that it was impossible to hold that the debt which was sought to be recovered accrued to the State while it was acting in its capacity as a private juristic person or while it was engaged in commercial activities. 1957 Punj 150 (Pr 5) [(S) AIR V 44 C 66] : ILR (1957) Punj 310 (DB).

3. Debt incurred by fraud. — [1] Insolvent executing promissory note after filing petition for adjudication—Fact of filing petition not disclosed to creditor — Act amounts to fraud—Discharge of insolvent does not ab-

Section 44 — Note 3 *(contd.)*
solve him from liability on pro-note. 1937 Mad 677 (679) [AIR V 24].

4. Fraudulent forbearance.—[1] Where a debtor who filed an insolvency application has deliberately concealed the existence of a debt due by him and has thus prevented the creditor from appearing in the Insolvency Court and obtaining a share of the assets, if any. S. 44 (1) (c) applies to such a case. 1941 Mad 100 (100) [AIR V 28].

5. Order for maintenance. — [1] Under S. 44 (1) (d), an order of discharge shall not release insolvent from any liability under an order for maintenance made under S. 488, Criminal P. C. 1935 Lah 758 (760) [A I R V 22] : 37 Cri L Jour 207.

6. Effect of order of discharge— Subsection (2). — [1] Section 44 (2) means that order of discharge frees insolvent from liability for all debts provable under Act but does not free his property from such liability. 1937 Nag 171 (172) [AIR V 24] : I L R (1937) Nag 380 ✣ 1939 Lah 300 (301) [A I R V 26]. (Section protects insolvent and not assets in hands of official receiver.)

[2] An order of discharge does not extinguish the decretal debt of the respondent creditor in the sense that after the discharge the creditor can look to the assets which the insolvent was possessed of and which had vested in the Court or Receiver on filing of the application for adjudication. Discharge order protects the insolvent and not the assets in the hands of the official Receiver. The claim of the creditor would be satisfied also from any other property which may be acquired by the insolvent after the date of order of discharge in view of the condition attached to the order of discharge that "his after-acquired assets, if any will vest in the Official Receiver till his creditors are paid 8 annas in a rupee." ('56) 1956-1 Mad L Jour 527 (529. 531). (Law relating to effect of order of discharge discussed in detail.)

[3] The effect of S. 44 (2) is not to extinguish altogeher the claims of the creditors whose claims are provable under Act but to limit their remedy for purpose of realizing same from assets vested in Court or receiver according to provisions of S. 28. 1936 Cal 434 (436) [AIR V 23] : ILR (1937) 1 Cal 127.

[4] The effect of an order of discharge under S. 44 (2) is not to extinguish the debts of the insolvent. But the claims of the creditors cannot be directed against any other property which may be acquired by the insolvent after an order of discharge. Creditors can only look only to those assets which the insolvent was possessed of and had accordingly vested in the Court or the Receiver on the date of the filing of the adjudication petition. 1950 Cal 487 (Pr 14) [AIR V 37 C 183.]

[5] Order of discharge does not divest official receiver of property placed in his hands for distribution among creditors. 1939 All 114 (115) [AIR V 26] ✣ 1937 Lah 87 (88) [A I R V 24] : 17 Lah 775 ✣ 1944 Nag 28 (29) [AIR V 31] : I L R (1944) Nag 14 (DB). (Property is not revested in insolvent.) ✣ 1937 Sind 306 (308) [AIR V 24] : 31 Sind L R 506 (DB).

[6] Discharge order does not terminate insolvency proceedings — Property of insolvent cannot become available to his creditors to be proceeded against in ordinary Civil Court. 1939 Nag 103 (105) [AIR V 26] : ILR (1939) Nag 478.

[7] It is not accurate to say that debts that are proved up to the date of discharge are discharged under S. 44 (2). They have ceased to be debts and have become claims before a Court administering an estate. 1944 Nag 28 (29) [AIR V 31] : ILR (1944) Nag 14 (DB).

[8] Any liability arising from a provable debt disappears when order of discharge is made. It cannot be said that that protection under S. 44 (2) is taken away from him merely because liability takes form of a decree. 1941 Lah 314 (315) [AIR V 28] ✣ 1933 All 340 (341) [A I R V 20] (Decree obtained prior to discharge.)

[9] After discharge, a suit to recover debt contracted by insolvent after filing petition but before adjudication is barred under S. 44. 1932 Bom 511 (512) [AIR V 19].

[10] Failure of attaching creditor to prove his debt under S. 34 releases insolvent from such debt. 1928 Nag 336 (337) [AIR V 15].

[11] Where an insolvent executes a promissory note after his discharge and a part of the consideration for the note is a debt due to him prior to his adjudication the promisee cannot claim the old debt in a suit on the promissory note. 1932 Mad 416 (416) [A I R V 19].

[12] Alienation pending attachment—Subsequent insolvency and discharge of judgment-debtor — Decree-holder can proceed against attached property notwithstanding S. 44 (2). 1936 Mad 100 (101) [AIR V 23].

[13] Liability of insolvent to indemnify his surety though contingent is provable under the Act and hence an order of discharge absolves the insolvent from that liability. 1942 Mad 745 (745) [A I R V 29] ✣ 1928 All 306 (306) [AIR V 15] : 50 All 606.

[14] Section 47 makes provision for a secured creditor to come under the Act if he chooses ; but the provision is optional and if the secured creditor does not choose to come under the Act and apply in the Insolvency Court he is entitled to remain apart from the insolvency proceedings and rely entirely on his decree and execution proceedings and he is not in any way barred by any provisions of the Insolvency Act. Hence an order of discharge will not release the insolvent from proceedings being taken against him under O. 34, R. 6. Civil P. C. 1939 All 401 (402, 403) [A I R V 26] : ILR (1939) All 492 (DB) ✣ 1942 Mad 273 (274) [AIR V 29] : I L R (1942) Mad 448 (DB). (AIR 1942 Mad 151, *Overruled.*)

[See however 1940 Nag 252 (252, 253) [AIR V 27] : ILR (1940) Nag 512 (DB).]

[15] A creditor having a mortgage decree against the insolvent, realised his security before the passing of the discharge order. He did not, however, value his security and prove the balance personally due from the

Section 44 — Note 6 *(contd.)*

insolvent—*Held* that since the mortgage-debt was provable the discharge order released the insolvent from personal liability under the mortgage and the creditor could not subsequently claim a personal decree for the balance against the insolvent. 1938 Lah 217 (218) [AIR V 25] (DB).

[16] The rule of law that an order of discharge shall release the insolvent from all debts provable under the Provincial Insolvency Act is not qualified by any rule that the creditor should have notice of the proceedings. The rule is based on a policy of law and not any rule of constructive notice. Notice or no notice S. 44 comes into play and releases the insolvent from the debt in question which could undoubtedly have been proved under the Act. Section 44 applies even where the omission of the name of the creditor is deliberately made by the insolvent if no question of fraud is involved. 1933 All 600 (600, 601) [AIR V 20] : 55 All 636 (DB).

[17] Where the debt or liability exists at the time of adjudication or arises before the discharge in consequence of any obligation incurred before the date of such adjudication it shall not cease to be "provable debt" because it was not immediate or was contingent. The only requisite condition is that it must be in existence. 1949 Lah 167 (Prs 4, 5, 6.) [AIR V 36 C 31]: Pak L R (1949) Lah 192 (DB).

[18] Under the Co-operative Societies Act, there is no doubt a possibility, howsoever remote it might be, of a member becoming liable for contribution to the Society's assets, but this remote possibility could hardly be said to be a liability existing at the time of adjudication or discharge. It is not a liability provable under the Act. Until the Society is wound up and a liquidator is appointed, it cannot be said that there is any debt or liability, certain or contingent, which can affect the member. The liability of a member of a co-operative Society for the contribution to the assets of the Society on its dissolution imposed by the statute is not, therefore, wiped out by the fact that he had been discharged by the Insolvency Court before the Society had been wound up and the Liquidator appointed. 1949 Lah 167 (Prs 6, 10, 13, 15) [AIR V 36 C 31] : Pak L R (1949) Lah 192 (DB).

[19] The liability of a member of a co-operative society to contribute to the assets of the society in the event of its being dissolved before or during insolvency of the member is a debt provable in insolvency and if the liquidator fails either to prove it or have it excluded from the schedule under S. 33 the member's liability for such debt ceases on his being granted a complete discharge. The liquidator, therefore, has no jurisdiction to assess the contribution of the insolvent as a member of a society under S. 42 (2), Co-operative Societies Act, after his complete discharge. The fact that the liability of the member did not materialise till some time after the adjudication is immaterial. 1942 Lah 237 (238) [AIR V 29] : I L R (1943) Lah 553 (DB). (AIR 1940 Lah 280, *Reversed.*)

[20] An order of discharge under S. 44 of the Provincial Insolvency Act releases an insolvent from his liability under a decree passed by a liquidator of a Co-operative Society against him either as a debtor to the Society or as a member liable to contribute to its assets, and the decree cannot, therefore, be executed against him thereafter. 1941 Lah 314 (315) [AIR V 28].

[21] Person purchasing shares of company making certain payment on allotment and call —Purchaser adjudged insolvent and unconditionally discharged — Subsequent liquidation of company — Balance of money due upon shares held irrecoverable in liquidation. 1940 Lah 304 (305, 306) [A I R V 27] : I L R (1940) Lah 458 (DB).

[22] Insolvency of monthly tenant — Rent due subsequent to adjudication but before discharge is debt provable — Under S. 44 (2) order of discharge would release the insolvent from such debt. ('50) I L R (1950) 1 Cal 628 (630).

[23] An insolvent having obtained an absolute discharge in respect of debts cannot claim the benefit of S. 21, Madras Agriculturists Act, 1938 in respect of such debts which no longer remain payable by the insolvent personally but which are payable from his estate in the official receiver's hands. 1947 Mad 95 (95) [AIR V 34 C 43].

[24] It is not only incumbent on the creditors of a firm which has been adjudicated as insolvent but also on the creditors of each individual partner to prove their claims in the insolvency proceedings, and a partner whose property has vested in the official receiver for the benefit of his creditors should not be allowed to be harassed again by one of such creditors merely and solely because the order of adjudication was not passed in an application directed against him but against a firm in which he was a partner or because, for the sake of convenience, the Court passed an order against the firm and did not pass a specific order against each individual partner in such firm. 1932 Sind 39 (39, 40) [AIR V 19] : 25 Sind L R 422 (DB).

[25] A Hindu insolvent's normal obligations end when his property is completely liquidated. Only as long as, he is not discharged, if he comes into possession of any assets, the same can be seized to pay off the creditors. But, this does not apply to the insolvents' children. His sons are not liable for their insolvent fathers' remaining debts, if any, where, no property of that insolvent has been left. 1949 Kutch 2 (Pr 5) [AIR V 36 C 2].

7. Sub-section (3).—[1] The fact that sub-s. (3) of S. 44 provides for the continuance of the liability of persons jointly liable along with the insolvent indicates that the debt as such is not extinguished but it only releases the insolvent from all liability keeping alive the liability of the other debtors jointly liable with him. It, therefore, follows that the liability of a person jointly bound with the insolvent is not extinguished despite

PART III

ADMINISTRATION OF PROPERTY

Method of Proof of Debts.

45. Debt payable at a future time.

A creditor may prove for a debt not payable when the debtor is adjudged an insolvent as if it were payable presently, and may receive dividends equally with the other creditors, deducting therefrom only a rebate of interest at the rate of six per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted.

[P. I., 1907 — S. 29 ; P. T. I., 1909 — Sch. II, R. 24.]

46. Mutual dealings and set-off.

Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively.

[P. I., 1907 — S. 30 ; P. T. I., 1909 — S. 47.]

Section 44 — Note 7 *(contd.)*

the discharge of the insolvent. 1952 Mad 108 (Pr 15) [AIR V 39] (DB).

[2] The effect of decree against the son against whom a decree has been passed along with his father is to make the son jointly liable along with his father to discharge the debt. Hence, the release of an insolvent father under S. 44 (2) from all debts does not extinguish the liability of the son who is liable under a decree along with the father in respect of his father's debts. 1952 Mad 108 (Pr 1, 8, 16) [AIR V 39] (DB). (A I R 1951 Mad 48 (FB), *Not applied.*)

[3] Discharge of insolvent—Judgment-creditor of insolvent seeking to execute his decree obtained prior to adjudication, by attachment and sale of house belonging to insolvent's wife—Held that as the wife of the insolvent was under no personal obligation to pay the debt and did not come under any of the categories mentioned in S. 44 (3) of the Act, a creditor of the insolvent was not entitled to bring the house to sale after the discharge. 1941 Mad 620 (620, 621) [A I R V 28] (DB). (AIR 1937 Mad 727, *Reversed.*)

[4] Normally, a surety is discharged when the principal debtor is discharged from the liability for paying the debt. But S. 44 (3) implies that the surety continues to be liable throughout the insolvency proceedings and makes explicit that even after discharge, his liability does not cease to exist. Hence a suit against a surety is not barred by the principal debtor becoming insolvent. 1936 Pesh 150 (151) [AIR V 23].

[*See also* ('35) 18 Nag L Jour 145 (149).]

Section 46 — Note 1

[1] The object of the doctrine of equitable set off as embodied in this section is not merely to avoid cross actions, but to do substantial justice and to prevent the great injustice which would arise if a person who is the insolvent's creditor on one account and his debtor on the other is compelled to pay 16 annas in a rupee on what he owed to insolvent and to receive less than what the insolvent owed him. 1914 Lah 317 (318) [AIR V 1] : 1914 Pun Re No. 53 (DB).

[2] Where there are mutual dealings between an insolvent and a creditor, an account has to be taken of what is due from the one to the other in respect of such mutual dealings and the balance of the account and no more is to be paid by the one to the other. 1935 Cal 225 (227) [A I R V 22] : 62 Cal 298 (DB).

[3] Section applies only where there are mutual dealings between parties. 1925 Sind 153 (155) [AIR V 12] (DB). 1954 Cal 303 (304) [A I R V 41 C 109] : I L R (1956) 1 Cal 102.

[4] "Mutual dealings" include not only a debt but also a claim for unliquidated damages. Thus damages for breach of covenant can be set off under this section against a claim for rent. 1935 Cal 225 (227) [AIR V 22] : 62 Cal 298 (DB).

[5] Mutual credit or mutual dealings under S. 46, mean reciprocal demands which must be naturally terminated in a debt. In a case where there are reciprocal demands available by one party against the other in the same capacity it is a clear case of mutual dealings in which a set-off is a matter of course. 1954 Orissa 7 (10) [A I R V 41 C 2] : I L R (1952) Cut 309. (Suit by Official Liquidator of Bank against depositor on overdraft account—Overdraft allowed on security of depositor's fixed deposits with Bank—Depositor could claim set-off in respect of amounts payable under fixed deposits.)

[6] A joint debt cannot be set off against a separate debt. Thus the dealings of the insolvent on deposit account with a Bank and on a promissory note executed by him jointly with another in favour of the Bank, are of a different character and so cannot be called

47. Secured creditors.

(1) Where a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.

(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.

Section 46 — Note 1 *(contd.)*

mutual dealings and cannot be set off. 1921 Bom 66 (66, 67) [AIR V 8] : 45 Bom 1219(DB).

[7] Debt due to joint creditors cannot be set off against separate debt due from one of joint creditors. But where one of joint creditors shows that amounts standing in joint names really belongs to him solely, set off can be allowed. 1949 East Punj 337 (338 [AIR V 36 C 82].

[8] Debt due to one of two or more persons can be set off againt the sum due from them where their liability is joint as well as several : any sum due to one of the partners in a firm from a company in liquidation can be set off against the debt due to such company from the firm : But the converse is not true and the amount due to the firm from the insolvent company cannot be set off against the separate debt of one of the partners due to the company. 1949 East Punj 337 (339) [AIR V 36 C 82].

[9] A debt repayable under a contract with *A* and *B* to either or survivor cannot at one and the same point of time be a debt jointly payable to *A* and *B* and also a debt severally payable to *A*. During the joint lives of *A* and *B* at least until due demand for repayment of the money to *A* specifically is made, the debt continues to be a debt jointly due to *A* and *B* and *X* cannot set off a debt due from *A* alone against such debt nor can *A* set off this debt against a separate debt due from him to *X*. 1954 Cal 303 (304, 305) [AIR V 41 C 109] : ILR (1956) 1 Cal 102.

[10] Bank in liquidation—Money due to Bank on personal account by partner of firm —Money due by Bank under joint account in the name of the firm—Held not mutual dealings and sums could not be set off. 1927 Lah 228 (230) [AIR V 14] : 8 Lah 105 (DB).

[11] Liability of principal debtor and surety to company joint and several—Surety himself creditor of company in separate dealing —Dealings between company and surety are mutual as contemplated by S. 46—Surety can claim set off under S. 229, Companies Act, 1913 (now S. 529, Companies Act, 1956). 1940 Mad 266 (268) [AIR V 27].

[12] Word "due" in this section means sum which is legally recoverable and not time-barred. 1930 Mad 998 (999) [A I R V 17] (DB).

[13] Official receiver cannot set-off against creditor's claim a time-barred claim against creditor. 1930 Mad 998(999) [AIR V 17](DB).

[14] The principle underlying the section cannot be extended to cases where the debtor of the insolvent at the time of the insolvency buys up a third person's claim against the insolvent, in order to relieve himself of the liability of having to pay his just debts. 1914 Lah 317 (318) [AIR V 1] : 1914 Pun Re No. 53 (DB).

[15] Privileges and rights which are given in S. 46 apply to proceedings under S. 229, Companies Act. 1913 (now S. 529 of Companies Act, 1956). 1940 Mad 266 (268) [AIR V 27].

[*See also* 1953 Mad 610 (611) [AIR V 40 C 239].]

[16] Under S. 529, Companies Act, 1956, read with S. 47 of Kerala Insolvency Act, in the case of mutual dealings an account has to be taken and only the balance of the account can be claimed by the one party or the other, as the case may be. It is only this balance if it is in favour of the company that the liquidator is entitled to claim. 1959 Ker 11 (11) [AIR V 46 C 7].

[17] Section 46, Provincial Insolvency Act is more or less a copy of S. 39 of the English Bankruptcy Act, 1869. Hence it is proper to presume that the Indian Legislature intended to give S. 46 the same import. The rule embodied in S. 46 is a rule of equity and there are no legitimate grounds to limit its benefits solely to actions in Insolvency Courts. If that be not so it is bound to give rise to fraudulent practices with a view to evade the law. 1958 Mys 126 (128) [A IR V 45 C 31] : ILR (1957) Mys 333. (Insolvency of proprietor of chit fund —Official Receiver assigning pronote executed by one of subscribers in favour of proprietor as security for future instalments — Suit by assignee on pronote—Subscriber can claim set off of sum due to him in respect of instalments paid by him to proprietor under separate chit.)

[18] If at the relevant date for the application of S. 31, (English) Bankruptcy Act, (Corresponding to S. 46, Provincial Insolvency Act) a guarantor has not paid the principal creditor (and has not taken any other step to enforce his rights against the principal debtor) and so long, at least, thereafter as that situation continues, there is no debt due to the guarantor from the principal debtor capable of forming the subject of a set-off against a debt due from the guarantor to the principal debtor. And a sum paid some time later by the trustee in bankruptcy of the guarantor then due to the principal creditor's bankers cannot be treated as a mere quantification of an obligation in the nature of a debt already existing on the relevant date. (1956) 1956-3 All E R 225 (229, 230).

SECTION 47 — SYNOPSIS

1. Scope.
2. Secured creditor—Meaning of.
3. Sub-section (1)—Realisation of security.
4. Sub-section (2) — Relinquishment of security.
5. Sub-section (3) — Valuation of security.
6. Sub-section (5)—Substitution of amount of valuation.

(3) Where a secured creditor does not either realise or relinquish his security, he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

(4) Where a security is so valued, the Court may at any time before realisation redeem it on payment to the creditor of the assessed value.

(5) Where a creditor, after having valued his security, subsequently realises it, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

(6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend.

[P. I., 1907 — S. 31 ; P. T. I., 1909 — Sch. II, Rr. 9 ; 11 ; 15.]

Section 47 — Synopsis *(contd.)*

7. Sub section (6)—Exclusion from share in dividend.

1. Scope.—[1] Section 47 does not in any way derogate or reduce the nature of the Official Receiver's right in the property that is vested in him under S. 28 (2). 1957 Mad 1 (2) [AIR V 44 C 1] : I L R (1957) Mad 344 (DB).

[2] Section 47 must be read as corollary to and subject to S. 62. 1935 Sind 57 (59) [AIR V 22] : 29 Sind L R 241. (Official receiver cannot be expected to reserve in his hands any asset when there is no compliance with S. 47.)

[3] Money in the hands of receiver representing entirely rents and profits of property under mortgage to a bank which has subsequently gone into liquidation—Claim of liquidator of bank is not affected by S. 47 or 48 of this Act and the receiver has no right to deal with the money. 1935 P C 104 (107) [AIR V 22].

[4] Section 47 gives power to a creditor to insist on certain procedure; there is nothing in the section which prohibits the adoption of some other procedure with his consent. 1930 Nag 198 (197) [AIR V 17]. (Mortgagee desiring property should be sold free of mortgage and the debt paid out of sale proceeds—Court can comply with his request.)

[5] Section 47 does not empower the mortgagee to authorise the official receiver to sell property not vested in him. 1933 Lah 1010 (1010) [AIR V 20]. (House of agriculturist under mortgage—The official receiver cannot sell even the equity of redemption as under S. 60 of the Civil P. C., it does not vest in him.)

[6] Provision in S. 47 is optional and a secured creditor may remain apart and rely upon his security in ordinary proceedings by suit and execution. He is not barred from entirely relying upon his decree and execution proceedings by any provision of the Insolvency Act. 1939 All 401 (402, 403) [AIR V 26] : I L R (1939) All 492 (DB). (An order of discharge will not release insolvent from proceedings taken under O. 34, R. 6, C. P. C.) ✣ 1929 Bom 258 (259) [AIR V 16] (DB). (Or under the section he can prove the whole debt abandoning security or prove for balance after deducting the value of security.) ✣ 1924 Pat 259 (261) [AIR V 11] : 2 Pat 724 (DB). (Or can realise security and prove for balance or relinquish it and prove for the whole debt or value the security and receive dividend for the balance.)

[7] The right of a secured creditor in insolvency proceedings is a contingent one and until the contingency happens he is outside the Act. His debt is not provable until he has realised his security or has abandoned it or valued it as per S. 47. In such a case, he is entitled to a personal decree against the insolvent under O. 34, R. 6, Civil P. C., after the insolvent's unconditional discharge, if the security has not been realised before the discharge of the insolvent. 1954 Punj 180 (181) [AIR V 41 C 93] : I L R (1954) Punj 831.

2. Secured creditor — Meaning of. — [1] *P*, who obtained decree against *E* attaching movables of *E* — *B* who sued *E* obtaining attachment before judgment of a portion thereof — *B* after obtaining ex parte decree putting it into execution and applying for action being taken under S. 63, C. P. C. — *B* consenting to sale of property under *P's* decree and for rateable distribution—Ex parte decree of *B* set aside on *E's* application subject to sale proceeds being held as security for the satisfaction of decree that may subsequently be passed in favour of *B* — *Held B* was a secured creditor for the purposes of S. 47. 1915 All 406 (408) [AIR V 2] (DB). (Case under Act of 1907.)

See also Notes under S. 2.

3. Sub-section (1)—Realisation of security.—[1] Secured creditor whose realisation from the security is not sufficient to pay off the whole debt can prove for the balance. 1930 Oudh 20 (29) [AIR V 17] (DB). (He can utilise decree under O. 34, R. 6 as proof of balance.) ✣ 1957 Mad 1 (2) [AIR V 44 C 1] : I L R (1957) Mad 344 (DB) ✣ 1954 Punj 180 (181) [AIR V 41 C 93] : I L R (1954) Punj 831 ✣ 1925 Pat 438 (440) [AIR V 12] : 4 Pat 128 (DB). (Act of creditor in having his name removed and proceeding against security does not affect his right to prove for balance.)

4. Sub-section (2) — Relinquishment of security. — [1] The relinquishment of the security may be by an abandonment of it by

48. Interest.

(1) On any debt or sum certain whereon interest is not reserved or agreed for, and which is overdue when the debtor is adjudged an insolvent, and which is provable under this Act, the creditor may prove for interest at a rate not exceeding six per centum per annum —

(a) if the debt or sum is payable by virtue of a written instrument at a certain time, from the time when such debt or sum was payable to the date of such adjudication ; or,

(b) if the debt or sum is payable otherwise, from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication.

(2) Where a debt which has been proved under this Act includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding six per centum per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full.

[P. I., 1907—S. 32; P.T.I., 1909—Sch. II, R. 23.]

Section 47 — Note 4 *(contd.)*

conduct. 1929 Bom 258 (260) [AIR V 16] (DB). (Secured creditor proving whole debt and receiving dividend on the whole debt.) ✣ 1936 Lah 690 (691) [AIR V 23] (DB). (Do.) ✣ 1924 Mad 761 (762) [AIR V 11] : 47 Mad 605 (DB). (Silence on the part of mortgagee, in reply to notice sent by official receiver that he proposed to sell the property free of encumbrance and in the absence of any reply he would treat his silence as consent, does not amount to relinquishment.) ✣ 1944 Oudh 203 (204, 208) [AIR V 31] : 19 Luck 611 (DB). (Mortgagee on relinquishing will be entitled to rateable distribution only.)

[2] Secured creditor not relinquishing security — Court has no power to order sale of it and give him only priority of payment. 1924 Pat 259 (261) [AIR V 11] : 2 Pat 724 (DB).

[3] A creditor who is a charge-holder cannot be placed as creditor in schedule under the Insolvency Act, if he is not prepared to give up his charge. 1946 Nag 119 (120) [AIR V 33 C 31] : I L R (1946) Nag 39.

5. Sub-section (3) — Valuation of security. — [1] The right of a secured creditor to realise the security in accordance with the terms of the bond in his favour is not affected in any manner whatsoever by the valuation which he puts on his security under S. 47 of the Provincial Insolvency Act. A secured creditor is clearly entitled to make a claim in respect of the whole of the amount due under the security despite the valuation made by him of his security at a lesser figure. And if he limits his claim in a subsequent suit to the amount of the original valuation he is precluded under O. 2, R. 2, C. P. Code, from recovering any amount in excess of that valuation thereafter. 1955 Andh 152 (155, 156) [(S) AIR V 42 C 55] (DB).

[2] A secured creditor who only gets his security valued in order to get himself scheduled as a creditor in insolvency proceedings with respect to the balance due to him cannot be regarded as a decree-holder with respect to the amount of the valuation of the security. His right of realising his security is unaffected. 1940 Nag 369 (370) [AIR V 27] : I L R (1940) Nag 675.

6. Sub-section (5) — Substitution of the amount of valuation. — [1] Where a secured creditor realises in a subsequent suit his security, the net amount so realised will then have to be substituted for the amount at which it was previously valued and a dividend can be claimed only in respect of the balance due to him after deducting the value as so amended, which may be more or less. 1955 Andh 152 (155) [(S) AIR V 42 C 55 (DB).

7. Sub-section (6).—Exclusion from share in dividend.—[1] If a secured creditor ignores the Insolvency Court altogether he would be debarred from claiming any dividend if his security should prove insufficient. 1940 Nag 252 (252, 253) [AIR V 27] : I L R 1940) Nag 512 (DB). (Secured creditor neither assessing under S. 47 or acting under S. 34 (1) should be content with his security.) ✣ 1932 Lah 84 (84) [AIR V 19]. (He is not entitled to be included in the schedule of creditors.)

[2] Where a secured creditor has during the insolvency proceedings realised his security and there is a deficiency, the balance of the debt constitutes a debt provable in insolvency. If the creditor omits to make an application to the Official Receiver for being included in the list of creditors, he cannot after the discharge of the insolvent recover the balance by executing his decree in execution proceeding under O. 21, Civil P. C. 1954 Punj 180 (181) [AIR V 41 C 93] : ILR (1954) Punj 831.

Section 48 — Note 1

[1] Per *Anantakrishna Ayyar J.* — To regularise proceedings for the purpose of calculating dividends it is necessary to fix the rate of interest under S. 48, where the proved debts exceed the assets that are likely to be realised. 1931 Mad 729 (735) [AIR V 18] (DB).

49. Mode of proof.

(1) A debt may be proved under this Act by delivering, or sending by post in a registered letter, to the Court an affidavit verifying the debt.

(2) The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers.

[P. I., 1907—S. 25; P.T.I., 1909—Sch. II, R. 2.]

Section 48 — Note 1 *(contd.)*

[2] Rate of interest for purpose of dividend cannot exceed 6 per cent per annum under provisions of S. 32 (b). 1917 Lah 81 (81) [AIR V 4]. (Case under old Act of 1907.)

[3] The principle underlying the law of insolvency is that interest ceases to run when adjudication takes place. An order of adjudication relates back to, and takes effect from, the date of the presentation of the petition on which it is made. Interest should therefore run up to the date of the presentation of the petition in an insolvency case and up to the date of winding up petition in the case of an insolvent company. 1954 All 129 (131) [AIR V 41 C 79].

[4] Section 48 has no application to a secured creditor. Therefore interest due after the date of adjudication should be allowed to be included in the balance which is provable under S. 47 (1). 1930 Oudh 20 (29) [AIR V 17] (DB).

[5] Court administering insolvent's estate— Unsecured creditors are entitled to be paid out of the sale proceeds interest upto the date of preliminary decree and secured creditors upto the date of payment. 1929 Mad 242 (243) [AIR V 16].

[6] Mortgagee being a secured creditor can collect his debt with interest thereon at the contractual rate upto the time of payment. 1919 All 255 (255) [A I R V 6] : 41 All 481 (DB).

[7] Secured creditor stepping into insolvency proceedings under S. 47 (3), assessing value of security and getting himself scheduled for balance — Creditor is entitled to interest only on amount for which he was scheduled and that too at rate which Court may determine under Ss. 48 and 61. 1945 Nag 276 (277) [AIR V 32] : ILR (1945) Nag 1009.

[8] Sufficient surplus assets in the hands of the receiver after paying all debts — Creditor to whom money is due under a promissory note, providing for interest at a higher rate than six per cent. is entitled to be paid out of the surplus at that rate from the date of adjudication to the date of payment. But where there are special reasons for reducing that rate the Court has power to do so. 1931 Mad 729 (734, 739) [AIR V 18] (DB) ✠ 1926 All 289 (290) [AIR V 13] : 48 All 272 (DB). (Subsequent interest, though cannot be taken into account at the time of the first distribution of the dividend, is a part of the debt.)

[9] Compound interest as such is not objectionable. 1935 Mad 468 (472) [AIR V 22] (DB).

Section 49 — Note 1

[1] Tendering of proof can be done by producing evidence of the amount and particulars thereof and has to be done by the creditor. One of the ways in which the creditor can do so is mentioned in S. 49 (1) of the Act. 1949 All 645 (646, 647) [AIR V 36 C 243] : ILR (1949) All 686 (DB).

[2] The section lays down only one method of proof. It does not lay down any mandatory method of proof by which alone debts can be proved. 1938 Pat 65 (66) [AIR V 25] (DB) ✠ 1929 Cal 159 (160) [AIR V 16] (DB). (Insolvent debtor admitting in insolvency proceedings decree passed against him—*Held* the debt was proved.)

[But see 1941 Lah 6 (7) [AIR V 28] : I L R (1940) Lah 345 (DB). (There is no legal proof of debt unless the method laid down in the Act is adopted.) ✠ 1947 Pat 161 (162) [A I R V 34 C 59] : 25 Pat 447 (DB). (Certified copy of decree under execution sent with letter giving particulars of amount due under decree— *Held* certified copy was proof within the meaning of S. 78.)]

[3] A creditor proves his debt when he lodges proof in the mode prescribed by S. 49. Acceptance or admission by the Court is not necessary to hold that the debt has been proved. 1943 P C 98 (101, 102) [AIR V 30] : I L R (1943) Kar (PC) 109 : 70 Ind App 83 : I L R (1943) Nag 669 ✠ 1934 Mad 465 (466) [AIR V 21] : 57 Mad 767.

[4] Unless the affidavit concerning the debt is for the purpose of claiming distribution in the assets of the insolvent before the Insolvency Court, mere tender of proof will not suffice. 1960 Andh Pra 257 (259) [AIR V 47 C 79] (DB).

[5] Where a claim for recovery of a debt is not contested, the mode of proof prescribed by S. 49 should be sufficient. 1958 All 54 (59) [AIR V 45 C 20] (DB).

[6] Creditor filing affidavit in time specifying amount and particulars of decretal debt— Affidavit returned for representation along with copy of decree — Affidavit represented along with copy of decree when final dividend was declared and distributed among creditors—Creditor's name omitted from schedule of creditors—Application by creditor for including his name in schedule — *Held* creditor must be deemed to have proved his debt and was entitled to dividend. 1946 Mad 500 (501, 502) [A I R V 33 C 255]. (Court can order re-distribution after calling back the amount distributed.)

[7] Where a debt is contested in the insolvency proceedings, it should be proved in the ordinary way, and it would be no answer to

50. Disallowance and reduction of entries in schedule.

(1) Where the receiver thinks that a debt has been improperly entered in the schedule, the Court may, on the application of the receiver and after notice to the creditor, and such inquiry (if any) as the Court thinks necessary, expunge such entry or reduce the amount of the debt.

(2) The Court may also, after like inquiry, expunge an entry or reduce the amount of a debt upon the application of a creditor where no receiver has been appointed, or where the receiver declines to interfere in the matter or, in the case of a composition or scheme, upon the application of the debtor.

[P. I., 1907—S. 26; P.T.I., 1909—Sch. II Rr.26 ; 27.]

Section 49 — Note 1 *(contd.)*

the contest that a prima facie proof of it according to the mode prescribed by S. 49 had already been given. 1958 All 54 (59) [AIR V 45 C 20] (DB).

[8] Where the circumstances on which the preliminary inference as to the weakening of the presumption as regards certain pronotes under S. 118 (a) of the Negotiable Instruments Act was based are found to be illusory and unfounded, the creditors are not deprived of the benefit of that presumption and there is no necessity of proving by evidence that consideration did actually pass. 1958 All 54 (63) [AIR V 45 C 20] (DB).

[9] The word "proved" includes affidavit of debt under S. 49 and also admission in the Court. The word is used in the technical sense of proof of debt for the purposes of claiming distribution in the assets of the insolvent before the insolvency Court. 1960 Andh Pra 257 (259) [AIR V 47 C 79] (DB).

[10] "Provable" and "proof" are words of technical import in the language of the law of insolvency. And it is only that a certain debt may conform to that description for certain purposes of the Act that the convenient mode of proof prescribed by S. 49 has been laid down. 1958 All 54 (59) [AIR V 45 C 20] (DB).

[11] There is no express period of limitation for creditor in insolvency proceedings to prove his debt. Debt is to be proved ordinarily before any dividend is declared. 1936 Cal 434 (436) [AIR V 23] : I L R (1937) 1 Cal 127 ✠ 1938 Oudh 8 (9) [AIR V 25] (DB). (Some form of proof is necessary if a debt is to be considered.)

[12] Proof of debt has to be offered in proceedings subsequent to the adjudication. Filing of the insolvency petition therefore would not amount to a proof or admission of amount due. 1930 Mad 874 (881) [AIR V 17]: 53 Mad 826 (DB).

[13] Proof of debt must be tendered before discharge but acceptance of proof and determination of persons who have proved to be creditors need not necessarily be before discharge. 1949 All 645 (646, 647) [AIR V 36 C 243] : ILR (1949) All 686 (DB).

[14] Section 49 (2) does not require in every case that the vouchers should be specified along with the claim. Vouchers, if any, are required to be specified under S. 49 (2) and even then it is left to the Court at any time to call for the production of the vouchers, if the vouchers are specified in the affidavit. In a case where the claimant has no vouchers in his possession, it does not follow that because no vouchers are specified in the affidavit his claim must be dismissed. 1955 NUC (Bom) 6015 [AIR V 42].

[15] Dismissal of the claim on the ground of failure to submit vouchers with claim without giving an opportunity to the creditor to prove his claim is opposed to the elementary notions of justice and fairness. 1955 N U C (Bom) 6015 [AIR V 42].

Section 50 — Note 1

[1] Section 50 will apply only to cases where the insolvency is pending. So where the insolvency has ended by an annulment the section cannot be invoked to expunge or reduce a debt due to a creditor. 1938 Pat 225 (226) [AIR V 25] : 16 Pat 754 (DB).

[2] Section 50 gives a special right to the receiver to apply to the Court for expunging or reducing a debt which he has himself included in the Schedule. The creditor is also given such a right if the receiver declined to act. The insolvent is given the same right under S. 50, but only if a scheme or composition is pending. 1950 Mad 492 (502) [AIR V 37 C 212] : ILR (1951) Mad 77 (FB). (A I R 1926 Mad 556 (FB), overruled in so far as it laid down that the insolvent could, in no circumstances, apply to the Court under S. 68 to set aside a sale by the Official Assignee or receiver because he had no legal interest in the estate and could not for the same reason appeal against the adverse order.)

[3] In deciding the question whether an equiry under S. 50 should be held the Court should act on the principles that have found favour in England. Hence where there is proof for assessed taxes the Courts will not go behind the assessment to see whether the debtor was liable to that tax. 1941 Oudh 260 (262) [AIR V 28] : 16 Luck 599 (DB). (Case of a Company under liquidation.)

[4] A debt included in the schedule of an insolvent can be expunged only by the Court. The receiver has no such powers. 1926 Mad 1019 (1019, 1020) [AIR V 13] (DB).

[5] Official receiver framing schedule under powers delegated to him — The act of official receiver is not final and Court can entertain applications for enquiry under this section. 1918 Mad 206 (206, 207) [A I R V 5] : 41 Mad 30 (DB). (Case decided under Act of 1907.)

[6] The official assignee can come to the Court to expunge a debt only where the matter rested on a proof of the claim only. But where he transfers the insolvent's pro-

Effect of Insolvency on antecedent Transactions

51. Restriction of rights of creditor under execution.

(1) Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition.

(2) Nothing in this section shall affect the rights of a secured creditor in respect of the property against which the decree is executed.

(3) A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver.

[P. I., 1907—S. 34; P.T.I., 1909—S. 53.]

Section 50 — Note 1 *(contd.)*

perty by a registered sale deed to a creditor after admitting proof of his claim his only remedy is to file a suit to set aside the sale deed. 1929 Mad 141 (142) [AIR V 16].

[7] The Court should consider any cause that might be shown against and come to a judicial finding before it refuses to remove the names under S. 50, after considering the report of the receiver as to whether or not each or any of those debts was really due. 1926 Cal 160 (161) [AIR V 13] (DB).

[8] Where an order was passed under S. 26 on the basis of the evidence recorded by the receiver who was not an official receiver and who did not submit his opinion on the evidence along with his report. *Held*, that the procedure adopted was irregular and that the order must be set aside. 1921 Mad 28 (29) [AIR V 8] (DB). (Case decided under Act of 1907).

[9] Creditor to whom dividend has been paid cannot be directed to bring back that amount merely by reason of fact that subsequently, debt is expunged from list of creditors. 1942 Mad 644 (645) [AIR V 29] : I L R (1942) Mad 879.

[10] The Insolvency Court has got not only the right, but also the duty, to order dividends paid on settled and non-existent time barred debts expunged by it from the schedule to be put back into Court. 1951 Mad 814 (816) [AIR V 38 C 281].

[11] A creditor although authorised and directed by the Official Receiver cannot file a petition under S. 50 in the Insolvency Court, to have debts incorrectly or improperly admitted expunged from the schedule and get a valid order. Where, however, such a petition is made by the creditor and no objection is raised to it in the Courts below, objection cannot be raised for the first time in second appeal as it does not go to the root of the matter vitiating the proceedings. 1951 Mad 814 (815) [AIR V 38 C 281].

[12] Receiver is proper party in matters between creditors and third parties — But in dispute among creditors, he is not — Amendment of Schedule prepared under S. 33 sought to be amended by one creditor — All other creditors but not receiver are necessary parties. 1934 Rang 112 (114, 115) [AIR V 21] (DB).

[13] So long as insolvency exists a debtor cannot apply for expunging or reducing a debt. 1926 All 361 (362) [AIR V 13] (DB).

[14] Section 50 does not exclude the applicability of S. 68 or disable the insolvent from objecting under that section during the pendency of the insolvency proceedings to a debt admitted by the Official Receiver provided he applies within 21 days of the act or decision of the Receiver. 1950 Mad 492 (502) [A I R V 37 C 212] : ILR (1951) Mad 77 (FB).

[15] A debtor cannot apply to expunge an entry or reduce the amount of a debt in the absence of an approved composition or scheme. Before the composition, the Official Receiver would be the person to represent the creditors whereas after the composition is accepted by the Court, the debtor is given the right to apply under S. 50. 1950 Mad 800 (801) [AIR V 37] C 337]: ILR (1951) Mad 237 (DB). (AIR 1926 All 361, *Rel. on.*)

[16] Section 50 does not say that any question of title raised by two creditors of an insolvent should be decided by the Insolvency Court only. An executing Court can decide it and its order is final. 1926 All 244 (245) [AIR V 13]

[17] Where an order under S. 50 has been passed expunging or reducing a debt any person who is prejudiced by it can appeal as of right. 1926 All 361 (368) [AIR V 13] (DB).

[18] Where the application by the debtor to the District Court purported to be made with reference to a scheme or composition and for the expunging of the debt of the respondent from the schedule of creditors, an appeal would lie to the High Court from the order of the District Court rejecting the debtor's application. 1950 Mad 492 (503) [A I R V 37 C 212] : ILR (1951) Mad 77 (FB). (A I R 1926 Mad 556 (FB), overruled in so far as it laid down that the insolvent could, in no circumstances, apply to the Court to set aside a sale because he had no legal interest in the estate and could not for the same reason appeal against the adverse order.)

SECTION 51 — SYNOPSIS

1. **Scope.**
2. **Adjudication by foreign Court.**
3. **"Assets realised".**
4. **Realisation after admission of insolvency petition.**
5. **Attachment — Effect of.**
6. **Effect of order for rateable distribution.**
7. **"Benefit of the execution".**

Section 51 — Synopsis *(contd.)*

8. Rights of creditors.
9. Rights of official receiver.
10. Powers of Insolvency Court.
11. Secured creditors — Sub-section (2).
12. Bona fide purchaser — Sub-section (3).
13. Summary administration.

1. Scope.— [1] Sections 51 and 52 cannot be read together, for wording of S. 51 precludes this. 1943 Mad 118 (121, 122) [AIR V 30]: ILR (1942) Mad 757 (DB). (Costs of the suit cannot be retained when decree-holder has been ordered to refund the money he has wrongly withdrawn from Court. But he can retain costs of execution; A I R 1939 Mad 291, *Overruled.*)

[2] Sections 51 and 52 are based upon the policy that when a debtor commits an act of insolvency no single creditor should be entitled to receive more than a rateable share of the amounts realised from the property of the insolvent and also at the same time of protecting the diligent creditor who has by execution already realised his debts. 1938 Mad 906 (907) [AIR V 25].

[3] Section 51 is intended to put an end to the power of the executing Court to proceed against the property so soon as it finds that there is insolvency proceedings against the judgment-debtor and an application under S. 52 is made by the receiver. 1935 Mad 651 (653) [AIR V 22]: 58 Mad 1056.

[4] The section applies to a case where the decree is against a person against whom insolvency proceedings are pending and who has been subsequently adjudicated insolvent. 1929 Lah 805 (806) [AIR V 16]. (Insolvency proceedings against decree-holder who was subsequently adjudicated — Dispute between original decree-holder and his assignee — *Held* the section did not apply.)

[5] One creditor bringing property of insolvent to sale during pendency of insolvency proceedings and realising the money — Receiver when appointed can call upon him to refund the money by reason of S. 51 read with S. 28 — S 37 has no applicatiun to the case. 1936 Pat 112 (113, 114) [AIR V 23] (DB).

[6] (Obiter) — Section 51 applies only in the case of an undisputed title of the insolvent to the property put to sale i. e., where S. 4, Provincial Insolvency Act, is not required to be pressed into service. 1949 Nag 39 (41) [AIR V 36 C 19]: ILR (1948) Nag 284.

2. Adjudication by foreign court. — [1] An adjudication order by a foreign Court cannot have the effect of vesting in the receiver any immovable property of the insolvent. Therefore a decree-holder will be entitled to the benefit of his prior attachment of the property. 1933 P C 134 (135 136) [AIR V 20]: 60 Ind App 167: 56 Mad 405.

3. "Assets realised".—[1] Where, in execution sale, one-fourth of purchase-money is deposited before and balance of three-fourth is paid into Court after admission of insolvency petition, sale proceeds cannot be deemed to have been realised within S. 51 (1). 1943 Mad 118 (119) [AIR V 30]: ILR (1942) Mad 757 (DB). (AIR 1942 Mad 88, *Affirmed.*) ✣ 1925 Mad 248 (249) [AIR V 12]: 48 Mad 656 (DB).

[2] Several properties sold in execution separately under one proclamation— Moneys paid into Court separately – Sale of each lot is complete when whole of balance of purchase-money is paid— The money paid into Court represents assets realised in execution. 1943 Mad 118 (120) [AIR V 30] : I L R (1942) Mad 757 (DB)✣ 1942 Mad 88 (89) [AIR V 29].

[3] Unless the Court orders the transfer of money lying to the credit of the suit, the mere petition by the decree-holder who is executing cannot make the money assets realised in execution. If the debtor is adjudicated before such an order the decree-holder cannot claim any preferential claim thereto. 1944 Mad 389 (389) [AIR V 31].

[But see 1931 Sind 164 (166) [AIR V 18]: 26 Sind L R 41 (DB). (AIR 1928 Sind 165, *Reversed*; AIR 1927 Sind 194, *Impliedly overruled.*)]

[4] The mere order on an execution petition sending for the moneys of the judgment-debtor would not tantamount to an order realising the assets within the meaning of sub-S. (1) of S. 51 and therefore when a petition to adjudicate the judgment-debtor is filed a few days after such an order and the money is not in fact received by the Court before the date of the petition, the prior sending for the moneys of the judgment-debtor cannot have the effect of bringing into operation the exception referred to in that sub-section. 1952 Mad 256 (257) [AIR V 39].

[5] Creditor's application to declare debtor insolvent admitted and interim receiver appointed — Creditor's application to stay an execution by another creditor but Court ordering sale to proceed but proceeds held in deposit to credit of insolvency — Creditor's petition subsequently dismissed — Second petition by the creditor and application to withhold payment of money in deposit — *Held* that it could not be done so and the money was money realised in execution before the date of the application. 1933 Cal 651 (652) [AIR V 20] (DB) ✣ 1930 Rang 265 (265) [AIR V 17] (DB). (Petition for insolvency by a creditor — Petition dismissed on the ground that the act of insolvency alleged, viz., sale in execution took place subsequent to petition— Second petition on the same fact after confirmation of sale — *Held* money realised by sale was not one realised during the pendency of insolvency proceedings as the second petition cannot be considered to be in continuation of the first.)

4. Realisation after admission of insolvency petition. — [1] Section 51 applies only to monies brought into Court after the admission of the petition. 1931 Sind 65 (67) [AIR V 18] (DB). (Money brought in after presentation of petion but before admission of it cannot be denied to the creditor.)✣ 1935 Lah 690 (691) [AIR V 22] ✣ 1933 Lah 477 (478) [AIR V 20] : 14 Lah 724 (DB). (Execution sale between date of admission of petition and adjudication — Receiver entitled to the assets

Section 51 — Note 4 *(contd.)*
realised.) ✠ 1941 Mad 575 (576) [AIR V 28] (Money.)

[2] *Mustajri* of debtor's land must be held good, where it has been completed before admission of insolvency petition. 1937 Lah 634 (634) [AIR V 24].

[3] *See* the following cases decided under Act of 1907 where the line was drawn at the date of adjudication. Under the present Act this has been changed to the date of admission of the petition. 1919 All 68 (69) [A I R V 6]: 41 All 274 (DB) ✠ 1916 All 336 (336, 337) [AIR V 3] ✠ 1919 Cal 43 (44) [AIR V 6] (DB) ✠ 1925 Mad 224 (224) [AIR V 12] (DB) ✠ ('11) 11 Ind Cas 433 (433) (Sind).

[4] Date of admission does not mean the date of presentation of the petition. 1935 Lah 690 (691) [AIR V 22].

[5] The date on which an applicant is asked to furnish security for his regular attendance in Court can be regarded as a date of the admission of the insolvency petition. 1936 Lah 885 (886) [AIR V 23].

[6] Where the petition complies with the law the Court admits it. So where the Court ordered on the petition 'check and file emergently' and the petition was taken on the file the same day the fact that the Court ordered the costs of publication to be paid before a subsequent date will not affect the date of its admission which is the same as on which it was taken on file by the Court. 1943 Mad 118 (119) [AIR V 30]: ILR (1942) Mad 757. (AIR 1942 Mad 88, *Confirmed.*)

5. Attachment — Effect of. — [1] Section 28 (2) read with Ss. 51 and 52 indicates that an attaching creditor of the insolvent's property has no priority over the receiver in insolvency. An attachment creates no charge on property and once an adjudication order has been passed which relates back to the date of the presentation of the application for insolvency, the attaching creditor is relegated to the same position as other creditors by reason of the combined effect of S. 28 (2) and Ss. 51 and 52 and cannot execute his decree. 1943 Nag 101 (108) [AIR V 30] : ILR (1943) Nag 390 (DB) ✠ 1915 All 305 (306) [AIR V 2] : 37 All 452 (DB). (Case under Act of 1907.) ✠ ('12) 9 All L Jour 707 (708). (Attachment of money does not mean realisation unless the money reaches the Court. Retention of salary under attachment by Treasury Officer is not realisation. Case under Act of 1907.) ✠ 1933 Cal 625 (626) [AIR V 20]: (DB). (Attachment before judgment — Subsequent decree in his favour does not give him any charge or lien over attached property.) ✠ 1929 Cal 524 (525) [AIR V 16] : 57 Cal 122 (DB). (Attaching creditor should be classed with unsecured creditors.) ✠ 1916 Cal 531 (532) [AIR V 3] (DB). (Case under Act of 1907.) ✠ 1933 Nag 229 (230) [AIR V 20] : 29 Nag L R 303 (DB). (It is immaterial whether attachment is before judgment or after decree.)

[**But see** 1933 Sind 305 (306) [AIR V 20]. (Rights of official receiver do not prevail over claims of attaching creditor.) ✠ 1931 Sind 164 (168) [AIR V 18] : 26 Sind L R 41 (DB).]

6. Effect of order for rateable distribution. — [1] The exception contained in S. 51 (1) which applies to the money credited in favour of attaching creditor applies also to amounts rateably distributed to other decree-holders under S. 73, Civil P. C. Once the Court holding the assets passes the order for rateable distribution the official receiver loses his right to claim it from the Court. 1922 Mad 31 (31, 32) [AIR V 9] (DB).

7. "Benefit of the execution."—[1] The effect of S. 51 is that the executing creditor is deprived from having the benefit of his execution for his sole benefit. The execution itself does not become void by reason of the section. 1937 Mad 727 (729) [AIR V 24] ✠ 1959 Mad 431 (432) [AIR V 46 C 135]. (Leave to bid and set off obtained by decree-holder — Judgment-debtor adjudicated insolvent — Decree-holder should pay sale amount into Court.)

[2] 'Benefit of execution' represents the bids made at a sale or the assets realised otherwise in the course of execution. In other words it refers to the money. 1942 Mad 425 (425) [AIR V 29] : ILR (1942) Mad 635 (DB). (AIR 1935 Mad 907, *Overruled.*)

[3] The expression 'benefit of execution' in S. 51 means the sum realised less costs of execution. Therefore the decree-holder who is ordered to refund the money can retain the costs of the execution. 1943 Mad 118 (122) [AIR V 30] : ILR (1942) Mad 757 (DB). (But costs of suit cannot be retained. AIR 1942 Mad 88, *Affirmed*; AIR 1939 Mad 291, *Overruled.*) ✠ 1933 Mad 703 (704) [AIR V 20] : 57 Mad 330. (The creditor can be given a charge as against the receiver in respect of expenses incurred in execution by bringing the property to sale.)

8. Rights of creditors.—[1] Sale of property by Court without knowledge of pending insolvency proceedings—Sale will have no effect upon the rights of creditors inter se though bona fide purchaser under the sale is protected. 1936 Pat 112 (113, 114) [AIR V 23] (DB).

[2] Attachment by one of the creditors before admission of insolvency petition — Applicant in insolvency applying for stay of sale which was rejected — Application by another creditor to Insolvency Court to issue direction to the executing Court to sell and deposit sale proceeds for distribution which was also rejected — Attaching creditor who bought the property in sale applying for amendment of insolvency petition by excluding the property he bought therefrom — Amendment allowed — *Held* that another creditor had no locus standi to appeal against the order allowing amendment. 1937 Pat 643 (644) [AIR V 24] (DB).

[3] A decree-holder auction-purchaser who has obtained leave to bid and set off the sale proceeds against his dues under the decree cannot get the benefit of the execution sale and cannot set off but must put sale proceeds into Court, if the judgment-debtor was adjudicated insolvent on his petition presented before the date of the sale. The combined

Section 51 — Note 8 *(contd.)*
effect of S. 51 (1) and (3) of the Provincial Insolvency Act is that while a purchaser in good faith gets good title to the properties sold in Court-auction after the presentation of the insolvency petition, the decree-holder cannot get any right to the proceeds which would vest in the Receiver. 1959 Mad 431 (432) [AIR V 46 C 135]. (AIR 1938 Mad 907 and AIR 1942 Mad 425, *Rel. on.*)

9. Rights of official receiver.—[1] Official receiver has no claim over the sale proceeds of a property sold before insolvency. ('37) 1937 Mad W N 366 (368).

[2] Where the execution Court refuses to stay sale on being informed of the insolvency proceedings only the sale proceeds will vest in the receiver. ('35) 1935 Mad W N 1102 (1103).

[3] *A* obtaining attachment before judgment against *D*—*D* transferring property by sale to *B* few days after decree — A applying for sale in execution of decree — *D's* application for being declared insolvent — Property sold in execution though official receiver applied for stay of sale—*B* getting sale set aside under O. 21, R. 89, Civil P. C. by depositing necessary amount in Court — *A's* application for payment to him of money deposited by *B* in Court opposed by official receiver who claimed it as the property of insolvent—*Held* that as from the date of sale by *D* to *B* of the land he was not the owner thereof and therefore the amount deposited by *B* was not an amount which was realised in the course of execution by sale or otherwise and therefore could not be claimed by the receiver. ('37) 1937 Mad W N 366(368).

[4] To claim the benefit of this section it is necessary for the official receiver to apply for the proceeds. The proceeds will not ipso facto belong to him merely because execution was issued against the property after admission of the 'petition for insolvency. 1931 Pat 70 (72) [AIR V 18] : 9 Pat 945 (DB) ✠ 1940 Lah 37 (37) [AIR V 27].

[5] Decree against Hindu father and son — Attachment of son's share — Subsequent insolvency of father—Right to sell son's share, does not pass to receiver. 1936 Mad 193 (194, 195) [AIR V 23] : 59 Mad 296 (DB).

[6] Receiver can challenge a sale in execution of a decree against the insolvent held after the date of petition in insolvency. 1942 All 263 (264) [AIR V 29] : ILR (1942) All 421 (DB). (AIR 1934 All 252, *Overruled.*)

[7] Under S. 51 it is the receiver only against whom the sale in favour of the decree-holder who has purchased the property cannot prevail. Where the receiver did not lay claim to the property the judgment-debtor cannot object to the confirmation of the sale. 1941 Oudh 505 (506, 507) [AIR V 28].

10. Powers of Insolvency Court. — [1] Court can under its inherent powers allow interest if it thinks it just to do so while passing order for the refund of the money by the creditor. 1943 Mad 118 (122) [AIR V 30] : ILR (1942) Mad 757 (DB). (Official receiver not entitled to interest anterior to the date of his demand for refund. AIR 1942 Mad 88, *Affirmed.*)

[2] As soon as the executing Court with or without notice of the insolvency proceedings orders sale and recovers sale proceeds S. 51 operates to vest the money in the Insolvency Court. The Insolvency Court has jurisdiction to call upon the purchaser to deposit the purchase-money he had received from the executing Court. 1937 Nag 193 (194) [AIR V 24]: ILR (1937) Nag 249.

[3] Court has no power to pass an order directing the decree-holder to restore to the official receiver property which he has purchased at an execution sale. 1942 Mad 425 (425, 426) [AIR V 29] : ILR (1942) Mad 635 (DB).

[**See however** 1921 Mad 204 (208, 209) [AIR V 8]:44 Mad 524 (DB). (Property of insolvent sold in execution of decree after adjudication — Insolvency Court has power to declare the sale invalid and order delivery of possession of the property to official receiver. Case decided under Act of 1907.)]

11. Secured creditors—Sub-section (2).—[1] Secured creditor can pursue his remedy on his security in absence of official receiver from array of parties. 1930 Lah 855 (857) [AIR V 17] (DB).

[2] Deposit made by debtor under O. 21, R. 89 to set aside a Court sale after presentation of petition to declare him insolvent—The decree-holder purchaser at whose instance the sale was held does not stand in the position of a secured creditor in respect of the deposit. 1943 Cal 555 (557) [AIR V 30] : ILR (1943) 2 Cal 397 (DB).

[3] Suit by mortgagee for portion of mortgaged property — Decree creating charge on portion — Fresh suit in respect of remaining portion is barred under Civil P. C., O. 2, R. 2, but security is not extinguished—Where such mortgagee has realized whole security by auction-purchase and is in possession of same, he can resist receiver's claim in proceeding under S. 51 on plea that he was secured creditor in respect of whole of property. 1940 Lah 166 (168, 169) [AIR V 27].

[4] Subsequent decree in favour of the creditor who has attached before judgment, does not convert him into a secured creditor. But where under orders of Court the defendant makes a deposit which is to be in part satisfaction of a decree that may be passed against him, the creditor becomes a secured creditor with respect to that deposit in the event of a decree being passed in his favour. 1933 Cal 625 (627) [AIR V 20] (DB).

12. Bona fide purchaser—Sub-section (3).—[1] In view of the provisions of S. 51 (3), intervention of judgment-debtor's insolvency in course of execution proceedings can never bring practical cancellation of execution proceedings. 1942 Mad 425 (425) [A I R V 29] : ILR (1942) Mad 635 (DB).

[2] Section 51 (3) does not restrict sales to those held in execution of decree but applies to sales in execution in general. 1940 Mad 932 (934) [AIR V 27]. (Sale held in execution

52. Duties of Court executing decree as to property taken in execution.

Where execution of a decree has issued against any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that an insolvency petition by or against the debtor has been admitted, the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the receiver,

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Section 51 — Note 12 *(contd.)*

of an award of Registrar of Co-operative Societies—Purchaser in good faith protected.)

[3] Section 51 (3) is of wider range than O. 21, R. 90, Civil P. C. It is unnecessary to prove substantial injury under section 51 (3). 1936 Mad 819 (823) [AIR V 23] : 59 Mad 928 (DB).

[4] Sub-section (3) of S. 51 applies also to sales which have taken place after the order of adjudication. 1949 All 660 (662) [AIR V 36 C 248] : ILR (1949) All 508 (DB). (AIR 1938 Mad 449. *Dissented from.*) ✣ 1959 Bom 10 (13) [AIR V 46 C 4] : ILR (1958) Bom 1367 : I L R (1959) Bom 249✣ 1956 Andh Pra 243 (246) [(S) A I R V 43 C 69] : ILR (1956) Andh 230 (FB). (AIR 1938 Mad 449 & A I R 1942 Mad 415 (1), *Dissented from.*)✣ ('51) ILR (1951) 2 Cal 348 (349). (*Bona fide* purchaser at execution sale held after application for adjudication is admitted—Purchaser is protected—But Receiver has superior claim over sale proceeds —Decree-holder himself purchasing property —He is not entitled to sale proceeds in satisfaction of his decree—He cannot claim set-off of price realised at sale against his own decretal dues.) ✣ ('49) 53 Cal W N 304 (308)✣ 1940 Nag 414 (416) [A I R V 27] : ILR (1942) Nag 377.

[But see 1951 Trav-Co 193 (194) [AIR V 38 C 78] : 1950 Trav-Co L R 125 (DB)✣ 1942 Mad 415 (415) [AIR V 29] : ILR (1942) Mad 614 (DB)✣ 1939 Mad 433 (435) [A I R V 26]✣ 1938 Mad 449 (452, 453) [AIR V 25] : I L R (1938) Mad 1063 (DB).]

[5] Doctrine of relation back of title of official receiver is subject to exception enacted in S. 51 (3) which protects title of the auction-purchaser to property sold in auction and purchased in good faith. 1938 Mad 906 (907) [AIR V 25]✣ 1959 Bom 10 (13) [A I R V 46 C 4] : ILR (1958) Bom 1367 : ILR (1959) Bom 249✣ 1959 Mad 431 (432) [AIR V 46 C 135].

[6] "A person" will include decree-holder purchaser and stranger purchaser. 1942 Mad 425 (425) [AIR V 29] : ILR (1942) Mad 635 (DB).

[7] The provisions of sub-section (3) of S. 51 would apply whether notice of the insolvency proceedings is given to the executing Court or not. The matters dealt with by these provisions are quite different from those dealt with by S. 52. 1959 Bom 10 (13) [AIR V 46 C 4] : ILR (1958) Bom 1367 : I L R (1959) Bom 249.

[8] Sale held by Court with notice of insolvency proceedings — Sale is not void — If petition is dismissed the purchaser gets indefeasible rights — If adjudication follows he must show good faith to protect his title against the receiver. 1947 Nag 76 (77) [AIR V 34 C 21] : ILR (1946) Nag 937.

[9] Even if the purchaser had notice of insolvency want of good faith cannot be inferred when he purchased the property at a sale sanctioned by the Court. A purchase made on the faith of a Court's order would negative any inference of bad faith which knowledge of the debtor's insolvency standing alone might possibly justify. 1936 Mad 819 (823) [AIR V 23] : 59 Mad 928 (DB)✣ 1935 Cal 503 (505, 508) [A I R V 22] : 62 Cal 457 (DB).

[*See also* ('51) ILR (1951) 2 Cal 348 (350). (Other circumstances have also got to be considered as knowledge alone is not conclusive of want of good faith.)]

[See however 1959 Bom 10 (13) [AIR V 46 C 4] : I L R (1958) Bom 1367 : I L R (1959) Bom 249. (Knowledge of insolvency proceedings by purchaser is sufficient to disprove that he was not *bona fide* purchaser.) ✣ 1933 Nag 28 (29) [AIR V 20] : 28 Nag L R 317. (A person who purchases with notice of insolvency is not a purchaser in good faith within the meaning of S. 51 (3)).]

[10] Where the decree-holder deliberately kept back from the Court his knowledge of pending insolvency of judgment-debtor with the object of making the Court to proceed with the sale in execution, so that he could purchase the property to the exclusion of other creditors, the sale is invalid and can be set aside. 1938 Mad 718 (719, 720) [AIR V 25]✣1933 Pat 619 (621) [AIR V 20] : 13 Pat 30 (DB).

[See however 1938 Mad 906 (909) [A I R V 25].

[11] Transferee from *bona fide* purchaser at a Court auction gets a good title against the receiver even though he had notice of insolvency proceedings. 1917 Cal 606 (607) [A I R V 4] (DB). (Case under Act of 1907.)

13. Summary administration.—[1] Property vesting in Court as receiver under S. 74 (ii) — Purchaser in good faith at an execution sale will be protected though such property cannot be made the subject of an execution sale—Sale would prevail against receiver and he can get only the sale proceeds. 1927 Mad 983 (984) [AIR V 14].

SECTION 52 — SYNOPSIS

1. **Scope.**
2. **Executing Court—When can act.**
3. **'Receiver.'**
4. **Property to be delivered.**
5. **Duty of executing Court where no receiver appointed.**
6. **Secured creditors.**
7. **Costs of suit and execution.**

but the costs of the suit in which the decree was made and of the execution shall be a first charge on the property so delivered, and the receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge.

[P. I., 1907—S. 35; P.T.I., 1909—S. 54.]

Section 52 *(contd.)*

1. Scope. — [1] Section 52 applies to a state of affairs antecedent to what is contemplated by S. 51 (1) of the Act. The Court can act and direct property under attachment to be delivered only where the execution is pending. Once the property is sold S. 52 cannot apply. 1933 Lah 477 (478) [AIR V 20]:14 Lah 724 (DB). (A I R 1930 Lah 39, *Overruled.*)

[2] There is a distinction between Ss. 52 and 51 since the matters dealt with by them are quite different. Section 52 applies to cases before sale of the property whereas S. 51 covers cases both before and after the sale of the property. Provisions of S. 52 are available only where notice of the admission of the insolvency petition is given to the executing Court and while it is still in possession of the property of the insolvent, while S. 51 makes no reference to the powers of the executing Court to sell the property at all and sub-s. (3) thereof can be resorted to even for obtaining a good title under the sale held by the executing Court, whether before or after adjudication. 1959 Bom 10 (13) [A I R V 46 C 4] : I L R (1958) Bom 1367 : I L R (1959) Bom 249.

[3] The amended S. 52 contemplates the presentation of an application not as it used to be after adjudication but at the stage when insolvency petition has been admitted. 1932 Mad 95 (96) [AIR V 19] : 55 Mad 316 (DB) ✣ 1932 Lah 471 (473) [A I R V 19] : 14 Lah 63 (DB) ✣ 1936 Nag 120 (121) [A I R V 23] : 31 Nag L R (Sup) 212.

[4] The object of S. 52 is not to give an advantage to the insolvent but to prevent individual creditors deriving unfair advantage over other creditors and to place the property in the hands of a receiver for equal distribution to the general body of creditors. 1930 Pat 406 (407) [AIR V 17] (DB).

[5] An application under S. 52 has to be made to the Court which is executing the decree and it is that Court which has to decide whether in regard to an application under S. 52 the conditions laid down by that section are fulfilled and whether the provisions of the section are applicable. The insolvency Court has no jurisdiction to make an order under S. 52. 1959 Madh Pra 420 (422) [AIR V 46 C 147] ✣ 1935 Cal 150 (151) [AIR V 22] (DB).

[6] Application under S. 52 presented in conformity with conditions prescribed therein—Executing Court can only direct delivery of property to the receiver—It cannot investigate questions of title in dispute between the insolvent judgment-debtor and any other co-judgment debtor or stranger. 1935 Mad 651 (652, 653) [AIR V 22] : 58 Mad 1056.

[7] Section 52 does not confer any right upon the insolvent to make an application for stay of execution by a creditor on the ground that his petition in insolvency has been admitted. The section is not intended to protect the insolvent and though the insolvent can make an application of the kind it should be made for the general body of creditors and not for himself. The Court can only pass an order that the property be delivered to the official receiver if one has already been appointed. 1930 Pat 406 (407) [A I R V 17] (DB).

[8] Section 52 applies to immovable as well as to movable property. 1930 Lah 970 (970) [AIR V 17] ✣ 1929 Cal 524 (526) [A I R V 16] (DB) ✣ 1939 Mad 456 (459) [AIR V 26] : I L R (1939) Mad 803 (SB) ✣ 1932 Mad 95 (96) [AIR V 19] 55 Mad 316 (DB). (Applies to all kinds of property.)

[9] The right of a Hindu father to sell the joint family property including the undivided shares of his sons is property which vests in the receiver of his estate in insolvency. 1931 Bom 50 (52) [AIR V 18] : 55 Bom 110 (DB).

[10] Sale stopped and execution struck off as result of application by receiver under S. 52 — Attachment of property before judgment does not cease. 1940 Mad 733 (737) [AIR V 27].

2. Executing Court — When can act.— [1] It is necessary that two conditions must be satisfied before the executing Court can make an order for delivery of the attached property to the receiver in insolvency The first is that notice is given to the executing Court of the admission of a petition of insolvency by or against the judgment debtor. In the second place, there should be an application before the executing Court for delivery of such property to the receiver. 1945 Cal 400 (401) [A I R V 32] (DB) ✣ 1935 Cal 612 (613) [AIR V 22]: 63 Cal 176 (DB). (Mere admission of insolvency petition does not debar creditor from executing his decree against debtor.) ✣ 1930 Lah 851 (852) [AIR V 17].

[2] Section 52 is applicable only where notice is given to the Court in time and before the sale has already taken place. 1932 Cal 203 (203) [AIR V 19] (DB).

[3] The Court is not prohibited from executing a decree by sale of judgment-debtor's property merely by reason of its getting notice of admission of insolvency petition by him in the absence of an application for delivery of property to receiver 1925 Lah 158 (159) [AIR V 12]. (Sale so held cannot be impeached either by receiver or the creditors.) ✣ 1938 Mad 906 (908) [AIR V 25]. (The fact of insolvency brought to Court's notice by judgment-debtor)✣ 1935 Rang 317 (318) [AIR V 22]: 13 Rang 534 (DB).

[But see 1933 Cal 561 (562, 563) [AIR V 20]: 60 Cal 696 (DB). (The underlying principle of the Provincial Insolvency Act as can be gathered from the provisions of S. 52 is that when the Court is appraised of the pendency of an application for insolvency in another

Section 52 — Note 2 *(contd.)*

Court and of the further fact that such an application has been admitted it should stay its hand so far as the execution of the decree by the creditors of the insolvents is concerned. Sale held by Court in such circumstances is void even though there is no application by interim receiver.)]

[4] Executing Court having no knowledge of insolvency proceedings—No application by receiver for delivery of property — Sale held before adjudication — Executing Court has jurisdiction to continue proceedings. 1936 Nag 117 (118) [AIR V 23]: ILR (1936) Nag 41.

[5] Sale held before adjudication but after admission of petition in ignorance of insolvency proceedings as no notice was sent to executing Court — Sale held was not void. 1937 Nag 193 (194) [AIR V 24] : I L R (1937) Nag 249.

[6] Even in cases where the executing Court has notice of the insolvency proceedings, the sales held by it under S. 52 will not be void. In such cases if the insolvency application is dismissed, the auction-purchasers get an indefeasible title; but if an order of adjudication is made, they cannot claim any title against the receiver unless they can show that they purchased the property in good faith. 1947 Nag 76 (77) [A I R V 34 C 21] : I L R (1946) Nag 937.

[7] Where an insolvent's property is attached in execution of a decree before he applies for insolvency and an *ad interim* receiver applies for stay of sale, the Court should stay sale and deliver property to the receiver. If the sale is held in contravention the receiver is not bound to recognise the title of auction-purchaser. 1932 Mad 95 (96) [AIR V 19] : 55 Mad 316 (DB).

[8] The effect of S. 52 is not to validate a sale held subsequent to the admission of the insolvency petition but prior to the order of adjudication even though the auction purchaser was not a bona fide purchaser, merely because no notice of the admission of the insolvency petition was given to the executing Court. The nature of the title that the purchaser gets in such a sale will depend on whether he fulfils or not the condition laid down in sub-s. (3) of S. 51. 1959 Bom 10 (13) [AIR V 46 C 4] : ILR (1958) Bom 1367 : I L R (1959) Bom 249. (Knowledge of insolvency proceedings by the purchaser is sufficient to disprove the contention that he is a bona fide purchaser.)

3. 'Receiver.' — [1] Receiver in S. 52 includes ad interim receiver. 1934 All 444 (445) [A I R V 21] (DB) ✠ 1933 Lah 192 (192) [AIR V 20] (DB) ✠ 1932 Lah 471 (473) [A I R V 19] : 14 Lah 63 (DB). (Interim receiver is competent to make application.) ✠ 1936 Mad 819 (822) [A I R V 23] : 59 Mad 928 (DB). (AIR 1926 Mad 432, *Overruled.*)✠1936 Nag 120 (121) [AIR V 23] : 31 Nag L R (Sup) 212.

[**But see** 1930 Lah 851 (852) [AIR V 17]. (Not referred to in A I R 1932 Lah 471.)✠1926 Mad 606 (606, 607) [A I R V 13] (DB) ✠ 1926 Sind 199 (200) [AIR V 13] : 19 Sind L R 35 ✠ 1924 Sind 69 (70) [AIR V 11]].

4. Property to be delivered. — [1] It is only where the property proceeded against is the property of the insolvent that the Court is bound to deliver to the receiver. 1940 Mad 222 (223) [AIR V 27].

[2] Section 52 has got its specific purpose and that is to enable the Receiver to obtain possession of the property which is in the custody of the executing Court. Where notice of the admission of the insolvency petition is given to the executing Court, that Court is bound to direct delivery of the property to the Receiver provided at that date the property is still in its possession, that is to say, that property is not sold. 1959 Bom 10 (13) [AIR V 46 C 4] : ILR (1958) Bom 1367 : ILR (1959) Bom 249.

[3] The effect of attachment of immovable property under S. 64, Civil P. C., is that the property attached is kept in custodia legis during the period of attachment and therefore, the Court which attaches the property and purports fo sell it is in possession within the meaning of S. 52. The sale of such property must be stopped and the property should be ordered to be delivered to the receiver. 1928 Bom 177 (177) [A I R V 15] (DB) ✠ 1936 Nag 120 (120) [A I R V 23] : 31 Nag L R (Sup) 212.

[**But see** 1926 Sind 199 (200) [A I R V 13] : 19 Sind L R 35. (Immovable property attached under O. 21, R. 54 is not in the possession of Court and S. 52 cannot apply to such cases and the property cannot be ordered to be delivered.)]

[4] Property which a judgment-debtor is seeking to bring to sale on the ground that the decree creates a charge upon it is not property in possession of the Court and the executing Court has no power to direct its delivery to the receiver. 1933 Mad 152 (153) [AIR V 20] : 56 Mad 453 (DB).

[5] Where the father of joint Hindu family is adjudicated an insolvent, only his share of the property vests in the official receiver and the shares of the undivided sons do not actually vest in the receiver, but only the father's power to sell such shares. But where such shares of the undivided sons have been attached before the father's share vested in the receiver, there can be no vesting of even the father's power to sell the shares in the receiver. 1935 Mad 427 (428) [A I R V 22] ✠ 1936 Mad 193 (194, 195) [AIR V 23] : 59 Mad 296 (DB). (No difference whether attachment of son's share is for his pious obligation liability or for his own liability.)

5. Duty of executing Court where no receiver appointed. — [1] Section 52 has no application to a case where no receiver either interim or otherwise has actually been appointed or his appointment has actually ceased. 1945 Cal 400 (401) [AIR V 32] (DB)✠ 1933 All 559 (560) [AIR V 20] (DB)✠1938 Cal 503 (505) [AIR V 25] (DB).

[2] No receiver in existence — Executing Court can proceed with the sale of the property. 1935 Cal 612 (614) [AIR V 22] : 63 Cal 176 (DB)✠1938 Cal 503 (505, 507) [AIR V 25] (DB). (Executing Court is not bound to stay

53. Avoidance of voluntary transfer.

Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent [a][on a petition presented] within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court.

[P. I., 1907—S. 36; P.T.I., 1909—S. 55.]

[a] *Inserted* by the Insolvency Law (Amendment) Act, 1930 (X of 1930), S. 6.

Section 52 — Note 5 *(contd.)*

its hands if no receiver to whom attached property can be made over is in existence at time of sale.)

[3] No receiver appointed to whom property can be delivered — Executing Court is bound to go on with sale and hold sale proceeds subject to the orders the Insolvency Court may pass in the matter. 1930 Pat 406 (407) [AIR V 17] (DB).

6. Secured creditors. — [1] Section 52 does not apply to decree-holders obtaining security in execution for satisfaction of their money decrees. 1926 Mad 194 (198, 201) [AIR V 13] (DB).

[2] Section 52 cannot in its very nature apply to mortgage decree-holders or to money decree-holders holding a charge or lien on the property of the debtor as security for the payment of the debt due from him. 1959 Madh Pra 420 (422) [AIR V 46 C 147].

[3] Where a compromise instalment decree in a mortgage suit provides that till repayment of the decretal amount the property mortgaged shall remain attached as security for the payment of the amount, the decree cannot be construed as a simple money decree but is in the nature of a mortgage decree. In any event, it gives the decree-holder a charge or a lien on the properties of the debtor specified as security in the decree. Section 52 cannot in such a case, be invoked by the interim receiver appointed in the insolvency proceeding filed by the debtor for delivery to him of the property mortgaged. 1959 Madh Pra 420 (422) [AIR V 46 C 147].

[4] Decree-holder in appeal ordered by High Court to stay execution provided the judgment-debtor executed mortgage of the property attached in favour of decree-holder for his benefit — Decree-holder successful in appeal—Adjudication of debtor in the meanwhile — Official receiver who came in subsequently cannot have delivery of the property mortgaged to the decree-holder who was secured creditor in respect of it. 1931 Lah 298 (299) [AIR V 18].

7. Costs of suit and execution. — [1] Where sale has already taken place the creditor who brought to sale the property is not entitled to the charge for costs under S. 52. This section does not apply to cases where sale of property is already effected. 1933 Mad 703 (704) [AIR V 20] : 57 Mad 330.

[2] The "expression "costs of execution" includes costs of suit brought under O. 21, R. 63 of the Civil P. C. in which the creditor succeeded in having the order under R. 60 of Civil P. C. releasing the property set aside. 1929 Cal 524 (526) [AIR V 16] (DB).

[3] The costs of arbitration cannot be treated as costs of suit under S. 52. 1926 Sind 199 (201) [AIR V 13] : 19 Sind L R 35.

SECTION 53 — SYNOPSIS

1. "Any transfer."
2. Good faith.
3. "For valuable consideration."
4. "Voluntary transfer."
5. Transfer in favour of wife.
6. Transfer from insolvent's transferee
7. Transfers to creditors.
8. Fraudulent transfers—Illustrative cases.
9. "Purchaser."
10. Benami acquisition of property.
11. Conditions of avoiding transfer under Section 53.
12. "If the transferor is adjudged insolvent."
13. "On a petition presented within two years after the date of the transfer."
14. Fictitious and benami transfers.
15. Transfers effected after presentation of insolvency petition.
16. "Voidable as against the receiver."
17. "May be annulled."
18. Annulment of adjudication or granting of absolute discharge—Effect on pending proceedings.
19. Transfer annulled—Rights of transferee.
20. Defence to an application under this section.
21. This section and section 53, T. P. Act.
22. Jurisdiction.
23. Property situate beyond jurisdiction of Court.
24. Burden of proof.
25. Procedure.
26. Report of receiver whether evidence.
27. Res judicata.
28. Appeal.
29. Revision.
30. Limitation for application under S. 53.
31. Scope of enquiry—Duty of Court.

1. "Any transfer." — [1] Any transfer of propery must mean transfer recognized by general law. 1927 Mad 869 (871) [AIR V 14] : 50 Mad 815 (DB).

[2] Deed of release accompanied by mutation and transfer of possession is a transfer. 1930 Oudh 314 (315) [AIR V 17] : 5 Luck 742 (DB).

Section 53 — Note 1 *(contd.)*

[3] "Any transfer" means transfer recognised by general law — Court must look to substance and not to form — *Held*, that surrender deed executed by the insolvent though clothed as a relinquishment amounted to transfer of property. 1955 N U C (Mad) 3144 [AIR V 42].

[4] A partition of joint family property amounts to "transfer of property" which falls within the mischief contemplated by S. 53. 1930 Lah 645 (647) [AIR V 17] (DB).

[5] The words "any transfer" include a transfer made by a decree. 1936 Bom 176 (177) [AIR V 23].

[6] Section 53, besides voluntary transfers, applies to transfers in invitum. 1940 Mad 749 (753) [AIR V 27] ✣ 1931 Mad 597 (1) (597) [AIR V 18] (DB).

[7] Deed by insolvent, constituting a person, in fact a selling agent, comes within the mischief of S. 53. 1927 Mad 869 (871, 872) [AIR V 14] : 50 Mad 815 (DB).

[8] The question whether a Hindu father as the manager of the family has the right to alienate the son's share for a binding debt is not quite relevant in considering whether he alone was a transferor within the meaning of S. 53 of the Act. The mere fact that the father has got such a power does not imply that he is purporting to exercise that power in any given case. Where a document of transfer is executed not only by the Hindu father but by the son as well and the fact that the son is a minor and is represented by the father does not make the transfer effected by the father as the managing member of the family. The circumstance, that the son also is a party to the document, shows the father alone is not the transferor so as to render the whole document voidable as against the receiver. In such a case it is only the transfer effected by the father who is adjudged an insolvent, that can be annulled and the share of the minor son will be unaffected. 1954 Mad 481 (432) [AIR V 41 C 169]. (AIR 1935 Mad 246; AIR 1944 Mad 233; AIR 1945 Mad 253 and AIR 1937 Mad 791, *Dissented from.*)

[9] The jurisdiction of an Insolvency Court when setting aside a transfer under S. 53 or 54, where the transaction is not sham and nominal, is confined to doing so in respect of the insolvent's share. In so far as the insolvent's share of property is involved in the alienation the official receiver will get it back when the alienation is set aside, but if under the powers vested in the insolvent father under the general law (such as, the Hindu Law) he has alienated the interests of his sons which are not insolvent's no order of the Insolvency Court under S. 54 can get back from the alienee and vest in the official receiver the interests of persons, who have not been adjudicated. The question as to the father's powers to alienate family property for the discharge of antecedent debts and the provision enacted in S. 28A vesting such a power in the official receiver is wholly irrelevant for the consideration of the question. 1955 Mad 51 (53) [(S) AIR V 42 C 11] : ILR (1955) Mad 1039 (DB).

[10] A father of a joint Hindu family was adjudged insolvent on an application by a creditor who applied under Ss. 53 and 54 of the Provincial Insolvency Act for annulment of a sale of certain joint family property effected by the father and his sons. The father and the major sons signed the sale-deed on their behalf and the minor sons were represented by their father who acted as their guardian, and the recitals in the deed stated that the debt was a family debt and was borrowed for a family purpose. The sons were not made parties to the proceeding. The Court found that the sale was bogus. *Held*, that the Insolvency Court could set aside the sale only to the extent of the father's interest in the property sold and that the interests of the sons, including the minor sons, could not be touched by the Court, at any rate, in their absence. As the son's share in the property had been sold there was no disposing power left to the father and consequently there was nothing which could vest in the receiver or the Court. 1949 Nag 223 (225, 226) [A I R V 36 C 90] : ILR (1949) Nag 155 (DB).

2. Good faith. — [1] The true test with respect to good faith of a transferee is not as to the honesty on the part of the transferee to discharge the obligations standing against the transferor. The true test is as to whether the transferee at the time of taking the transfer did or did not honestly know that the transferor was so heavily burdened with debts that there was no property left for him, more than what was needed, to discharge his obligations towards his creditors; if the transferee honestly knew that the properties were more than the obligations standing against the transferor, he may possibly prove that there was no bad faith on the part of the transferee. If, however, there are indications sufficient to prove that the transferee had the knowledge that the debts standing against the transferor were more than the property owned by the transferor, then in that circumstances it cannot be said that the transferee, when taking the transfer, was acting in good faith. The transfer in that case may be proved to have been entered into by the transferee in collusion with the transferor to screen the properties from the reach of the creditors. 1955 Pat 458 (467) [AIR V 42 C 122] : 34 Pat 440 (DB).

[2] Inadequate consideration may be evidence of want of good faith which may itself be sufficient for setting aside of transfer. 1932 All 243 (243) [AIR V 19] (DB) ✣ 1941 All 316 (318) [AIR V 28] : ILR (1941) All 603 (DB).

[*See also* 1927 Nag 166 (167, 168) [A I R V 14].]

[**See however** 1919 All 348 (348) [AIR V 6] (DB).]

[3] In determining the question of good faith with respect to an alienation by insolvent, it is necessary that the facts should be considered in relation to each other and weighed as a whole. 1933 Lah 631 (632) [AIR V 20] (DB).

[4] Good faith is necessary only on part of transferee. 1938 Cal 417 (422) [AIR V 25] : ILR (1938) 2 Cal 275 (DB).

Section 53 — Note 2 *(contd.)*

[5] For a man practically in a state of insolvency to alienate his last remaining property and that only an expectancy, to a relative, for a sum only part of which was paid would indicate that there was bad faith and the transaction must be set aside. 1939 Lah 322 (323) [AIR V 26].

[6] Where a near relation of a debtor purchases the whole, or substantially the whole of the property of a person in insolvent circumstances he cannot be said to be acting in good faith. 1920 Nag 63 (63) [AIR V 7].

[7] If the transaction is real it is not brought within S. 53 unless receiver proves that transferee knew that the transferor was insolvent when the transfer was made, even where transfer is of whole of available assets. 1934 Rang 208 (210) [AIR V 21] (DB).

[8] In the vicissitudes of business, firms do sometimes part with their property to get cash or satisfy old creditors and thus keep their credit in market. But this does not necessarily imply that they are acting *mala fide* nor does it lead to the conclusion that the transferees had become aware of their difficulties. 1934 Pesh 126 (129) [AIR V 21].

[9] A threat of legal proceedings to person in embarrassed conditions cannot be said to be genuine pressure so as to make transfer *bona fide* which otherwise appears fraudulent. 1940 Lah 6 (6) [AIR V 27] ✠ 1951 Trav-Co 55 (70) [AIR V 38 C 20] : 1950 Trav-Co L R 707 (DB).

[10] Transferee ignorant of transferor's impending insolvency and having no intention to cheat other creditors — Transferee acts in good faith. 1928 Bom 341 (345) [AIR V 15] (DB).

[11] When the creditor's good faith is questioned under S. 53, Provincial Insolvency Act that the fact that he had notice of the financial position of the debtor and that he made no contemporaneous advance would be sufficient to destroy his plea of good faith even though the creditor in fact acted honestly and attempted to secure what was due to him. The mortgage in favour of the creditor is voidable against the receiver. 1952 Sau 47 (49) [AIR V 39] (DB).

[12] If it was within the knowledge of the transferees that the transferor was in insolvent circumstances at the time of the sale and there was pressure from his creditors for the payment of the moneys due to them and transferees purchased from him his entire stock-in-trade and assets without making any substantial contemporaneous payment and without undertaking to make any such payment in future in order that he might be able to continue his business so that he would be in a position to pay off his creditors, it would be very difficult to hold that the transfer was one entered into in good faith. 1958 Mys 35 (38) [AIR V 45 C 11] : ILR (1957) Mys 147 (DB).

[13] The expression 'good faith' in S. 53 does not contemplate that both parties to the transaction should act in good faith and the section requires only proof of absence of good faith on the part of the transferee and not the absence of good faith on the part of the transferor. 1959 Ker 380 (381) [AIR V 46 C 132] (DB) ✠ 1951 Trav-Co 55 (61) [AIR V 38 C 20]: 1950 Trav Co L R 707 (DB).

[14] Question of determining good faith with respect to a transfer under S. 53 depends not alone on the recitals and covenants contained in it; the circumstances surrounding the transaction and the conduct of the parties at the time of and after the execution of the deed should be taken into account. The facts should be considered in relation to each other and weighed as a whole. 1959 Ker 380 (381) [AIR V 46 C 132] (DB).

[15] Mortgagee advancing Rs. 75,000 on mortgage—Mortgagor in embarrassed circumstances at time of mortgage—No proper enquiry regarding general financial condition of mortgagor made by mortgagee though there were materials to put mortgagee on enquiry—Mortgage held was not made in good faith. 1951 Trav-Co 55 (63) [AIR V 38 C 20] : 1950 Trav-Co L R 707 (DB).

[16] It is settled law that it is not necessary in annulment proceedings under S. 53 to prove that the transferor who has been subsequently adjudged an insolvent should have been honest and straightforward in the matter of the transaction impeached. Even if the transferor was wanting in *bona fides* the crucial question still remains to be answered. Unless it is found that the transferee was wanting in *bona fides* in respect of the transaction in question, he cannot be affected by the dishonest course of conduct of the transferor. 1958 S C 1 (10) [AIR V 45 C 1] : 1958 S C R 257.

[17] The Travancore General Clauses Act (II of 1072) (1897) in cl. (6) of S. 2 provides that "Nothing is said to be done or believed in good faith which is done or believed without due care and attention." The definition of "good faith" in the Indian General Clauses Act (X of 1897) is in these terms : "A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not". The test of good faith as laid down in the law (viz., the General Clauses Act, 1897) generally applicable to Indian Statutes is more appropriate to proceedings under the insolvency law and not the test of good faith as laid down in the Travancore General Clauses Act, 1125, which is the same as found in the Act of 1072. For, it cannot be said that the definition of "good faith" as contained in the Travancore General Clauses Act of 1125 must apply in the same sense to every piece of legislation to which it may apply irrespective of the subject or the context. The Travancore Insolvency Regulation is on the same lines as the Provincial Insolvency Act and therefore must be understood in the same sense. If that is the correct approach to the law of insolvency, a secured creditor who has advanced money to a debtor honestly, even though he may not have taken all due precautions, would not come within the mischief of S. 35. 1958 S C 1 (10) [AIR V 45 C 1] : 1958 S C R 257.

3. "For valuable consideration." —[1] A consideration will be 'valuable' within S. 53,

Section 53 — Note 3 *(contd.)*

if it is not so small as to be negligible when value of property is taken into account though not fully adequate. 1932 All 243 (243) [AIR V 19] (DB) ✣ 1941 All 316 (317) [AIR V 28] : ILR (1941) All 603 (DB).

[2] A responsibility taken by a person to whom properties are transferred in consideration of his taking up a trust thereof falls within the expression "valuable consideration" in S. 53. 1925 Oudh 28 (29) [AIR V 12]: 27 Oudh Cas 392 (DB).

[3] Surrender by insolvent — Landlord aware of a previous contract to sell—Transfer is not for valuable consideration. 1927 Cal 766 (768) [AIR V 14] (DB).

[4] In case of mortgage by insolvent to person not creditor, if bulk of consideration is fictitious, whole mortgage should be declared void. 1932 Lah 455 (456) [AIR V 19].

[5] Remission of contract by person on verge of insolvency, without consideration, is not operative against official receiver under S. 53. 1940 Mad 737 (738) [AIR V 27] (DB).

[6] A transfer by a debtor of most of his properties to a few of his creditors for distribution among all the creditors *pro rata* made more than three months before the presentation of his petition in insolvency, is a transfer for valuable consideration. 1917 Mad 102 (103) [AIR V 4] (DB).

[7] *Prima facie* old debts are good consideration into the adequacy of which the Court will not enter. 1919 All 348 (348) [AIR V 6] (DB).

[8] Transfer for inadequate price — Mortgage to transferee, not mentioned—Transfer is void. 1922 Nag 235 (236) [AIR V 9].

[9] The expression 'valuable consideration' as used in S. 53, Provincial Insolvency Act, has to be read in a manner consistent with the implication of the words 'purchaser' and 'incumbrancer' used therein along with it. The word 'purchaser' means a 'buyer' in the ordinary commercial sense and a purchaser in the legal sense of the word. The consideration for the transfer need not be necessarily something equivalent to what is transferred under the contract, but it must be valuable consideration in the sense that there must be '*quid pro quo*'. In other words, something should be paid for something. Looked at from these considerations, a donee, in whose favour a gift is made for 'obedience and submission', cannot be called in law a purchaser as there is no '*quid pro quo*' at all; which means that nothing passed from the side of the donee for what is given to her under the gift deed. 1955 Pat 458 (462) [AIR V 42 C 122] : 34 Pat 440 (DB).

[10] Once the consideration is found to be real and not illusory, the transfer goes outside the scope of S. 53, whether or not it will come within that of S. 54. 1954 Vindh Pra 11 (12) [AIR V 41 C 4].

[11] The mere acceptance of the liability on the part of the donee to discharge the debts of the donor and to maintain him till his lifetime out of the income and profits of the properties transferred to her does not amount in any way in law to a valuable consideration and satisfies the condition of '*quid pro quo*'. Anything done or to be done by a universal donee under a transfer in the form of the mere management of the properties transferred so as to save them from the liabilities standing against the transferor at the time of transfer cannot in law amount to a valuable consideration as contemplated by the expression '*quid pro quo*' or within the meaning of S. 53, Provincial Insolvency Act. 1955 Pat 458 (466) [AIR V 42 C 122]: 34 Pat 440 (DB).

[12] A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other. The obedience and submission to donor referred to in the deed of gift might be a motive or ground for the gift in favour of the donee; but the obedience and submission cannot be said to have been suffered by her as a consideration for the gift. It is well-settled that a transfer in consideration of natural love and affection is not a transfer for consideration within the meaning of S. 2, Contract Act. In law a consideration in a contract for sale, as in all other contracts under the Contract Act, must be a good and valuable consideration. Therefore, a meritorious or a gratuitous consideration such as natural love and affection or obedience and submission by way of respect or love may at best be a meritorious or a gratuitous consideration and in no case can be a good consideration or valuable consideration. 1955 Pat 458 (462) [AIR V 42 C 122] : 34 Pat 440 (DB).

4. "Voluntary transfer." — [1] "Voluntary" in marginal note of S. 53 means gratuitous or without consideration. 1928 Bom 341 (343) [AIR V 15] (DB).

[2] Under S. 53 "voluntary transfer" covers all sorts of devices to deprive creditors of the benefit of the property of insolvent. 1928 Lah 750 (750) [AIR V 15].

[3] Transaction evidenced by decree passed on confession of judgment by insolvent is voluntary. 1928 Lah 750 (751) [AIR V 15].

[4] A transfer which the debtor is bound to make in pursuance of a contract entered into prior to his insolvency petition is voluntary within the meaning of S. 53, if it is not in terms of the contract. Consequently, where a wakf, which the debtor was found to create under a contract, is found to be invalid, the transfer is voluntary and is liable to be annulled if it falls within the mischief of S. 53. 1940 Cal 417 (422) [AIR V 27] : ILR (1940) 2 Cal 189 (DB).

[5] Debt due from insolvent — Validity challenged by another creditor — Matter should be tried by Insolvency Court — Mere voluntariness of transfer will not justify its being set aside. 1923 Mad 641 (645, 646, 647) [AIR V 10] (DB).

5. Transfer in favour of wife.—[1] In an enquiry under S. 36 of the Act, when a dower debt is alleged to be fraudulent, relevant matters for consideration are: — (a) the exact amount of the dower due, (b) the nature of

Section 53 — Note 5 *(contd.)*

the dower debt, (c) the reality and good faith of the transfer, (d) the value of the property transferred and (e) the delay in the discharge of the dower debt. 1917 All 32 (34) [AIR V 4]: 39 All 95 (DB).

[2] A person who was in debts sold his house to his wife in lieu of her deferred dower. Some days before sale, he had received a notice from his creditors for payment of their debts. Within one year from such sale, the person applied for being adjudged insolvent. There was a great probability that the husband had retained an advantage to himself by such sale — *Held* that under the circumstances, the transfer was tainted with fraud and must be set aside. 1937 Lah 859 (861) [AIR V 24] : ILR (1938) Lah 502.

[3] Where a Mahomedan wife obtained in lieu of dower debt from her husband who was heavily indebted a transfer of his house the transaction could not be declared fraudulent solely because shortly after the transfer, the husband put in an application for being adjudicated insolvent. 1918 Oudh 29 (30) [AIR V 5] : 20 Oudh Cas 295.

[4] A transfer made before and in consideration of marriage does not include an insolvent's transfer of his property to his wife long after marriage in view of dower settled at marriage. 1917 All 32 (34) [AIR V 4] : 39 All 95 (DB).

[5] A transfer by an insolvent of a portion of his property within two years of his insolvency, to his wife, not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration is ipso facto void. 1919 Cal 192 (193) [AIR V 6] (DB).

[6] The transfer by an insolvent to his wife of property which is under attachment in execution of a decree against him raises an inference against the bona fide nature of the transaction. The onus is on the wife to rebut the inference. 1941 Rang 250 (253, 254) [AIR V 28] : 1941 Rang L R 268 (DB).

[7] Decree for maintenance in favour of wife against husband creating charge on property is not necessarily tainted because of relationship or the fact that suit was filed shortly before the husband's insolvency. 1940 Mad 749 (750) [AIR V 27].

6. Transfer from insolvent's transferee.—[1] Section 53 does not give power to the Court to cancel a transfer made by a transferee of the insolvent. 1925 Lah 295 (295) [AIR V 12] (DB) ✠ 1926 Lah 146 (147) [AIR V 13] (DB). (Section does not apply to transfers by insolvent subsequent to adjudication, nor to transfers by insolvent's transferee.) ✠ 1927 Mad 58 (58) [AIR V 14] (DB). (Under S. 53 the official receiver is not at liberty to attack a transfer from a transferee of the insolvent.)

[2] Where the insolvent, prior to his insolvency petition, transfers his property to another who transfers the same to third person after date of adjudication, remedy in respect of first transfer might be asked for either under S. 53, or under S. 4 but remedy in respect of the second transfer can only be obtained from the Insolvency Court under S. 4. 1941 Cal 298 (302) [AIR V 28] (DB).

[3] Section 53 applies only to transfers by the insolvent and not to transfers by transferees of the insolvent. Thus though a mortgage by the vendee of the person adjudged insolvent cannot be impeached in insolvency proceedings, it cannot be said that it cannot be impeached at all. 1930 Nag 34 (35) [AIR V 17].

[4] A transferee from an insolvent cannot avoid the operation of S. 53, by merely passing on the property to some other person. The original transfer made by the insolvent is voidable under S. 53 and if once it is declared void as against the official receiver, the subsequent transfer by the transferee cannot stand and can be annulled under S. 4, if not technically under S. 53. 1935 Lah 368 (369) [AIR V 22] : 16 Lah 1013 (DB) ✠ 1958 Mys 35 (39, 40) [AIR V 45 C 11] : ILR (1957) Mys 147 (DB) ✠ 1940 Lah 124 (125) [AIR V 27] ✠ 1934 Lah 101 (102) [AIR V 21] : 15 Lah 349 ✠ 1938 Mad 370 (372) [AIR V 25].

[5] If the original transfer is found to be sham or fictitious the subsequent transfer must also fall within it. In a proper case it may, however, be possible to protect a subsequent transfer if it falls within the purview of S. 55 (c). With respect to transfers falling within the scope of S. 53 there is, however, no express protection clause. Even if the subsequent transfers were annulled, if it afterwards turns out that the sale proceeds of the other properties were sufficient to pay off the creditors the transferees will have to be reinstated to their former position. If the sale did not bring in the amounts needed, subsequent transferee can at that stage step in and make good the deficit with a view to retain unhampered the transfers in their favour. 1956 Trav-Co 61 (62) [AIR V 43 C 21] : ILR (1955) Trav-Co 764 (DB).

[6] Where the transfer in favour of *A* is itself hit by S. 53 because of the absence of valuable consideration for it, then the transfer in favour of *B*, transferee of *A*, is equally hit by that section. However, this does not mean that in no case a purchaser from a transferee under a transfer made by the insolvent can in law sustain his title for the simple reason that the original transfer made by the insolvent is itself hit by S. 53, Provincial Insolvency Act. He may in certain circumstances defend his title on the equitable principle of being a purchaser for value without notice. 1955 Pat 458 (468) [AIR V 42 C 122] : 34 Pat 440 (DB).

[7] The section does not provide for transfers by a transferee. But the words of S. 53 are wide enough to include the real transferor as distinct from the nominal transferor. Consequently, transfer by nominal transferee from insolvent can be set aside, if it is proved that real transferor behind transfer was the insolvent himself and both transactions formed part of same transaction. 1936 Bom 176 (177) [AIR V 23].

[8] The Court has jurisdiction under S. 36 to enquire into a petition by the official recei-

Section 53 — Note 6 *(contd.)*

ver for the avoidance of a transfer by the debtor's transferee, where the second transfer is only a colourable transaction and debtor's transferee is only a benamidar for his subsequent transferee. In such an enquiry the second transferee is a necessary party. 1920 Mad 917 (918) [AIR V 7] (DB).

[9] Although generally it is incompetent for the Court in proceedings under S. 53, to inquire into the validity of transfers by transferees from an insolvent, yet in proceedings properly framed under Ss. 53 to 55, it may be convenient and sometimes necessary to have such transferees before the Court. The power of Court under S. 4 to decide all questions arising in insolvency is undoubted and it is only matter of discretion whether the procedure under Act should be adopted or a suit directed. 1932 Mad 513 (515, 516) [AIR V 19].

[10] Official receiver seeking declaration that transfer is fraudulent and for recovery of property—Transferee transferring to another *bana fide* purchaser for value—Court ordering recovery of unpaid purchase-money from first transferee — Order is valid. ('34) 1934 Mad W N 681 (682).

[11] When property has been transferred by the transferee of an insolvent to a third party and the receiver is aware of the transfer, the dispute is really between the receiver on the one hand and the subsequent transferee on the other and not between the receiver and the first transferee who has no longer got any interest in the property left. In order to start proceeding under S. 4, the application should therefore be by the receiver against the person who is now claiming title to the property and an adjudication by the Court on such dispute would be final and would bar a second suit and would be binding on the parties to the proceedings. But if the receiver chooses to proceed under S. 4 against the first transferee who has no interest left in the property and obtains an order against him either *ex parte* or after contest, he cannot use that order as a final adjudication of the matter in dispute against the real claimant of the title. 1935 All 671 (674) [AIR V 22] : 57 All 900 (DB).

[12] Fraudulent sale by insolvent — Fraud completed by transferee selling property to third person in furtherance of original fraud—Neither insolvent nor receiver can recover sale price in hands of transferee. 1937 Oudh 129 (130) [AIR V 24] (DB).

[13] A transfer by the transferee cannot be avoided by the Official Assignee unless it was found that such transfer was not in good faith and for valuable consideration. Where there is good faith the Official Assignee cannot avail himself of S. 53 of the Provincial Insolvency Act. ('50) 1950 All W R 267 (269).

[14] If a transfer is set aside under S. 53 of the Provincial Insolvency Act, it becomes ineffective only from the date of application for setting it aside, and it cannot affect the rights of transferees from the transferee prior to that date who were not made parties to the application. 1956 Mad 19 (25) [AIR V 43 C 7] : ILR (1955) Mad 744 (DB).

7. Transfers to creditors.—[1] Section 54 deals with a fraudulent preference by the debtor himself and the question for consideration of the Court is as to his dominant motive only. Under S. 53 the law requires that whatever be the dominant motive of the transferor if the transferee himself had acted in good faith he is protected. The general words in S. 53 declaring all transfers void subject to certain exceptions cannot, therefore, be controlled by the specific mention of certain transfers which are declared void by S. 54. 1926 Sind 133 (134) [AIR V 13] : 20 Sind L R 197.

[2] Where the dominant motive of the debtor when he executes the mortgage is not to prefer the mortgagee to his other creditors but the debtor is compelled to execute the mortgage deed under a threat of legal proceedings which would have led to costs being incurred by the debtor, the mortgage cannot be challenged under Ss. 53 and 54. 1940 Mad 228 (229, 230) [AIR V 27].

[3] A transfer to a creditor may be dealt with under S. 53. 1933 Lah 43 (53) [A I R V 20] (DB) ✣ 1933 Mad 185 (186) [AIR V 20].

[**See however** 1928 Bom 341 (346) [A I R V 15] (DB).]

[4] The fact that the transfer is in favour of creditor, necessarily takes it out of the reach of S. 53. Cases may however be conceived where transaction is not a real one as where though the sale is ostensibly in favour of a creditor there is some benefit reserved to the debtor or again, where a third party, i.e., some person other than the transferee is really intended to take the benefit. Such cases of bad faith tainting the transfer, while being unconnected with the fraudulent preference which comes within the mischief of S. 54, are nevertheless within the ambit of S. 53. 1935 Mad 250 (251) [AIR V 22].

[5] Where, in satisfaction of pre-existing debts, a debtor transfers to his creditor some immovable property by way of mortgage, the value of such property not being greater than the value of liquidated debts and the creditor being unaware that there were other creditors of the transferor and the debtor is subsequently adjudicated insolvent the transaction is *bona fide* and for value and cannot be impeached. 1935 Rang 53 (54) [AIR V 22] : 12 Rang 625 (DB).

[6] It is not *mala fide* for a creditor to accept security for his debt merely because he may not be wholly ignorant, that debtor is so embarrassed that there may not be enough left for all creditors and that some of them may receive less than he has got in case debtor becomes insolvent on a petition presented within two years after transaction. 1934 Mad 294 (298, 299) [AIR V 21].

[7] If creditor takes whole or substantially whole of property of his debtor in payment of past debts and knowing that there are other creditors, he is not acting in good faith. 1933 Lah 43 (44) [AIR V 20] (DB).

[8] Even before where an order of adjudication is based on the basis of fraudulent preference, the receiver is entitled to show if he can, that there was no consideration and to

Section 53 — Note 7 *(contd.)*

have the transaction avoided under S. 53 and not under S. 54. 1937 Rang 27 (28) [AIR V 24] : 14 Rang 748 (DB).

[9] An insolvent executed a mortgage-deed in favour of one of creditors. The object of raising money was to carry on business of the debtor or to pay off some of business creditors. Consideration for the mortgage was not satisfaction of the past debt of the mortgagee merely but substantial advance in addition—*Held*, document does not fall within mischief of S. 53. 1938 Cal 417 (422) [AIR V 25] : ILR (1938) 2 Cal 275 (DB).

[10] Where the transfers are sought to be avoided, not under S. 54 but under S. 53, preferential transfer of property to one creditor in satisfaction of an existing debt due to him is not fraudulent as to other creditors, if purpose of the latter is to secure his own debt and the property is not worth materially more than amount of debt. 1939 Cal 503 (507) [AIR V 26] (DB).

[11] Where vendees are not connected with insolvent and *prima facie* transaction does not seem to be colourable one nor does any question of "fraudulent preference" arise the sale not having taken place within three months before adjudication, case comes under S. 53 and sale should not be annulled. 1930 Lah 135 (135) [AIR V 17].

[12] The true test whether S. 53 applies to a transaction or not is not whether the transferee is not the creditor of the insolvent but whether the transferee creditor is proved not to have acted in good faith. The creditor's good faith will afford a complete answer to an application under S. 53 and the burden is on the receiver to establish the absence of good faith on the part of the creditor. There is nothing either in S. 53 or S. 54 to justify the construction that the provisions of S. 54 which are meant to meet the specific case of the debtor's fraudulent act control in any way the general provisions of S. 53 or that the latter section makes any exception in favour of the creditors. Transfer in favour of a creditor in consideration of a pre-existing debt is as much subject to the provisions of S. 53 as any other transfer provided that the conditions laid down in that section have been fulfilled. 1952 Sau 47 (48) [AIR V 39] (DB).

8. Fraudulent transfers — Illustrative cases. — [1] Where the insolvent transferred substantially all his property in favour of his relative who was also a creditor at a time when he was heavily indebted — *Held* the transfer was fraudulent and should be set aside. 1937 Rang 27 (27, 28) [AIR V 24] : 14 Rang 748 (DB) ✣ 1931 Lah 667 (668) [A I R V 18] ✣ 1926 Lah 621 (621) [A I R V 13]. (Mortgage in favour of relations shortly before application—Mortgage presumed to be fictitious.) ✣ 1915 Mad 82 (82) [AIR V 2] ✣ 1936 Rang 498 (499) [AIR V 23]. (Debtor transferring all his property to his children—Presumption of fraud arises.)

[2] An assignment of an insurance policy by a person who is adjudged insolvent within two years from the assignment in favour of sons, it not being made before or in consideration of marriage or made in favour of a purchaser incumbrancer in good faith and for valuable consideration is liable to be set aside under S. 53. 1944 Nag 185 (185) [AIR V 31] : ILR (1944) Nag 871.

[3] The deed of transfer purported to be a *wakfnama* executed by the debtor just one day before he applied for insolvency. Although he could retain considerable benefits out of the properties, he divested himself of all the rights therein and conferred them almost wholly on his wife and children—*Held* that the transaction was *mala fide* and without consideration and was liable to be annulled under S. 53. 1940 Cal 417 (418, 422) [AIR V 27] : ILR (1940) 2 Cal 189 (DB).

[4] A deed is void against creditors when the debtor is in a state of insolvency or when effect of deed is to leave debtor without the means of paying his present debts. 1933 Rang 424 (424) [AIR V 20] (DB).

[5] The fact that there are certain circumstances appearing in the evidence on the side of the alienees which, in the absence of an explanation, would offer ground for suspicion is not sufficient for coming to the conclusion that alienations fall under S. 53. 1938 Mad 285 (286) [AIR V 25] ✣ ('36) 38 Pun L R 212 (213).

[6] When a transfer is shown to have taken place directly after the insolvent had been served with a summons and is one of two transfers by which he got rid of all his immovable properties, and when it is known that the other has been admitted by the transferee to be a fraudulent one, and that this transfer was to a mere child, the circumstances certainly require a very full explanation. 1936 Rang 506 (507) [AIR V 23] (DB).

[7] If person tricks would-be insolvent into giving him mortgage by representation that he would settle with his other creditors transfer can be annulled under S. 53. 1930 Rang 315 (317) [AIR V 17] (DB).

[8] Where an insolvent transferred property worth not less than Rs. 18,000 to a relative of his for Rs. 12,000 when he was in embarrassed circumstances and though the alienee claimed to be the purchaser of the property, he had not got the title deeds with respect to the property and the property itself was occupied by a relation of the insolvent's wife—*Held*, that although a large part of the alleged price was paid before the Sub-Registrar, the circumstances, when taken together, pointed to the conclusion that the sale was a mere device resorted to by the debtor to withdraw the whole of his immovable property from the claims of his creditors and to reserve it for himself and his family and was therefore, void. 1933 Lah 631 (632) [A I R V 20] (DB).

[9] Insolvent nominally transferred property of his to *P*. Deed directed *P* to pay certain amounts to *A*, a mortgagee but no payments made by *P*. Pending appeal from order annulling adjudication, *P* sold land to nephew and son-in-law of insolvent who paid off mortgagee *A*. The order annulling the

Section 53 — Note 8 *(contd.)*
adjudication being reversed — *Held*, that the conveyance by the insolvent in favour of *P* was voidable under S. 53 as not being in good faith and for valuable consideration. 1924 Mad 358 (359) [A I R V 11] (DB).

[10] Section enables official receiver to get any immovable property supposed to have been transferred for protecting it against his creditors. ('11) 5 Sind L R 80 (81, 82).

[11] *Obiter.* — Where the transaction was between the insolvent and the guardian of the minors who were the transferees, the guardian's fraud could not be deemed to be fraud of the minor's under S. 53. 1938 Bom 449 (451) [A I R V 25] : I L R (1939) Bom 1.

[12] Annulment of transfer — Gift deed by insolvent of *sir* land in favour of his son prior to adjudication — Land not liable to attachment and sale in view of S. 155, M. P. Land Revenue Code — Bar under S. 155 does not apply to usufruct or income of land—Receiver can be appointed — Inquiry under S. 53 not barred. 1960 Bom 477 (478) [A I R V 47 C 127].

9. "Purchaser." — [1] The word "purchaser" in S. 53 is used in the wider sense commonly given to the term in English Law and not in the mercantile sense of a person who has bought something by contract of purchase and sale. It therefore includes a trustee. 1925 Oudh 28 (29) [A I R V 12] : 27 Oudh Cas 392 (DB).

10, Benami acquisition of property. — [1] Where a person, a few days before applying to be adjudicated as an insolvent, purchased a property in another person's name and it was proved that the real purchaser was the insolvent and another's name was merely inserted in the sale-deed in order to defeat creditors — *Held*, that the case was not one within the purview of S. 53, because the allegation here was not that the insolvent had transferred property, but that the insolvent acquired certain property before his insolvency, but acquired it in the name of somebody else, but the Court could, on being satisfied as to the fraudulent nature of the transaction, set it aside. 1935 All 982 (984) [A I R V 22].

[2] Where an alleged benami transaction is in favour of female members of the family, it is of course, extremely difficult to secure definite evidence on the point of subsequent possession, but the onus to establish benami is on the person who alleges it and thus where there is no satisfactory evidence of possession one way or the other it must be held that it was not established that the transaction was not real. 1947 Pat 471 (472) [A I R V 34 C 153] : 26 Pat 263 (DB).

11. Conditions of avoiding transfer under section 53.—[1] In proceedings under S. 53, the two points that have got to be determined by the Court are good faith on the part of the transferee and valuable consideration for the transfer. 1940 Nag 393 (395) [AIR V 27] : ILR (1940) Nag 564 ✠ 1934 Mad 294 (298, 299) [A I R V 21].

[2] The transfer can be avoided even if only one of the two conditions are not fulfilled. It can be upheld only if both the conditions are complied with. The protection given to the transferee under the section is limited to cases where the transfer is found to be both in good faith and for valuable consideration. 1941 All 316 (317) [AIR V 28]: ILR (1941) All 603 (DB)✠ 1942 Mad 294 (295) [A I R V 29] (DB).

[3] Under Travancore Insolvency Act after Amendment in 1108 protection was given only to payments made prior to the presentation of the petition which when applied to an administration suit would be the date of the institution of the suit. Prior to it the law protected moneys realised before the actual adjudication. The rule of relation back does not under the Travancore or Cochin Acts or under the Provincial Insolvency Act, 1920, relate to a period anterior to the presentation of the petition. Transactions which do not come under that rule are *prima facie* valid unless they can be avoided under some express statutory provision, e.g., Ss. 53 and 54, Insolvency Act (these sections are the same under Travancore-Cochin and the Provincial Insolvency Acts) or S. 53, Transfer of Property Act, 1882. The avoidance of a voluntary transfer under S. 53, Insolvency Act, is confined to cases where the transferor is adjudged insolvent within two years after the date of the transfer and S. 54 covers only cases where the presentation of the petition in insolvency is within three months of the transfer. 1953 Trav-Co 321 (322, 323) [A I R V 40 C 119] : I L R (1953) Trav-Co 326 (DB).

12. "If the transferor is adjudged insolvent." — [1] Unless a person is adjudged insolvent, the Insolvency Court has no jurisdiction to decide whether a transfer of property made by him should be annulled or was fraudulent and void. 1927 Lah 95 (96) [A I R V 14].

[2] Mortgage by father and sons — Father alone adjudicated—Mortgage can be avoided under Ss. 53 and 54 only in respect of father's share. 1935 Mad 246 (248, 249) [AIR V 22]✠ 1944 Mad 235 (235, 236) [A I R V 31] ✠ 1943 Mad 303 (308, 310) [A I R V 30]. (Hindu Manager.) ✠ 1928 Mad 531 (533) [AIR V 15] : 51 Mad 567 (DB). (When a Hindu father is declared an insolvent in so far as the son's shares are concerned, the purchaser from the official receiver is not entitled to apply for delivery of possession under S. 4.)

[3] Annulment of an alienation under S. 53, Insolvency Act, is invariably "in pursuance" of the order of adjudication. If, therefore, the order of adjudication was made before the notification, the application for annulment of a transfer made by the insolvent would be subject to the Kumaun rules and not to the arrangement introduced by the notification. 1930 All 511 (512) [AIR V 17] (DB).

[4] Questions relating to the alleged fraudulent transfers by the applicant do not arise at the time of his being declared an insolvent but they are more appropriate for determination when the question arises of realising his assets. 1927 Lah 108 (109) [A I R V 14].

Section 53 *(contd.)*

13. "On a petition presented within two years after the date of the transfer."— [1] An application to set aside a voluntary transfer lies under S. 53 where the transfer is more than two years from the date of the order of adjudication but within two years from the date of the presentation of the petition on which the adjudication is made. 1927 Mad 163 (166) [AIR V 14] : 50 Mad 300 (DB) ✣ 1920 Cal 557 (557) [AIR V 7] : 46 Cal 991 (DB) ✣ 1927 Mad 826 (828) [AIR V 14] (DB) ✣ 1919 Mad 473 (475) [A I R V 6] (DB) ✣ ('10) 6 Nag L R 146 (147).

[*See also* 1917 Mad 144 (144) [A I R V 4] (DB).]

[But see 1925 Bom 480 (482) [A I R V 12] : 49 Bom 730 (DB) ✣ 1928 Lah 361 (364) [AIR V 15] : 10 Lah 106 (FB) ✣ 1924 Lah 374 (377) [AIR V 11] (DB) ✣ 1914 Oudh 246 (247) [AIR V 1] ✣ 1928 Rang 148 (150) [A I R V 15] : 6 Rang 193 (DB) ✣ 1929 Sind 94 (95) [A I R V 16] ✣ 1927 Sind 66 (70) [AIR V 14].]

[2] Amendment made by Act X of 1930 in S. 53 has restrospective effect. It does not introduce new period of limitation but has only clarified meaning of old section. 1932 Oudh 267 (267) [AIR V 19] : 7 Luck 713 (DB) ✣ 1930 Mad 834 (836) [A I R V 17] : 54 Mad 12 (FB) ✣ 1932 Oudh 77 (77) [A I R V 19] : 7 Luck 403.

[But see 1934 Pesh 30 (31, 32) [A I R V 21] (DB).]

[3] The adjudication dates back to date of presentation of petition in proper Court and not in wrong Court. 1930 Mad 782 (783) [AIR V 17] ✣ 1917 Mad 144 (145) [A I R V 4] (DB).

[4] Conveyance of property more than two years before insolvency — Court cannot set aside transaction under S. 53. 1943 Mad 592 (592) [AIR V 30] : ILR (1944) Mad 92 (DB) ✣ 1919 Cal 1009 (1010) [A I R V 6] (DB) ✣ 1940 Mad 564 (565) [A I R V 27].

[5] An Insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication of the transferor as an insolvent. Section 53 does not control or restrict the jurisdiction conferred upon the Court by S. 4 to decide all questions of title. 1934 Lah 365 (366) [A I R V 21] : 15 Lah 294 (DB) ✣ 1939 All 431 (432, 433) [AIR V 26] ✣ 1929 All 105 (108, 109) [AIR V 16] : 51 All 550 (FB) ✣ 1937 Mad 32 (33, 34) [A I R V 24] ✣ 1933 Mad 527 (528) [A I R V 20] ✣ 1944 Nag 44 (53) [A I R V 31] : I L R (1944) Nag 342 (FB).

[But see 1931 Oudh 124 (125) [AIR V 18] : 6 Luck 614 (DB).]

[6] Where a person makes a gift in favour of his wife and subsequently applies for insolvency two years after gift, transfer is one not coming within S. 53. The creditors must file a regular suit to set aside same. ('28) 5 Oudh W N 964 (966, 967) (DB).

[7] Where an insolvent has made a real transfer in fraud of his creditors he has no present right to remove the transferee, unless the Insolvency Court has first annulled the transfer, and it can only annul the transfer subject to the provisions of S. 53 of the Provincial Insolvency Act (i.e.) where the transfer is made within two years of the petition for insolvency. There is no power conferred by the Act to annul a transfer made outside the two-years' period. S. 4 of the Act no doubt confers wide powers to decide questions of title, but it confers nothing further than the right to decide. A Civil Court can no doubt in proper circumstances in a suit under S. 53 of the T. P. Act annul a transfer made more than two years before the petition for insolvency. But the Provincial Insolvency Act does not confer upon the Insolvency Court all the powers of a Civil Court. The proper course for the Insolvency Court in such circumstances is first to satisfy itself whether the transfer is really one liable to be annulled under S. 53 of the T. P. Act, and if it decides that it is so, then to instruct the Receiver to file a suit for the purpose in the Civil Court. 1947 Pat 471 (473, 474) [AIR V 34 C 153]: 26 Pat 253 (DB).

14. Fictitious and benami transfers.— [1] Section 4 is controlled by S. 53 only in respect of real transfers made by the insolvent whereby title has passed from the insolvent to the transferee — Limitation of two years does not apply to cases of fictitious and benami transfers and Court can decide such questions under S. 4 — Its jurisdiction in this respect is not restricted by limitations imposed in S. 53. 1932 Pat 129 (132) [AIR V 19] : 11 Pat 9 (DB) ✣ 1926 All 470 (472) [A I R V 13] : 48 All 414 (DB). (*Sulaiman J., Mukerji J.* Contra.) ✣ 1935 Bom 316 (317, 319) [AIR V 22] (DB) ✣ 1933 Lah 197 (197) [AIR V 20] ✣ 1943 Mad 252 (252) [AIR V 30] ✣ 1932 Nag 109 (109) [AIR V 19] : 28 Nag L R 89.

[*See also* 1933 Pesh 46 (47) [AIR V 20] (DB).]

[2] Nominal and fictitious transfers do not fall under S. 53. Such transfers are void at the inception and are not voidable. Where therefore the receiver alleges that certain transfers made by the insolvent beyond two years prior to the date of the insolvency petition were nominal and fictitious the Insolvency Court has jurisdiction under S. 4 to decide whether the transactions were nominal and fictitious. If they are found to be real transactions although voluntary they would fall within the ambit of S. 53 but having been entered into beyond the period mentioned in S. 53 cannot be avoided by the receiver. 1949 Bom 129 (130) [AIR V 36 C 39] : ILR (1949) Bom 129 (FB).

[3] Where an insolvent makes a gift of a small portion of his property under a registered deed of gift more than two years before the adjudication, and the property of the insolvent was worth great deal more on the date of gift and most of the debts in insolvency are incurred after that date the gift cannot be deemed to be made fraudulently with object of defeating creditors. 1936 Lah 593 (593) [AIR V 23].

[4] Section 53 applies where existence of transfer is admitted: S. 4 applies if transfer or the existence of right claimed by objector is denied by receiver. 1930 Lah 180 (181) [AIR V 17].

Section 53 — Note 14 *(contd.)*

[5] Where the consideration passed before the Sub-registrar, the presumption is that the transaction was intended to be operative. Until and unless that presumption is displaced transaction is neither sham nor bogus and cannot even be set aside under S. 4. 1934 Pesh 30 (33) [AIR V 21] (DB).

[6] Donor who was subsequently adjudicated insolvent had made a gift of his property to his minor son and a nephew and he no longer retained possession over the gifted property. The amount of indebtedness admitted by the insolvent did not show that the insolvent was under any pressure from his creditors which led him to make the gift in question. It had not been shown that any of the debts was a decretal debt or that there was any execution of decree pending against the insolvent—*Held*, that in the circumstances of the case, there was no evidence whatsoever to show that the deed of gift was a fictitious or colourable transaction which was not intended to take effect. Therefore, the insolvent had no interest in the property. 1941 Oudh 403 (404) [AIR V 28] (DB).

15. Transfers effected after presentation of insolvency petition.—[1] Transfers effected after the insolvency petition has been filed are, if the transferor is ultimately adjudicated insolvent, void as against the official receiver. 1938 Mad 801 (801) [AIR V 25] (DB).

[2] Sections 53 and 54 deal with transfer voidable at option of creditors. Transfer made after the presentation of creditors' petition on which an order of adjudication was passed, is void ab initio. 1939 Nag 207 (209) [AIR V 26] : ILR (1939) Nag 540.

16. "Voidable as against the receiver." — [1] Words "voidable against the receiver" in S. 53 must, in view of S. 58 of Act, be read as "voidable against the receiver or the Court as the case may be". 1933 Nag 365 (367) [AIR V 20] : 30 Nag L R 35.

[2] Under S. 53, a transfer is merely voidable and is valid until annulled by the Court. The possession of the transferee, therefore, is lawful and not wrongful till the date of annulment. 1946 Nag 163 (163, 164) [AIR V 33 C 47] : ILR (1946) Nag 273 (DB).

[3] A transfer of property made by an insolvent two years prior to the filing of the petition to be adjudged insolvent is only voidable. The property so transferred does not vest in the Official Receiver; but within two years the Official Receiver may apply for setting aside that sale. It is incumbent on him to establish that the sale was not in good faith and for valuable consideration. If so much is proved, it is in the discretion of the Court to annul the sale, in which case it is not binding on the receiver. It follows that the sale is valid till set aside. 1956 Mad 19 (24) [AIR V 43 C 7] : ILR (1955) Mad 744 (DB).

[4] In case of voidable transfer, property continues in the alienee unless transfer has been set aside. But where transaction is void, property continues to belong to insolvent. 1944 Mad 49 (50) [AIR V 31].

[5] Where a transaction is ab initio a nullity, it cannot be formally "annulled". It can only be declared invalid. Annulment applies to voidable transactions such as those lying under S. 53, which are good until avoided and annulled. 1936 Rang 54 (56) [AIR V 23] (DB).

[6] As the important words in S. 55, Presidency Towns Insolvency Act are exactly the same as those in S. 53, Provincial Insolvency Act, if a hypothecation bond would have come within the meaning of S. 55, Presidency-Towns Insolvency Act, had that Act been applicable, it would certainly be void under S. 53, Provincial Insolvency Act. 1933 Rang 424 (424) [AIR V 20] (DB).

[7] A fraudulent transfer coming under S. 6 (b) is one voidable under S. 53, T. P. Act independently of the insolvency of the transferor and one that is voidable under S. 53, Provincial Insolvency Act. 1955 N U C (Mad) 3169 [AIR V 42].

17. "May be annulled".—[1] The words used in S. 36 are "may be annulled" and not "must be annulled" but the power given to the Court is one that should be used if the circumstances call for it. ('10) 6 Nag L R 146 (148).

[2] On application to avoid transfer under S. 53, the Court is not bound to annul all transactions made by insolvent which come within S. 53. 1935 Rang 433 (435) [AIR V 22].

[But see 1933 Nag 365 (367) [AIR V 20] : 30 Nag L R 35. (It is incumbent on Court to annul every transfer of property by insolvent if the transferor is adjudged insolvent within two years after date of transfer.)]

18. Annulment of adjudication or granting of absolute discharge—Effect on pending proceedings. — [1] Section 37, Provincial Insolvency Act, was intended to permit and does permit a Court to direct as one of the conditions of the annulment that proceedings begun with its permission under S. 53 or 54 shall not automatically cease because of the annulment but be continued. 1932 Mad 731 (732) [AIR V 19].

[But see 1938 Nag 312 (313) [AIR V 25] : ILR (1940) Nag 204 (DB). (Once an adjudication is annulled, the receiver or the creditor or the Insolvency Court cannot either institute or continue proceedings under S. 53 or S. 54.)✠ 1925 Rang 301 (302) [AIR V 12] : 3 Rang 201 (DB).]

[2] Annulment of adjudication under S. 43 does not cause abatement of proceedings already instituted under Ss. 53 and 54. 1941 Lah 316 (321) [AIR V 28] : ILR (1942) Lah 330 (DB).

[3] Where an application under Ss. 53 and 54 by the official receiver is already pending when the order of annulment is passed under S. 43, and the person appointed under S. 37 is the official receiver who was receiver under the Act before the annulment, the receiver can continue to pursue his remedy. He, however, cannot initiate proceedings under Ss. 53 and 54 after the annulment. 1935 Mad 826 (834) [AIR V 22] : 58 Mad 908 (FB).

Section 53 — Note 18 *(contd.)*

[4] When an order adjudicating a debtor insolvent has been annulled by the Insolvency Court under S. 43 the custodian of the property of the debtor appointed by the Insolvency Court under S. 37 of the Act can continue an application which had been made by the receiver in insolvency under Ss. 53 and 54 of the Act for setting aside a fraudulent alienation. 1944 Bom 72 (73, 75) [AIR V 31] (DB).

[5] The granting of an absolute order of discharge has no immediate effect upon any proceedings which may be pending under either S. 53 or S. 54, whether in the Insolvency Court itself or in the Court of appeal. After an absolute order of discharge has been granted, proceedings which were pending under S. 53 or S. 54 could be continued by the official receiver, unless, of course, there were definite orders of the Insolvency Court to the contrary. 1943 Mad 644 (644, 645) [AIR V 30].

19. Transfer annulled—Rights of transferee.—[1] The general principle applicable to cases under S. 53 is that when the transfer is found to be partly not in good faith and for valuable consideration, the assignment, as an assignment, is void; but, for money genuinely paid in discharge of genuine debts, the alienee will stand in the shoes of those whom he has paid. In the case of a mortgage debt paid off, the transfer will not operate as a mortgage at all, not even to the extent of the amount paid, but the alienee will be entitled to rank in the schedule of secured creditors to the extent of his payment. 1926 Mad 672(673) [AIR V 13] (DB) ✣ 1925 Nag 73 (74) [AIR V 12] : 21 Nag L R 21.

[2] Alienees, the transfers in whose favour have been annulled, may prove as unsecured creditors in the insolvency of the alienor to the extent of just antecedent debts. 1919 Lah 211 (211) [AIR V 6] : 1919 Pun Re No. 65 ✣ 1947 Bom 392 (394, 395) [AIR V 34 C 111] : ILR (1947) Bom 156✣1933 Lah 211 (211, 212) [AIR V 20].

[3] Cash items of consideration in transfers set aside by the Insolvency Court advanced at the time of the execution of a fraudulent transfer cannot be allowed to be proved as a debt as the same is advanced for the purpose of carrying out the fraud. But when a transfer is annulled the alienee may prove just antecedent debts which existed before the fraudulent transfer but were included in the consideration therefor. Whether the alienee could rank as a secured creditor would depend upon whether the antecedent debt was itself secured or not. 1951 Trav-Co 55 (64) [AIR V 38 C 20] : 1950 Trav-Co L R 707 (DB).

[4] Transfer to wife in lieu of dower debt—Transfer set aside—Dower debt not proved—Wife applying to be entered in schedule of creditors could prove only true amount of dower. ('13) 11 All L Jour 614 (615) (DB).

[5] Once it has been found by the insolvency Court, at the time of adjudication, that the transfer was an act of insolvency, then the alleged transferee can no longer contend that the transfer was not void on that ground. This principle applies not only to cases where the transfer is declared automatically void by the insolvency Court at the time of adjudication, but also to a case where the Official Receiver, subsequent to a debtor's adjudication, makes an application under S. 53 for having a document adjudged void. The order of adjudication is conclusive and the aggrieved third party's remedy is to prefer an appeal against the order or adjudication. 1956 All 68 (68) [AIR V 43 C 24].

[6] Where the consideration for the transfer annulled under S. 53 consisted of two debts, one on the prior mortgage and the other on the promissory note, and both the debts were discharged by the transferee the transferee is entitled to have a charge for the mortgage amount and to rank as a secured creditor to the extent of the amount paid. But he can rank only as an ordinary creditor in respect of the amount covered by the promissory note. 1959 Ker 380 (381) [AIR V 46 C 132].

20. Defence to an application under this section.—[1] In proceeding under Ss. 53 and 54, against transferee, by sole creditor at whose instance the insolvent was adjudged as such, transferee can raise contention that this creditor was a bogus one and was not justified in getting his transferor adjudged insolvent. 1940 Nag 393 (395) [AIR V 27] : ILR (1940) Nag 564.

[2] Official receiver applying under S. 53 for setting aside transfer—Defence by transferee that adjudication was illegal — Plea cannot be entertained. ('30) 1930 Mad W N 651 (652).

[3] A transferee who was not a party to the adjudication proceedings can contend in subsequent proceedings for annulment that his transfer was good notwithstanding that the order of adjudication was based on the alleged transfer as being an act of insolvency. 1947 Nag 161 (164, 175) [AIR V 34 C 49] : ILR (1947) Nag 85 (FB).

[4] It would not be open to transferees to urge a contention that out of the consideration paid to the insolvent by transferees large number of creditors were paid, as a result of a composition between the creditors and the insolvent, by way of an answer to an application under S. 53 of the Act when they had not opposed the application for the adjudication of the insolvent on that ground. 1958 Mys 35 (39) [AIR V 45 C 11]: ILR (1957) Mys 147 (DB).

[5] When a transaction is impeached as fraudulent under S. 53 or S. 54 of the Insolvency Act, one way of escape is to plead and prove that the alienations were effected on account of pressure exerted upon the alienor by the creditors. If the debtor was not a free agent but was forced to enter into a transaction then that cannot be impeached on the ground of the debtor's intention to prefer some or defeat other creditors. Where the circumstances of a case leave no room for doubt that the transactions were resorted to by the debtor with a view to defeat his creditors that would

Section 53 — Note 20 *(contd.)*
be an act of insolvency. 1954 Trav-Co 419 (423) [AIR V 41 C 145] : ILR (1954) Trav-Co 93 (DB).

21. This section and section 53, T. P. Act.—[1] There is nothing in the Provincial Insolvency Act to prevent the creditors and, therefore, the official receiver from proceeding under S. 53 of the Transfer of Property Act, if they wish, though they have another remedy under S. 53 of the Provincial Insolvency Act. 1926 Mad 826 (827) [AIR V 13] (DB) ✠ 1929 Sind 94 (96) [AIR V 16].

[2] A suit under S. 53, T. P. Act is not a suit in respect of the property of the insolvent but is a suit in respect of the property which had been the property of the insolvent and which he had transferred in fraud of his creditors. Such a suit does not fall within the prohibition of the Insolvency Act. Moreover, the very definite right given by S. 53 to a creditor cannot be taken away without an express provision by the Legislature to this effect and there is nothing in the Presidency-Towns Insolvency Act or in the Provincial Insolvency Act which can be read as taking away his right. 1941 Mad 903 (904, 905) [AIR V 28]: ILR (1942) Mad 1 (FB). (AIR 1919 Mad 167, *Overruled.*)

[3] The scope of S. 36 of the Insolvency Act, 1907 is wider than that of S. 53, T. P. Act, the former section does not require the intent to defeat or delay creditors required by the latter. 1917 All 32 (33) [AIR V 4] : 39 All 95 (DB).

[4] Creditor or the official receiver acting for his benefit can institute suit under section 53, T. P. Act, subsequent to date of order of adjudication. 1929 Sind 94 (96) [AIR V 16].

[5] A suit under S. 53, T. P. Act has to be instituted on behalf of or for the benefit of all the creditors and it does not hit a transaction by which one creditor is given preference over others for which contingency proceedings will have to be had under some other law, for instance, section 53 or section 54 of the Provincial Insolvency Act. 1960 Punj 417 (418) [AIR V 47 C 149] (DB).

22. Jurisdiction.—[1] Insolvency Court is the only Court which has jurisdiction to go into questions under S. 53. Parties should not be referred to Civil Court for determination of such questions. 1932 Cal 151 (152) [AIR V 19] : 58 Cal 1352 (DB)✠1919 Mad 161 (163) [AIR V 6] : 42 Mad 322 (DB)✠1927 Oudh 357 (357, 358) [AIR V 14] : 2 Luck 651 (DB)✠1923 Oudh 80 (89) [AIR V 10] : 25 Oudh Cas 291 (DB).

[2] The District Judge must himself decide whether or not action should be taken to annul a transfer under the section and cannot delegate an enquiry. 1914 All 312 (313) [AIR V 1] : 36 All 549 (DB) ✠ 1916 Cal 500 (500) [AIR V 3] (DB).

[3] A subordinate Court has no jurisdiction whatsoever in insolvency and it is only by reason of S. 3, Provincial Insolvency Act and notification issued thereunder that it gets any jurisdiction. Even where there is such notification investing the subordinate Court with insolvency jurisdiction, such Court however has got no jurisdiction to try any insolvency matter which originates outside the local limits of its jurisdiction. An order of the District Court transferring the petition under S. 53, Insolvency Act to such Subordinate Court is ultra vires. 1937 Mad 444 (446) [AIR V 24] : ILR (1937) Mad 565 (DB).

[4] The official receiver is not a Court but a mere executive officer. He is not entitled to take evidence in an enquiry under S. 53 though ordered by the District Judge. 1933 Mad 471 (474) [AIR V 20].

[5] The duty of judicial enquiry under S. 36 is not to be allowed to be done by the official receiver who, in fact, should be made a party to such proceedings. 1917 Mad 858 (859) [AIR V 4] (DB) ✠ 1926 Mad 1019 (1019, 1020) [AIR V 13] (DB).

[6] Application for adjudicating person insolvent — Debts amounting to Rs. 14,700 — Jurisdiction of Sub-Judge Second Class — Notification No. 159612-2-XIV of 16th May, 1938, investing Subordinate Judge of Second Class to deal with insolvency petitions not exceeding Rs. 2000 — Court annulling transfer under S. 53 — Proceedings are null and void since Courts had no jurisdiction to entertain petition for insolvency. ('58) 1958 Nag L Jour 135 (136).

23. Property situate beyond jurisdiction of Court. — [1] Section contemplates only such property as is available to creditors or official receiver for purposes of insolvency and the transfer of colony land cannot be challenged by official receiver. ('40) 42 Pun L R 144 (145).

[2] Transfer of property in foreign territory — Court has no power to annul. 1922 Nag 221 (222) [AIR V 9] : 18 Nag L R 93.

[3] The question as to the validity of a transfer of property situate beyond the jurisdiction of the Court can be dealt with by the Court. ('10) 12 Cal L Jour 452 (457) (DB).

24. Burden of proof.—[1] In a petition to annul a mortgage-deed under S. 53 the onus of proving the fraudulent nature of the transaction lies on the petitioner and not on the mortgagee. 1931 P C 75 (78) [AIR V 18] : 9 Rang 170 : 58 Ind App 115.

[2] In application preferred by official receiver under S. 53 to annul transfer of property by insolvent, *onus probandi* is not on transferee but upon official receiver to establish that transaction was not bona fide and for value and was, in consequence, voidable as against him. 1938 Bom 449 (450) [AIR V 25] : ILR (1939) Bom 1 ✠ 1958 S C 1 (4) [AIR V 45 C 1] : 1958 S C R 257 ✠ 1958 Mys 35 (37) [AIR V 45 C 11] : ILR (1957) Mys 147 (DB) ✠ 1955 Pat 458 (486) [AIR V 42 C 122] : 34 Pat 440 (DB) ✠ 1951 Trav-Co 55 (62) [AIR V 38 C 20] : 1950 Tra-Co L R 707 (DB) ✠ 1941 All 316 (317) [AIR V 28] : ILR (1941) All 603 (DB) ✠ 1938 All 555 (556) [AIR V 25] : ILR (1938) All 800 ✠ 1932 All 243 (243) [AIR V 19] (DB) ✠ 1939 Cal 503 (507) [AIR V 26] (DB) ✠ 1995 Cal 650 (654) [AIR V 22] (DB) ✠ 1933 Cal 689 (690) [AIR V 20] (DB) ✠ ('37) 169 Ind Cas 975 (975) (Lah) ✠

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1934 Mad 294 (298, 299) [AIR V 21] ✣ 1934 Lah 365 (366) [AIR V 21] : 15 Lah 294 (DB) ✣ 1933 Lah 43 (43) [AIR V 20] (DB) ✣ 1933 Mad 271 (274) [AIR V 20] (DB) ✣ ('33) 1933 Mad W N 1049 (1057) ✣ ('32) 1932 Mad W N 59 (60) ✣ 1934 Pesh 126 (128) [AIR V 21] ✣ 1937 Rang 276 (278) [AIR V 24] : 14 Rang 704 (DB).

[**But see** 1926 All 29 (30) [AIR V 13] : 47 All 864 (DB) ✣ 1927 Cal 766 (767) [AIR V 14] (DB) ✣ 1918 Cal: 540 (541, 542) [AIR V 5] (DB) ✣ 1915 Cal 434 (434) [AIR V 2] (DB) ✣ 1927 Lah 415 (416) [AIR V 14] ✣ 1926 Lah 307 (308) [AIR V 13] (DB) ✣ 1927 Mad 1013 (1014) [AIR V 14] : 50 Mad 948 (DB). (Onus of proving good faith and valuable consideration is on the transferee.) ✣ 1926 Mad 672 (672) [AIR V 13] (DB) ✣ 1924 Mad 865 (865, 866) [AIR V 11] (DB) ✣ 1920 Mad 977 (977, 978) [AIR V 7] : 43 Mad 739 (DB) ✣ 1917 Mad 849 (850) [AIR V 4] (DB) ✣ 1921 Nag 103 (103, 104) [AIR V 8] : 17 Nag L R 69 ✣ 1931 Pat 14 (14) [AIR V 18] : 9 Pat 839 (DB) ✣ 1916 Pat 279 (280) [AIR V 3] : 2 Pat L Jour 101 (DB) ✣ 1929 Sind 94 (96, 97) [AIR V 16] ✣ 1926 Sind 140 (140) [AIR V 13] : 20 Sind L R 231.]

[**See however** 1918 Lah 35 (36) [AIR V 5].]

[3] In an application by creditors under S. 53 for annulment of transfers by the insolvent, the burden of proving that the transfers were not made in good faith and for consideration lies on the creditors. 1934 Oudh 368 (369) [AIR V 21] ✣ 1934 Lah 968 (968) [AIR V 21].

[**But see** 1923 Nag 97 (99) [AIR V 10] : 19 Nag L R 32. (Onus of proving good faith is on transferee.)]

[4] Onus lies upon applicant to prove that transfer was not made in good faith and for valuable consideration. 1935 Rang 53 (53) [AIR V 22] : 12 Rang 625 (DB) ✣ 1945 PC 38 (39) [AIR V 32] ✣ ('36) 38 Pun L R 965 (966) ✣ 1933 Pat 564 (564) [AIR V 20] (DB) ✣ ('36) 17 Pat L Tim 626 (626) (DB).

[5] If a creditor comes to Court and merely alleges that a transfer within two years of insolvency has not been made in good faith and for valuable consideration, the burden of proof rests initially on him. But where detailed allegations are made and some of these allegations are admitted, this is not necessarily the case. 1933 Nag 188 (188, 189) [AIR V 20] : 29 Nag L R 164.

[6] The burden of proving want of good faith on the part of alienee is not discharged by mere vague allegations of fraud by one witness going into the witness box and saying that all the alienations are fraudulent. The burden can be discharged only if circumstances are established from which it can be reasonably inferred that the alienee acted in bad faith and that there was no valuable consideration for the alienation. 1938 Mad 285 (286, 287) [AIR V 25].

[7] The burden of proof in a suit to set aside a fraudulent transfer under S. 53 is on the official receiver and can only be discharged by showing circumstances from which the strong inference can be drawn that the transfer impugned was made either mala fide or in the absence of valuable consideration. Where he discharges the prima facie burden, it is for the transferee to explain the case which gave grounds for suspicion and to show that there was, in fact, an explanation which the Court could deem to be satisfactory. 1938 Rang 506 (506) [AIR V 23] (DB).

[8] Where, in a suit, by receiver of insolvent's estate under S. 53 to set aside alienation, alienee is found to have been in dominant position on date of alleged fraudulent transfer, and it is also found that alienee is in possession of properties, onus lies on alienees to prove how they had come by them, as against receiver who is trying to secure them as belonging to insolvent's estate. 1940 P C 211 (213, 215) [AIR V 27] : 1941 Rang L R 355.

[9] The burden of proof in insolvency proceeding, is not upon the transferee but is on the official receiver or the creditor who challenges the transfer the burden is discharged as soon as it is shown that the property stood in the name of the debtor. It is then for the transferee to show that he was the real owner and the debtor was only a benamidar. 1961 Madh Pra 15 (20, 21) [AIR V 48 C 11] (DB).

[10] When the genuineness of a transaction is challenged by the insolvent under certain circumstances the duty is cast upon the transferee then to defend his transfer on both grounds that are mentioned in S. 53, and the burden, therefore, shifts on to him to establish not only good faith but valuable consideration. This he can only establish if he leads unimpeachable evidence to prove that prior to the transaction impugned, any debts were due to him from the insolvent and that he was not merely sheltering the property for the insolvent's benefit as against his bona fide creditors. Mere production of books of account, unattended by any disinterested statement to the effect that the accounts were genuine or that the sums covered by the accounts actually advanced to the insolvent, would not be enough to discharge the onus. 1937 Lah 801 (802) [AIR V 24] (DB).

[11] Where sale by insolvent has taken place only eleven months before application for adjudication and circumstances raise strong presumption that vendee was not acting in good faith, it is for vendee and insolvent to rebut that presumption and prove that insolvent's financial position was sound at time of sale, and both of them acted in good faith. 1937 Lah 441 (442) [AIR V 24].

[12] The receiver has to prove that the transferee or the purchaser gave no value or consideration for transfer and if there is consideration for transfer, then that there was no good faith on the part of transferee. What is required under the section is the fraud or want of good faith on the part of the transferee. 1938 Bom 449 (451) [AIR V 25] : ILR (1939) Bom 1 ✣ 1938 Mad 285 (286) [AIR V 25].

[13] An application by the Official Receiver under S. 53 for annulment of transfer can be

Section 53 — Note 24 *(contd.)*
allowed on proof either that there was no consideration for the transaction or that the consideration was so inadequate as to raise the presumption of want of good faith. Alternatively, the Receiver may also succeed on showing that though there was valuable consideration for the transaction impeached, there was want of good faith in the sense that the transferee knowing all the circumstances of the transferor who had since been adjudged an insolvent entered into the transaction with a view to screening the assets of the insolvent from the receiver in whom the insolvent's property vests for the benefit of the creditors. Such will be mostly cases of benami transactions in favour of some relative of the insolvent or a person in whom he has full confidence that he will hold it ultimately for the benefit of the insolvent or persons in whom he may be interested. Or it may be that a person finding himself over head and ears in debts wishes to convert his assets into liquid assets with the collusion or connivance of the transferee. In both cases the intention clearly is to shield the assets against the claims of creditors and in such cases, though the transfer may have been for consideration, either adequate or otherwise, but having been entered into with a view to defraud or delay the creditors, the transferor and the transferee sharing the common intention, the transaction must be annulled and the asset must be brought into the common hotchpot for the benefit of the insolvent's creditors. 1958 S C 1 (6, 7) [AIR V 45 C 1] : 1958 S C R 257.

25. Procedure. — [1] Where receiver reports that transfer is fraudulent and prays that transfer might be annulled under S. 53, Court should treat report as application under S. 53 and go into matter for itself after taking evidence. 1932 Cal 151 (152) [AIR V 19] : 58 Cal 1352 (DB).

[2] An application by a receiver should be like an ordinary written statement and the transferee should put in a reply and the Court should try it much like a suit and not dispose of it summarily. 1917 All 12 (14) [AIR V 4] : 39 All 391 (DB).

[3] In an enquiry held with respect to an Official Receiver's application to annul transfers made by insolvent the Receiver and the parties are expected to disclose their respective cases in their pleadings and the Court should hold the trial in the same manner as regular original suit is tried. 1951 Trav-Co 55 (71) [AIR V 38 C 20]:1950 Trav-Co L R 707 (DB).

[4] Issues in cases under S. 53 ought to be framed in terms of section. 1937 Nag 117 (118) [AIR V 24] : I L R (1937) Nag 78.

[5] When a question arises whether a transfer should or should not be annulled it is requisite that the transferee should have proper notice that proceedings are contemplated under that section and a proper opportunity was given to put his case before the Court. 1919 Cal 507 (508) [AIR V 6] (DB) ✠ 1917 All 15 (16) [AIR V 4] (DB).

[6] When a transfer is impeached as being fraudulent the Court ought not to decide the document invalid on a mere perusal of the same without giving the parties an opportunity to adduce evidence. 1918 Cal 796 (796) [AIR V 5] (DB).

[7] Where the District Judge and the opposite party were under a misapprehension as to the onus of proof and it is probable that the opposite party were induced not to offer any evidence when they saw that the party on whom the onus was believed to lie, did not offer any evidence, the proper course is to send the case back to the District Judge to determine the matter after giving an opportunity to the opposite party to adduce evidence and to the appellants to adduce rebutting evidence. ('36) 17 Pat L Tim 626 (626, 627) (DB).

[8] Where the trial of four separate applications under S. 53, together was with the consent of the parties, it is not open to the applicants to take objection to the joint trial. This, however, does not mean either that the evidence otherwise irrelevant becomes relevant because the applications were heard together, or that because some alienations are found to be fraudulent as being not in good faith, the others must necessarily, on that account, partake of the same character. In other words, in spite of the joint trial of the applications, the case as regards each alienation must be dealt with separately, and the evidence relating to it considered separately. 1938 Mad 285 (286) [AIR V 25].

[9] The proper course, in cases where a civil suit is pending on a mortgage and where the official receiver applies to the Insolvency Court for a declaration that the mortgage is bad under S. 53, would be to have the proceedings in the suit stayed till the disposal of the application by the Insolvency Court. The application must be made either to the Court in which the civil suit is pending or to a Court which has power to stay the proceedings in that suit. But there is no warrant either in law or in practice for the contention that the presentation of an application to the Insolvency Court for an order under S. 53 takes away the jurisdiction of the Civil Court to proceed with the suit of a secured creditor. 1925 Mad 1051 (1051, 1052) [AIR V 12] : 48 Mad 750 (DB).

[10] An order passed on an application made to the Insolvency Court under Ss. 53 and 54 of the Provincial Insolvency Act does not come within the definition of 'decree'. This is so in spite of the provisions of S. 5 of the Provincial Insolvency Act. For, merely because certain powers are conferred on the Insolvency Court and it can adopt the procedure followed by civil Courts, it does not mean that every order of that Court becomes a decree. ('58) 1958 Andh L T 896 (901).

[11] Except when the aliention are the outcome of a scheme of fraud and conspiracy between the insolvent on the one hand and the alienees on the other a joint application or joint trial is not the proper procedure to be adopted. 1951 Trav-Co 55 (71) [AIR V 38 C 20] : 1950 Trav-Co L R 707 (DB).

Section 53 — Note 25 *(contd.)*

[12] If a creditor applying for the annulment of a transfer made by the insolvent dies, no question of abatement of his application can arise. The property having vested in the Court for the benefit of the creditors of the insolvent, it is the Court and not a creditor which really has the "right to sue". What creditor does or can do is merely to move the Court to take a particular action for the benefit of the general body of creditors. The right of a creditor to move the Court is not "a right to sue" the transferee of the insolvent's property. It therefore does not fall within the purview of O. 22, Rr. 3 and 4, Civil P. C. 1951 Nag 268 (269) [AIR V 38 C 72] : ILR (1950) Nag 331.

[13] If the transferees took possession of the assets of the insolvent and handed them over to their transferee and latter in his turn dealt with those assets and stock-in-trade in the course of his business the proper direction to be given in those circumstances would be a direction that the transferees and each of them shall deliver to the Official Receiver all the assets and stock-in-trade purchased by them and that they should also render an account to the Official Receiver and to the Court of all their dealings with the insolvent in respect of the impugned transfers and also of all their dealings in respect of the assets, and stock-in-trade which they purchased and also in respect of the proceeds of those assets and stock-in-trade. Any amounts found due by transferees after such an accounting shall be paid by them to the Official Receiver for distribution by him among the creditors of the insolvent. 1958 Mys 35 (40) [AIR V 45 C 11] : ILR (1957) Mys 147 (DB).

26. Report of receiver whether evidence.—[1] The report of the official receiver in connection with an enquiry under S. 53 or S. 54 is not by itself legal evidence. Wherever it was intended by the legislature that the report of an official receiver should be treated as evidence in the case, an express provision is made in the section dealing with that matter *e. g.* in Ss. 38 and 42, on which a finding could be based. 1926 All 29 (29) [AIR V 13] : 47 All 864 (DB) ✣ 1917 Mad 838 (839) [AIR V 4] (DB).

27. Res judicata. — [1] The decision in the insolveney case under S. 53 operates as *res judicata* in a subsequent suit for declaration of right to possession based on conveyance. 1940 Cal 578 (578) [AIR V 27].

[2] An order of Court setting aside transfer operates as *res judicata*. 1939 Lah 145 (145) [AIR V 26].

[3] Notice to transferee on application of receiver — Transferee failing to appear—Case decided *ex parte* — Separate civil suit for declaring ownership is barred by S. 4. 1927 All 66 (68) [AIR V 14] : 49 All 71 (DB).

[4] Where a transaction, being several years old could not be questioned by the Insolvency Court under S. 36, the question which the Insolvency Court expressly declined to adjudicate upon, is not *res judicata* in a subsequent suit under S. 53 of the Transfer of Property Act. 1922 All :443 (443) [AIR V 9] (DB).

[5] When application under S. 53 is dismissed, subsequent application under S. 54 is not barred. 1937 Lah 668 (668) [AIR V 24].

[6] Order as to validity of transaction on application to which receiver after adjudication was not party does not operate as *res judicata* or does not affect his right to apply afresh. 1920 Pat 286 (287) [AIR V 7] (DB).

[7] The decision of the District Judge in the insolvency application declaring the sale to be fraudulent and amounting to an act of insolvency is not binding on the vendees who were not parties to proceedings, and can be challenged by them, when the Receiver applies under S. 53 of the Provincial Insolvency Act for the annulment of the sale. The Privy Council decision in AIR 1943 P. C. 130 which follows (1878) 10 Ch. D. 3, applies to orders of adjudication under the Presidency-Towns Insolvency Act alone and cannot be applied to orders of adjudication under the Provincial Insolvency Act, for the relevant provisions of the two Acts are different. 1960 Punj 24 (25, 26) [AIR V 47 C 10]. (AIR 1956 All 68, *Dissented from.*)

[8] Insolvency proceedings — Matter not decided in adjudication proceedings is not res judicata in proceedings started for avoiding transfer. 1958 S C 1 (6) [AIR V 45 C 1] : 1958 S C R 257.

[9] The dismissal for default of an application by a creditor for annulment of a transfer made by an insolvent, does not bar a subsequent fresh application by the legal representatives of the creditor. Indeed, such an application by the creditor himself, if alive, would be maintainable. 1951 Nag 268 (269) [AIR V 38 C 72] : ILR (1950) Nag 331.

28. Appeal. — [1] No second appeal lies from order passed under S. 53. 1931 Mad 745 (751) [AIR V 18] : 54 Mad 989 (DB) ✣ 1940 Bom 51 (53) [AIR V 27] : ILR (1940) Bom 1 (DB) ✣ 1935 Lah 708 (709) [AIR V 22] ✣ 1933 Lah 634 (635) [AIR V 20] ✣ ('22) 67 Ind Cas 887 (887) (Lah) ✣ 1935 :Mad 432 (433) [AIR V 22] ✣ 1933 Mad 653 (653) [AIR V 20] ✣ 1931 Nag 153 (153, 154) [AIR V 18] : 27 Nag L R 179 (FB).

[2] District Judge cannot decline to go into matter of nominal or fraudulent nature of alienation in an appeal on an application under S. 53. 1926 Mad 801 (805) [AIR V 13] : 49 Mad 794 (DB).

[3] According to Sch. 1 of the Act, only an order annulling a transfer under S. 53 is made appealable as of right. An order refusing to annul a transfer for any reason whatsover is covered by S. 75 (3) and can only be appealed from with the leave of the District Judge or the High Court. 1933 Lah 242 (243) [A I R V 20] ✣ 1931 Lah 651 (652) [AIR V 18].

[4] A creditor is person aggrieved by order in favour of another creditor in a proceeding under Ss. 53 and 54. 1924 Mad 345 (348) [AIR V 11] : 47 Mad 673 (DB) ✣ 1934 Lah 968 (968) [AIR V 21] ✣ 1917 Mad 411 (413) [A I R V 4] (DB).

Section 53 — Note 28 *(contd.)*

[5] In appeal by creditor from order dismissing application by receiver for setting aside sale official receiver is proper party. 1935 Mad 433 (435) [AIR V 22].

[6] A creditor applied and obtained sanction to institute proceedings under Ss. 53, 54 against an alienation by the insolvent. The application under Ss. 53 and 54 was heard and dismissed on the ground that the transaction in question was not in fraud of creditors and was supported by consideration. The aggrieved creditor appealed against the decision. During the pendency of appeal, the adjudication was annulled but the Court ordered the property to continue to vest in the receiver — *Held*, that the annulment did not put an end to the jurisdiction of the Appellate Court to hear appeal. 1944 Mad 49 (50) [AIR V 31].

[7] Where, soon after the dismissal of an application by the receiver to set aside a transfer, the adjudication is annulled, there is no existing insolvency upon which an order in favour of the receiver or the scheduled creditors as such can be based. The receiver has ceased to exist and consequently no appeal is competent by the receiver or a creditor from the order of dismissal. 1935 Rang 498 (499) [AIR V 22] (DB).

[8] It is not open to the District Judge in an appeal by the official receiver against the dismissal of his application under Ss. 53 and 54 to annul the order of adjudication passed against the insolvent. The Judge having seisin of the insolvency proceedings is the trial Judge and he alone can deal with such a matter unless it comes before the District Judge on appeal. 1942 Mad 483 (484) [A I R V 29] : ILR (1942) Mad 862 (DB).

[9] As a result of the order of adjudication other creditors would be able to make an application under S. 53 or 54 and that would very prejudicially affect the right of the person who was said to the creditor to whom fraudulent preference was given. He was therefore a person aggrieved by the order of adjudication and had a right to appeal. 1958 Raj 223 (224) [AIR V 45 C 73] : ILR (1958) 8 Raj 221 (DB).

29. Revision. — [1] Question whether a particular transaction is *bona fide* or genuine is a mere question of fact. Hence a decision under S. 53 on such point is not open to revision. 1935 Lah 708 (709) [AIR V 22].

30. Limitation for application under S. 53. — [1] The Court can take action under S. 53 at any time during the pendency of the proceedings when a transfer open to objection under the said section is brought to its notice, by an application made to it by a creditor of the insolvent. Art. 181 has no application to this case. 1924 Lah 553 (554) [AIR V 11] ✠ 1925 Mad 172 (172) [AIR V 12] ✠ 1920 Mad 974 (974) [AIR V 7] (DB).

[2] Joint petition for discharge—One of two petitioners discharged—Application by official receiver to annul transfer by discharged insolvent—Application is one during insolvency proceedings. 1937 Rang 276 (277, 278) [A I R V 24] : 14 Rang 704 (DB).

31. Scope of enquiry—Duty of Court. — [1] It has to be borne in mind that the fraudulent nature of the transaction in insolvency cases can scarcely ever be proved by direct evidence. The petitioning creditor or the receiver has to rely on circumstantial evidence in most cases, and usually that is to be found only in the conduct of the parties. It is, therefore, more than ever the duty of the Court carefully to examine all the surrounding circumstances; and in any case, if a Judge considers that the burden of proof lies on a particular party, it is incumbent on him at least to examine the facts on which that party's case is based. 1938 Nag 216 (219) [AIR V 25] : ILR (1940) Nag 526.

[2] In an action under S. 53 to set aside a transaction, it is essential for the Court to consider all the facts in relation to each other and weigh them as a whole and then come to a conclusion whether the creditor has discharged the burden. 1938 Mad 370 (371) [AIR V 25] ✠1927 Nag 166 (167) [AIR V 14]. (Facts dealing with *bona fide* of transactions not to be separated from rest of facts.)

[3] The powers are not to be exercised with reference to principle of expediency. 1933 Nag 365 (367) [AIR V 20] : 30 Nag L R 35.

[4] On an order of adjudication, all the property belonging to the insolvent vests in the Court or in receiver. When therefore a question is raised whether a certain property is the property of the insolvent or not, it is clearly the duty of the Court to determine the question and the determination of this question is in no way controlled by the provisions of S. 53. 1932 Pat 129 (132) [AIR V 19] : 11 Pat 9 (DB).

[5] A certain person was shown as mortgagee of certain property and one of the other creditors challenged the mortgage. *Held*, that the Judge was bound to enquire into the validity of the mortgage in insolvency proceedings without driving the parties to a separate suit. 1915 All 81 (81) [AIR V 2] : 37 All 252 (DB).

[6] Where suit has not been fought on merits, it is competent to Insolvency Court to go behind the judgment and to look into consideration for the judgment-debt. Case is otherwise where there has been real contest or where decree-holders claim to be mortgagees or charge-holders. In such a case, however, it is open to the receiver to challenge the mortgage or charge in appropriate proceedings and he would have to show grounds which would entitle him to have it annulled under S. 53 and S. 54. 1940 Mad 749 (752, 753) [AIR V 27].

[7] Pending insolvency of mortgagor, mortgagee impleading official receiver in mortgage suit and obtaining *ex parte* decree — Application of official receiver to set aside mortgage-decree is maintainable — Official receiver's right to have mortgage annulled is one foreign to mortgagee's suit. ('36) 1936 Mad W N 699 (699, 700) (DB).

[8] Official assignee praying for action under S. 53 or in alternative under S. 54 — Alienee not proving that he was creditor — Action under S. 53 is justified. 1927 Mad 412 (412) [AIR V 14] (DB).

54. Avoidance of preference in certain cases.

(1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.

(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent.

[P. I., 1907—S. 37; P. T. I., 1909—S. 56.]

Section 53 — Note 31 *(contd.)*

[9] Insolvent transferring before adjudication—Adjudication cannot be annulled upon this ground. 1928 Oudh 404 (404) [AIR V 15]: 3 Luck 323 (DB).

[10] Scope of an enquiry into the acts of insolvency as contemplated by S. 6 is wholly different from the scope of an enquiry for the purpose of an annulment or avoidance of certain transfers under S. 53 or S. 54. The annulment proceedings under Ss. 53 and 54 are in the nature of suits in the matter of pleadings, framing of issues, taking of evidence and the giving of judgment and decree, whereas the decision that a transfer is an act of insolvency must be based only on inconclusive material; the incidental determination of the question that the debtor firm has committed an act of insolvency for the purpose of deciding whether adjudication should be ordered or not cannot be regarded as a final determination with regard to the transfers for purposes of annulment proceedings under Ss. 53 and 54. 1955 Pat 413 (416) [AIR V 42 C 106] (DB).

[11] If a transfer of property with intent to defeat or delay the creditor is alleged as constituting an act of insolvency the Court is competent to determine the alleged nature of the transfer in the order of adjudication and cannot postpone its decision to the stage when the same is sought to be annulled under S. 53. 1961 Madh Pra 15 (19) [AIR V 48 C 11] (DB).

[12] At the stage of adjudication neither the Insolvency Court nor the appellate Court is required to say what the effect of adjudication order would be on the annulment proceedings under S. 53. 1961 Madh Pra 172 (173) [AIR V 48 C 58] (DB). (It is unnecessary for the transferee to take an appeal to the Supreme Court on that point at this stage.)

[13] Specific evidence of a convincing nature must be adduced to show that a sale deed reciting the payment of consideration was really executed for no consideration, and that no consideration was intended to be paid. No doubt, a piece of evidence tending to show that, will be the recital of the receipt of the consideration when no consideration has, as a matter of fact, been paid as recited. But such a recital will not be conclusive. A Court has to go into the whole evidence and come to its own conclusion. It will be inadvisable for Courts to apply the doctrine of inadequate consideration proving fraud by shocking the conscience of the Court where there is no evidence as to the real worth of property. It is better to apply in such cases the doctrine of "lucky purchasers" adumbrated in some cases. Often the "lucky purchaser" gets a property for less than 1/4th its value. That, by itself, will not prove any fraud. Only a careful scrutiny should be made of the circumstances to see whether the purchaser is a "lucky purchaser" or a "fraudulent purchaser." 1957 Mad 630 (631) [AIR V 44 C 191].

SECTION 54 — SYNOPSIS

1. Scope and applicability.
2. Burden of proof.
3. "Transfer".
4. "Debts".
5. "Creditor".
6. Fraudulent preference.
7. Intention to prefer—Proof of.
8. "Within three months".
9. "Void".
10. Effect of annulment of transfer.
11. Mesne profits.
12. Bar of suit.
13. Limitation.
14. Movable property.
15. Effect of annulment of adjudication.
16. Estoppel.
17. Procedure.
18. Appeal.

1. Scope and applicability. — [1] The insolvency law is one borrowed from England, and, the language of the Indian enactment being in terms of the corresponding English statute, English decisions on the interpretation of the terms of the enactment can be safely applied to cases arising in India under S. 54 of the Provincial Insolvency Act and S. 56 of the Presidency Towns Insolvency Act. 1956 Mad 33 (Pr. 13A) [(S) AIR V 43 C 9] : ILR (1956) Mad 505 (DB).

[2] Before S. 54 can apply the following conditions must be fulfilled : (i) the debtor must, at the date of transaction, be unable to pay his debts; (ii) the transaction must be in favour of a creditor; (iii) the debtor must have acted with a view to giving such creditor preference over other creditors; and

Section 54 — Note 1 *(contd.)*

(iv) the debtor must be adjudicated insolvent on a petition presented within three months of date of the transaction attacked. 1928 Rang 166 (167) [AIR V 15] (DB) ✠ 1931 All 142 (144) [AIR V 18] (DB).

[3] The conditions which S. 54 requires are (1) that the payment is made by a person unable to pay his debts as they become due from his own money, (2) that it in fact prefers one creditor over others, and (3) that the dominant motive with which the payment was made was a desire to prefer the creditor to whom the payment was made. Where there was more than sufficient to pay the debts of the debtors he cannot be described as a person unable to pay his debts. 1940 Pat 411 (412, 413) [A I R V 27] (DB).

[4] Section 53, T. P. Act does not hit a transaction by which one creditor is given preference over other. 1960 Punj 417 (Pr. 3) [AIR V 47 C 149] (DB).

[5] There is a distinction between setting aside a transfer under S. 53, Transfer of Property Act and setting aside a transfer under S. 54, Provincial Insolvency Act. In the former case the transfer is voidable and can be avoided at the instance of a creditor if it is proved to have been intended to defeat or delay the creditors whereas in the latter case, if an application for insolvency is made within three months after the transfer, such transfer is void. 1947 Bom 392 (394) [AIR V 34 C 111] : ILR (1947) Bom 156.

[6] In a case under S. 53 of the T. P. Act actual fraud must be proved but in a case under S. 54, Provincial Insolvency Act it is enough to show that there was a preference by the debtor of one creditor over another. ('12) 1912 Bun L R No. 26 p. 87 (91).

[7] The rule of relation back does not relate to a period anterior to the presentation of the petition. Transactions which do not come under that rule are prima facie valid unless they can be avoided under Ss. 53 or 54 of Prov. Ins. Act or S. 53 of T. P. Act. Section 54, Prov. Ins. Act covers only cases where the presentation of the petition in insolvency is within three months of the transfer. 1953 Trav-Co 321 (Pr. 9) [AIR V 40 C 119] : I L R (1953) Trav-Co 326 (DB).

[8] Sections 53 and 54 are enabling sections and do not take away the general and wide jurisdiction and powers conferred by S. 4. They confer certain additional powers on the Insolvency Court which ordinary Civil Court does not possess. 1944 Nag 44 (53) [AIR V 31] : ILR (1944) Nag 342 (FB) (AIR 1938 Nag 546, *Overruled.*) 1939 All 431 (432, 433) [AIR V 26] ✠ 1937 Mad 32 (34) [AIR V 24] ✠ 1933 Mad 271 (275, 276) [AIR V 20] (DB) ✠ 1933 Pesh 46 (47) [AIR V 20] (DB). (Under S. 4 an Insolvency Court can declare a transfer void even though it was more than two years old on the date of adjudication.)

[9] There is nothing either in S. 53 or S. 54 to justify the construction that the provisions of S. 54 which are meant to meet the specific case of the debtor's fraudulent act controls in any way the general provisions of S. 53 or that the latter section makes any exception in favour of the creditors. Transfer in favour of a creditor in consideration of a pre-existing debt is as much subject to S. 53 as any other transfer provided that the conditions laid down in that section are fulfilled. 1952 Sau 47 (Pr. 4) [AIR V 39] (DB).

[10] Per *A. H. Khan J.*—Fraudulent preference alleged as act of insolvency — Court is competent to determine it under S. 6 — Determination cannot be postponed till the proceedings have reached the stage under S. 54. Per *Shiv Dayal J.*—Transfer of property with intent to defeat or delay creditors, alleged to be act of insolvency — Court is competent to determine nature of transfer in the order of adjudication. 1961 Madh-Pra 15 (Pr 7) [AIR V 48 C 11] (DB).

[11] Scope of an inquiry into acts of insolvency as contempleted by S. 6 is wholly different from the scope of an inquiry for the purpose of an annulment or avoidance of the transfers under Ss. 53 and 54. Annulment proceedings, under Ss. 53 and 54 are in the nature of suits in the matter of pleadings framing of issues, taking of evidence and giving of judgment and decree, whereas the decision that a transfer is an act of insolvency is based on inconclusive material; the incidental determination of the question that the debtor has committed an act of insolvency for the purpose of deciding whether adjudication should be ordered or not, cannot be regarded as a final determination with regard to the transfers for purposes of annulment proceedings under Ss. 53 and 54. 1955 Pat 413 (Pr. 9) [AIR V 42 C 106] (DB).

[12] It is payments which fall within the mischief of S. 54 that are referred to as "fraudulent preferences" in S. 231 of the Companies Act, 1913. Where transfers were not within three months preceding the date of winding up application, there is no scope for the operation of the provisions of S. 231 of the Companies Act. 1955 Cal 338 (Pr. 6) [(S) AIR V 42 C 95] (DB).

[13] A case of fraudulent preference would arise only when there is a pre-existing debt and that the insolvent has preferred one creditor against the other. Where the debt is newly created by the insolvent in favour of a creditor and is not in continuation of any old debt the section will not apply. The case would fall under S. 53. ('50) 8 Sau L R 72 (73) (DB).

[14] The order of annulment has to be made by the court and not by the receiver or liquidator. Application for annulment can be made at any time during the pendency of the insolvency proceedings. ('57) 1957-27 Com Cas 581 (586) (Punj).

[15] The fact that the transfer is not illusory but real does not necessarily take the case out of the mischief of S. 54. 1954 Vindh-Pra 11 (Pr. 8) [AIR V 41 C 4].

[16] An insolvent executed a mortgage in favour of a third person to make payment to his creditors. It was found that only a small portion of the consideration was paid to the creditors and the major portion was found to be fictitious—*Held*, that the case was governed

Section 54 — Note 1 *(contd.)*

by S. 53 and not by S. 54 and the whole mortgage should be declared void. 1932 Lah 455 (456) [AIR V 19].

[17] No doubt by reason of S. 5 of the Act the provisions of Civil P. C. are applicable to insolvency proceedings subject to the provisions of the Provincial Insolvency Act. But the Insolvency Act provides for setting aside alienations under S. 53 and S. 54 on different grounds. Hence an application under S. 54 is not barred by S. 11, Expl. 4 by reason of the dismissal of the prior application under S. 53. 1937 Lah 668 (668, 669) [AIR V 24].

[18] Transfer of debts due to insolvent during pendency of application for adjudication — Application by receiver for refund of amounts realised by transferees and for making them personally liable for entire debts is not covered by S. 54 but by S. 4. 1937 Lah 913 (914) [AIR V 24].

[19] The object of S. 54 is to protect the interests of the whole body of creditors over whom an undue preference has been given in favour of other creditors. A disposition of a company's property cannot be impeached on the ground of fraudulent preference except on behalf of the general body of the creditors. One creditor alone cannot impeach the transfer on the ground of undue preference and *a fortiori* a person who is not a creditor of the bank but only a debtor cannot do so. 1921 Lah 200 (201) [AIR V 8] : 2 Lah 102 (DB).

[20] Section 54 covers transfers in favour of creditors only. 1940 Oudh 205 (207) [AIR V 27].

[21] Section 54 has nothing to do with the publicity or secrecy of the transaction for it contemplates payment of money and incurring of other obligations which do not require registration and need not be made openly at all. The legislature has deliberately dealt more leniently with a favoured creditor than a voluntary transferee and the former can escape if the preference is given more than three months before the application for insolvency was presented. 1938 Cal 417 (421) [AIR V 25] : I L R (1938) 2 Cal 275 (DB).

[22] The Privy Council decision in AIR 1943 P C 130 applies to orders of adjudication under the Presidency-Towns Insolvency Act alone and cannot be applied to orders of adjudication under the Provincial Insolvency Act, as Ss. 116, 51 and 56, Presidency-Towns Insolvency Act and Ss. 30, 28 (7) and S. 64, Provincial Insolvency Act are different. 1945 Mad 66 (67) [AIR V 32] : I L R (1945) Mad 541 (FB).

[23] Sale of family property by brothers *A* and *B* members of joint Hindu family—Insolvency of *A* — Sale so far as *B's* share is concerned cannot be challenged in insolvency proceedings. 1943 Mad 303 (311) [AIR V 30].

[24] Mortgage by insolvent and non-insolvent members of family — Insolvent fathers representing non-insolvents as guardians — Transaction with respect to non-insolvents *held* could not be set aside. 1945 Mad 253 (254) [AIR V 32].

[25] Transfer of joint family property by father binding minor son's interest—Transfer can be set aside under S. 54 as a whole and not only with regard to the insolvent's share. 1937 Mad 791 (792) [AIR V 24].

[26] Suit by creditor against insolvent — Property attached—Claim by wife allowed — No suit filed by creditor under O. 21. R. 63, C. P. C. — Subsequent application by him in Insolvency Court to annul sale in favour of wife is not barred as it is brought in different capacity. 1935 Mad 670 (671) [AIR V 22].

[27] In proceedings properly framed under S. 53 or S. 54 or S. 55 validity of transfers by transferees from insolvent may be considered. 1932 Mad 513 (515) [AIR V 19].

[28] Notification by Local Government investing subordinate Court with insolvency jurisdiction — Subordinate Court cannot try insolvency matter originating outside local limits of its jurisdiction — Order of District Court transferring petition under Ss. 53, 54 and S. 4 of the Act to such subordinate Court in an insolvency case originating outside the local jurisdiction of the sub-court is *ultra vires*. 1937 Mad 444 (446) [AIR V 24] : ILR (1937) Mad 565 (DB).

[29] It is not open to an official receiver to object to the execution of a decree under O. 21, R. 16, Civil P. C. by a person to whom it has been transferred on the ground that the transfer was void or fraudulent unless he has obtained an order under S. 54. 1918 Mad 1262 (1262) [AIR V 5] (DB).

2. Burden of proof. — [1] In cases under S. 54 the onus of proving that the transfer was made with a view to giving preference lies upon those who impugn the transaction. 1928 Rang 166 (167) [AIR V 15] (DB) ✣ 1942 Lah 121 (122) [AIR V 29]. ✣ 1928 Lah 744 (744) [AIR V 15] (DB) ✣ (1956) 1956-2 All E R 537 (541). (English Case — Onus is on the person alleging a fraudulent preference to prove the fact of the debtor's requisite state of mind, that is his intention.)

[2] The burden of proving that a transaction by the insolvent, which is impugned under S. 54, amounts to a fraudulent preference, is on the official receiver. 1941 Mad 796 (797) [AIR V 28] ✣ 1954 Vindh-Pra 11 (Pr 10) [AIR V 41 C 4] ✣ 1935 Lah 167 (168) [AIR V 22] ✣ 1933 Lah 354 (355) [AIR V 20] ✣ 1929 Mad 821 (823) [AIR V 16] (DB) ✣ 1937 Nag 117 (118) [AIR V 24]: ILR 1937 Nag 78 ✣ 1936 Rang 170 (173) [AIR V 23] (DB) ✣ 1931 Rang 136 (136) [AIR V 18]: 9 Rang 71 ✣ 1934 Lah 994 (994) [AIR V 21].

[3] Although onus to prove that the transfer is fraudulent is initially on the person applying for annulment, yet where the evidence shows that with the exception of a small residential house, the insolvent transferred all his property on the eve of bankruptcy and the tranfers are in respect of the old debts and are made in favour of a relation and there is evidence of other acts of preference in favour of other creditor committed by the debtor shortly before or after the transaction impugned, these circumstances are quite suffi-

Section 54 — Note 2 *(contd.)*

cient to shift the onus of proof on the transferees. 1941 Nag 188 (194) [AIR V 28] : ILR (1942) Nag 441.

[4] Fraudulent preference—Ordinarily onus is on official receiver — Insolvent paying some creditors on eve of bankruptcy — Onus is on insolvent to prove *bona fides*—Reasons for payment unexplaind—Court may presume undue preference. 1926 Sind 123 (124) [AIR V 13] ✠ ('28) 107 Ind Cas 210 (210, 211) (Sind).

[5] When all the circumstances have been ascertained, so far as the parties have thought fit to ascertain them, discussion on the point of burden of proof becomes immaterial and the decision must be come to on the whole of the circumstances so ascertained and the question of onus only becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it. 1937 All 4 (6) [AIR V 24].

[6] In applications under S. 54, the onus of proving fraudulent motive on the part of the debtor is in the first instance, on the official receiver but circumstances may shift the onus on to the transferee. Where a mortgage was effected on the eve of bankruptcy in lieu of an old debt without the creditor having sent even a notice for the amount to the debtor and the document itself recited that the transfer was made by the debtor of his own free will — *Held*, the burden was on the mortgagee to establish that he brought pressure to bear upon the debtor and that the transfer was not void. 1932 Lah 321 (321, 322) [AIR V 19].

[7] Ex parte decree for maintenance obtained by aged and blind mother against son — Charge on family properties created—Son adjudicated insolvent—Application to set aside decree — Burden lies heavily on Official Receiver to show that the decree was collusive and that there was fraudulent preference in favour of the mother—Decree held was not collusive nor was there fraudulent preference. 1960 Andh-Pra 144 (Pr 4) [AIR V 47 C 47].

3. "Transfer".—[1] The word "transfer" in S. 54 means a valid and effective transfer which could only take place after registration and not by mere execution of document. 1938 Nag 454 (454, 455) [AIR V 25] : I L R (1939) Nag 377.

See also under Note 8.

[2] A surrender of tenancy right is a transfer of an interest in property and S. 54 could operate on such a transaction. 1941 Nag 188 (194) [AIR V 28] : I L R (1942) Nag 441 (DB).

[3] It is doubtful if dissolution of partnership can, strictly speaking, be considered to be a transfer of immovable property. 1960 Punj 417 (Pr 3) [AIR V 47 C 149] (DB). (Case under S. 53, T. P. Act).

4. "Debts." — [1] Sum of money, being women's stridhanam deposited with Chettiyar firm — Deposit has no special sanctity and does not rank above ordinary debts — Mortgage executed within three months of insolvency to pay off such debt is liable to be set aside at instance of receiver. 1936 Rang 413 (416) [AIR V 23] (DB).

5. "Creditor." — [1] "Creditor" means any person who at the date of payment or transfer is entitled, if bankruptcy supervenes, to prove in bankruptcy and share in distribution of estate. 1928 Rang 166 (167) [AIR V 15] (DB).

[2] A new creditor who only becomes a creditor in respect of the transaction which gives rise to the question as to whether it was a fraudulent preference can be a creditor within S. 54 e.g., where a transaction consists of two independent parts (1) the consideration passing to the debtor thereby creating a debt from the debtor to the creditor and (2) then the debtor independently and voluntarily making a transfer in respect of the debt. But where the transaction which results in the transfer is one transaction complete in itself that view cannot apply. 1921 All 41 (42) [AIR V 8] : 43 All 427 (DB).

[*See also* ('50) 3 Sau L R 72 (73) (DB). (Newly created debt not in continuation of old debt—Section will not apply.)]

[3] A secured creditor is not a "creditor" within the meaning of S. 54. 1923 Cal 689 (689) [AIR V 10] (DB) ✠ 1950 All 479 (Pr 7) [AIR V 37 C 187].

[**But see** 1922 Nag 235 (235) [AIR V 9].]

[4] A surety for the payment of a debt by the insolvent is a creditor within S. 54. 1917 Mad 39 (41) [AIR V 4] : 40 Mad 783 (FB). (A I R 1917 Mad 681, *Overruled.*) ✠ 1923 Rang 149 (149) [AIR V 10] (DB).

[5] Sole proprietor of firm bona fide selling assets and liabilities of his firm to new firm — He becomes creditor of new firm and no notice of the sale transaction is necessary to old creditors — On insolvency of new firm he is entitled to rank as creditor along with the old creditors. 1936 Lah 760 (761) [AIR V 23] (DB).

6. Fraudulent preference.— [1] Transfer or payment to one creditor is not "preference" unless made with intention to give undue advantage to that creditor over others. 1929 Mad 471 (472) [AIR V 16] (DB) ✠ 1931 All 142 (145) [AIR V 18] (DB). (That transaction had effect of giving preference not sufficient.) ✠ 1929 Lah 79 (80) [AIR V 16] ✠ 1929 Lah 159 (160) [AIR V 16] ✠ 1926 Mad 338 (339) [AIR 13] (DB).

[2] Preference — State of mind of insolvent on date of payment or transfer and not prior to it is to be considered. 1930 Bom 217 (218) [AIR V 17] (DB). (Payment.) ✠ 1931 All 142 (145) [AIR V 18] (DB). (Transfer.)

[3] In considering whether a transfer is a fraudulent preference the motive or intention of the transferee is irrelevant. 1929 Lah 79 (80) [AIR V 16] ✠ 1932 Lah 381 (381) [AIR V 19] ✠ 1926 Mad 338 (339) [AIR V 13] (DB).

[4] In determining the nature of the transaction under S. 54, what the Court has to see is whether the dominant motive of the debtor

Section 54 — Note 6 *(contd.)*

in making the transfer was a desire to prefer a particular creditor or some other. 1935 Lah 167 (168) [AIR V 22] ✠ 1937 All 4 (6) [A I R V 24] (DB) ✠ 1930 Bom 217 (219) [AIR V 17] (DB) ✠ 1938 Cal 417 (421) [AIR V 25] : I L R (1938) 2 Cal 275 (DB) ✠ 1915 Cal 460 (463) [AIR V 2] (DB) ✠ 1942 Lah 121 (122) [A I R V 29] ✠ 1941 Mad 274 (274, 275) [AIR V 28]. (Bare fact that creditor has actually received preference is not sufficient.) ✠ 1933 All 431 (432) [AIR V 20] (DB). (Do.) ✠ 1938 Mad 177 (178) [AIR V 25] ✠ 1924 Rang 308 (308) [AIR V 11] : 2 Rang 193 (DB) ✠ 1915 Sind 15 (16) [AIR V 2] : 9 Sind L R 65.

[5] In order to determine whether a transfer is a fraudulent preference the test is to find what is it that eventually and effectually operated in the mind of the insolvent or what is the compelling force that induced him, or what is the immediate cause for the insolvent to enter into a transaction of this nature. There is only one test for understanding the meaning of "with a view", that is, if no other consideration prevailed but the only object was to prefer one creditor, then it could be said it was done voluntarily, nothing else influencing his decision to make the preference. If the sole view or the only view was to prefer the creditor, then undoubtedly the transaction could not be supported. Equally the bona fides or otherwise of the preferred creditor are immaterial. Considerations such as whether the transfer results in stiffling criminal prosecution and as such against public policy under S. 23 of the Contract Act are all extraneous to the only point to be decided, viz., whether the transfer has been made with a view of giving that creditor a preference over other creditors under S. 54. If the Court comes to the conclusion that the bankrupt's real motive was, e.g., to save himself from exposure or from a criminal prosecution, the payment or transfer is not a fraudulent preference. 1956 Mad 33 (Prs 14, 29, 30, 32) [(S) AIR V 43 C 9] : I L R (1956) Mad 505 (DB).

[6] The intention to prefer which must be proved is the principal or dominant intention. If a debtor, knowing himself to be insolvent and knowing, also, that bankruptcy is imminent, deliberately elects to pay his oldest friend or his closest relative, and to leave his other creditors unpaid or with little chance of being paid, it would appear to be irrelevant that he made the selection because of the love he bore for his friend or relative or because of his hopes for general but unspecified favours from them in the future. The real or dominant intention is to prefer. (1956) 1956-2 All E R 537 (541). (English case.)

[7] The word "preference" in S. 54 imports a voluntary act and a free choice on the part of the transferor. If the preference of a creditor was the result of pressure or threat from the creditor the act of the insolvent in giving that preference would not be voluntary and will not amount to fraudulent preference. 1929 Mad 471 (473) [AIR V 16] (DB) ✠ 1937 All 4 (8) [AIR V 24] (DB) ✠ 1928 Bom 341 (343) [AIR V 15] (DB) ✠ 1935 Cal 650 (653, 654) [AIR V 22] (DB) ✠ 1918 Cal 440 (442, 443) [AIR V 5] (DB) ✠ 1935 Lah 167 (168) [AIR V 22]. (Transfer under pressure of suit.) ✠ 1933 Lah 354 (355) [AIR V 20] ✠ 1940 Mad 228 (229, 230) [AIR V 27]. (Threat of civil proceedings.) ✠ 1938 Mad 177 (178) [AIR V 25] (Transfer under pressure of legal proceedings for breach of trust and misappropriation.) ✠ 1934 Pat 526 (528) [AIR V 21] (DB) ✠ 1934 Rang 208 (211, 212) [AIR V 21] (DB) ✠ 1933 Rang 216 (217) [AIR V 20] (DB) ✠ 1928 Rang 302 (303) [AIR V 15] : 6 Rang 536 (DB). (Creditor threatening debtor with insolvency proceedings.) ✠ 1917 Sind 20 (21, 22) [AIR V 4] : 10 Sind L R 123 ✠ 1915 Sind 15 (16) [AIR V 2] : 9 Sind L R 65.

[8] "Voluntary payment" is one made spontaneously of his own accord and not under pressure of demand by creditors or special agreement or possible danger of prosecution. Payment made in ordinary course of business is not voluntary. ('12) 35 Mad 712 (725, 726) (DB).

[9] Actual attachment of debtor's property by some of his creditors is such a pressure as would take out the transfer out of the purview of S. 54. 1941 Mad 274 (275) [AIR V 28] ✠ 1934 Lah 994 (994, 995) [AIR V 21].

[10] Where the dominant motive of debtor in making the transfer was to do, what he felt himself bound or compelled to do, the transfer is not void. 1928 P C 77 (80) [A I R V 15].

[11] The test for determining whether there has been a fraudulent preference is, did the debtor execute the transfer with a view to protect himself or to benefit the creditor. 1925 Mad 1089 (1090) [AIR V 12] (DB).

[12] Where the real object of the debtor in making the transfer to one of his creditors was not to prefer that creditor but to gain advantage to himself the transfer cannot be set aside on the ground of fraudulent preference. 1924 Lah 686 (687) [AIR V 11]. (Obtaining further loan.) ✠ 1937 Mad 872 (873) [AIR V 24]. (Advantage may be real or fancied.) ✠ 1926 Lah 231 (231) [AIR V 13] (DB). (Obtaining further loan.) ✠ 1935 Mad 300 (301) [AIR V 22] (Do.) ✠ 1921 All 41 (43) [AIR V 8] : 43 All 427 (DB) (Do.)

[13] If the object of the debtor is to give undue preference to a creditor in consideration of a fresh advance the fact that the creditor was able to persuade the debtor to give such preference will not affect the matter and S. 54 will apply. 1936 All 489 (491) [AIR V 23] (DB).

[14] A preference in return for the benefit of the debtor personally and not of his business is fraudulent. 1930 Rang 315 (317) [AIR V 17] (DB).

[15] The creditor at the time of receiving a fraudulent preference by way of mortgage from a debtor in embarrassed circumstances, advanced a fresh loan to the debtor— *Held*, that though the transaction could not be strictly viewed as a fraudulent preference within S. 54 of the Act so far as the fresh advance was concerned, yet it could be

Section 54 — Note 6 *(contd.)*

avoided under S. 53 of the said Act even in respect of the fresh advance. 1935 Mad 246 (248, 249) [AIR V 22].

[16] Where, at a suggestion from the debtor and not by pressure by a creditor the debtor mortgaged his properties to the creditor who was only too pleased to advance a little more money in order to secure the debts which may or may not be proved to have been incurred— *Held*, that the transfer should be annulled under S. 54. 1935 Rang 316 (316) [AIR V 22] (DB).

[17] A transfer made not with intent to prefer the transferee but to avoid a crisis in the business is not voidable under S. 54. 1932 Lah 381 (382) [AIR V 19].

[18] Where a transfer or payment is made to a creditor under a prior agreement no question of fraudulent preference arises. ('13) 11 All L Jour 545 (547, 548) (DB). (Payment.) ✣ 1951 Trav-Co 55 (Pr 37) [AIR V 38 C 20] : 1950 Trav-Co L R 707 (DB) ✣ 1916 Cal 975 (977, 978) [AIR V 3] : 43 Cal 640 (DB) (Mortgage.)✣1934 Mad 294 (299) [AIR V 21] (Do.)✣ 1929 Mad 471 (477) [AIR V 16] (DB) (Do.)

[19] Tranfers pursuant to prior agreements are held valid where the agreements are made contemporaneously with the advance of the loan or with the debtor incurring obligation in any other manner and not where the debtor transfers the whole or a substantial portion of his properties to a creditor for the purpose of securing payment of a past debt which act itself might or would constitute an act of insolvency. 1951 Trav-Co 55 (Pr 34) [AIR V 38 C 20] : ILR 1950 Trav-Co L R 707 (DB).

[20] The real test for determining whether a transfer by the debtor is fraudulent is not whether his assets were actully less than his liabilities at the time of the transfer but whether he honestly believed they were worth more. If he so believed the transfer would not be a fraudulent preference. 1941 Mad 274 (275) [AIR V 28].

[21] Pressure by several creditors—Payment made to one—No inference can be drawn that such payment was not with intention to defraud other creditors — Court, while considering whether payment was made due to pressure, cannot enter into question of degree of pressure. 1929 Mad 471 (477) [AIR V 16] (DB).

[22] It cannot be said if one of creditors insists on having his money and another creditor is content to take a mortgage, the granting of the mortgage to the latter would not be showing him preference as he was content with less. 1929 Mad 471 (477) [AIR V 16] (DB).

[23] Re-payment of the debt not actually due by a person in insolvent circumstances amounts to undue preference. 1925 Nag 225 (226) [AIR V 12].

[24] The facts that an insolvent executes a mortgage in favour of one of his creditors, eight months after the execution of the pronote in lieu of which the mortgage is executed, and there is no threat or pressure of any sort and the creditor is related to the insolvent are sufficient to show that insolvent executed the mortgage with the intention of preferring that creditor. 1937 Nag 197 (198) [AIR V 24] : ILR (1937) Nag 403.

[25] Where a debtor, who is in serious pecuniary difficulties, his debts surpassing his assets, transfers a considerable portion of his assets to one of his creditors, an intention to prefer the transferee creditor may properly be inferred. 1937 Pat 134 (136) [AIR V 24] (DB)✣ 1941 Mad 796 (799) [AIR V 28.]

[26] In case of a transfer of a man's whole assets to one creditor for no reason whatsoever, a fraudulent preference must be deduced. 1930 Rang 315 (316) [AIR V 17] (DB). (Mortgage.) ✣ 1930 All 282 (283) [AIR V 17] : 52 All 476 (DB) (Do.)✣ 1935 Mad 246 (249) [AIR V 22]. (Mortgage of entire property in vindictive preference to punish other creditors.)

[27] Where the creditors are themselves parties to the composition deed and agree that the scheme might be given preferential treatment, no question of fraudulent preference arises in such a case. 1927 Sind 78 (81) [AIR V 14] : 22 Sind L R 1.

[28] Where the insolvents assigned a promissory note to a relation of theirs three days before filing an application for adjudication, in liquidation of a debt alleged to be due to him, and it was proved in proceedings under S. 54, Provincial Insolvency Act, for annulment of the transaction at the instance of the official receiver that the assignee did not make any demands on the debtors for payment while some of the other creditors were executing decrees against them and others making pressing demands by letters and telegrams, and it also appeared that the assignment consisted of the only valuable movable assets of the insolvents — *Held*, that it was clear that the transaction was not entered into in good faith and that the dominant intention of the debtors was to give the assignee fraudulent preference over the other creditors. 1933 Lah 620 (621) [AIR V 20].

[29] If there be a *bona fide* negotiation for security and the security be given on the very eve of bankruptcy and the person taking the security knows the debtor was hopelessly insolvent, the transaction is valid according to law and everything depends upon the *bona fides* of the transaction. (1876) 2 Ch D 127 (137).

[30] Lease of occupancy holding granted for reasonable rent shortly before filing petition of insolvency is not fraudulent. If transaction is only colourable, it is void. 1915 All 389 (390) [AIR V 2] : 38 All 37 (DB).

[31] Insolvents' notorious financial position known both to them and their creditors — Insolvents shortly prior to insolvency alienating most of their property for value arbitrarily fixed, to few of innumerable creditors —Request by creditors for payment by letter, telegram, notice or in person but no legal proceedings taken — There is fraudulent preference in favour of creditors. 1937 Lah 53 (54) [AIR V 24].

[32] Transfer for a grossly inadequate consideration leads to an inference of fraudulent preference. 1934 Lah 271 (271) [AIR V 21].

Section 54 — Note 6 (*contd.*)

[33] Execution of mortgage for sum more than double of what was really due to near relative creditor — Section 54 applies. 1933 Lah 856 (857) [AIR V 20].

[34] If a debtor transfers a valuable property on eve of insolvency to a creditor of his, the consideration being the past debt due to the creditor, an inference of undue preference can legitimately be drawn. But if the debtor approaches a creditor for a loan and substantial advance is made by the latter who insists, as a part of the same bargain, on the payment of the existing debt, the debtor consenting to it cannot be said to have voluntarily given preference to the creditor. 1938 Cal 417 (421) [AIR V 25] : ILR (1938) 2 Cal 275 (DB).

[35] Where on the eve of insolvency, the insolvent made a transfer for which the creditor paid cash in addition to a prior debt as consideration, and it appeared that the insolvent's position was far from desperate though several suits were filed against him subsequently—*Held*, that the transfer was not a fraudulent preference. 1932 Mad 459 (461) [AIR V 19].

[36] Insolvent heavily indebted and pressed by his creditors transferring substantial part of his property to his relative—False circulation by him of his inability to pay to creditors—Transfer is fraudulent and must be set aside. 1937 Rang 27 (28) [A I R V 24] : 14 Rang 748 (DB).

[37] Ex parte decree for maintenance obtained by aged and blind mother against son—Charge on family properties—Son adjudicated insolvent—Application to set aside decree — Burden was heavy on Official Receiver to show that there was fraudulent preference in favour of mother — Under law mother is entitled to be maintained out of family property enjoyed by her son and the family property could be charged for ensuring payment—Passing of decree for maintenance could not be claimed to be collusive because it was obtained ex parte—Decree held was not collusive and nor was there fraudulent preference. 1960 Andh-Pra 144 (Pr 4) [AIR V 47 C 47].

[38] A sale to a secured creditor which includes also properties not mortgaged to him can be impugned under S. 54. The deed of transfer in such a case cannot be separated into two transactions, one dealing with the secured properties and the other dealing with the rest of the properties. 1950 All 479 (Pr 7) [AIR V 37 C 187].

[39] The fact that the preferred creditor had no knowledge of the debtor's intention to prefer him, cannot save the transaction from being a fraudulent preference. 1935 Mad 300 (301) [AIR V 22].

See also Note 7.

[40] Where a decree-holder for Rs. 30,000 who has expended a great deal of money in obtaining decrees is rather blatantly disregarded and preference given to the simple creditors to pay whom a transfer of property is effected by the insolvents. the transfer is a fraudulent preference within the scope of S. 54. 1954 Mad 93 (Pr 4) [AIR V 41 C 33].

7. Intention to prefer—Proof of.—[1] One way of escaping the mischief of S. 54 is to plead and prove that the alienations were effected on account of pressure exerted upon the alienor by the creditors. If the debtor was not a free agent but was forced to enter into a transaction, then the transaction cannot be impeached under S. 54. The subjective state of mind of the transferor is what is material and that has to be inferred from attendant circumstances. 1954 Trav-Co 419 (Pr 11) [AIR V 41 C 145] : ILR (1954) Trav-Co 93 (DB).

[2] In order that a transfer may be avoided as a fraudulent preference the law requires that the dominant motive with which the transfer is effected was to prefer the creditor in whose favour the transfer is made. 1951 Trav-Co 55 (Pr 83) [A I R V 38 C 20] : 1950 Trav-Co L R 707 (DB)=(1956) 1956-2 All E R 537 (541). (English case.)

[3] For the applicability of S. 54 the most important test is the state of mind of the debtor-transferor. Obviously every creditor of an embarrassed debtor will be anxious to get a preference; to penalise that would be futile. On the other hand, the motive of the debtor is to be examined to ascertain whether he is actuated by the substantial and dominant motive of preferring this creditor and depriving others of the benefit of rateable distribution of the assets thus transferred. 1954 Vindh-Pra 11 (Pr 9) [AIR V 41 C 4].

[4] For the applicability of S. 54 one of the test is whether the circumstances show that there was a real pressure brought to bear on the debtor by the creditor and whether he was acting under that pressure. Thus, where the mortgage in question was created on pressure by the creditor to replace a security given under an agreement made at the very inception of their business dealings and the dominant intention of the debtor was not to give any undue advantage to creditor nor was he voluntarily making a transfer. *Held*, that the mortgage was not fraudulent preference as defined under S. 54. 1954 Vindh-Pra 11 (Prs 9, 18) [AIR V 41 C 4].

[5] Having a "view to give preference to a creditor" is mental act and can only be determined if one looks into the surrounding circumstances. 1937 Pat 134 (136) [A I R V 24] (DB).

[6] It is competent for the Court to draw the inference of intention to prefer from all the facts of the case, particularly when there is no direct evidence of intention before it; but the inference should not be drawn, having regard to the situation of the onus of proof, unless the inference is the true and proper inference from the facts proved. Thus, it will not be drawn if the inference from the facts is equivocal, and, in particular, it will not be drawn from the mere circumstance that the creditor paid was in fact "preferred" in the sense that he was paid when other creditors were not paid and could not be paid. (1956) 1956-2 All E R 537 (541). (English case)

[7] An intention to prefer a particular creditor is not negatived by the circumstance that the preference is the means of making provi-

Section 54 — Note 7 *(contd.)*
sion also for a third party who is not himself a creditor and not therefore capable himself of being the subject of a preference. (1956) 1956-2 All E R 537 (541). (English case.)

[8] The document by which the transfer was made must be looked at for the purpose of seeing what was the primary intention of the insolvent. 1931 All 142 (144, 145) [A I R V 18] (DB).

[9] Where a transaction between a debtor and his creditor is attacked as a fraudulent preference evidence of other or similar contemporaneous acts of preference in favour of other creditors, is admissible to show the debtor's intent. 1941 Nag 188 (194) [A I R V 28] : ILR (1942) Nag 441 (DB)✣1937 Nag 117 (119) [AIR V 24] : ILR (1937) Nag 78.

[10] The report of the official receiver in connection with an enquiry under S. 54 is not by itself legal evidence. 1926 All 29 (29) [AIR V 13] : 47 All 864 (DB).

[11] In impugning a sale under S. 54 evidence given at the insolvency proceedings can be used against the purchaser though he was not a party thereto. 1914 Mad 355 (355) [AIR V 1].

[12] The question whether the object of the transfer was to give preference to one of the creditors is matter of inference from the circumstances of each case and is essentially a question of fact. 1933 All 431 (432) [A I R V 20] (DB).

[13] The fact that the transaction was effected by debtors when they were in imminent expectation of bankruptcy by itself is not sufficient to prove intention to give fraudulent preference. 1937 All 4 (8) [AIR V 24] (DB).

[14] Where payment is made shortly before petition for insolvency is put in, there is an intention of undue preference. 1935 Cal 190 (192) [AIR V 22] (DB).

[15] What amounts to pressure or extortion by creditor indicated — Voluntary offer by debtor to pay solicitor and client costs incurred as term for accepting payment in instalments —No threat of bankruptcy proceedings—*Held* no extortion. (1955) 1955-2 All E R 65 (78, 79). (English case.)

[16] *See also* Note 6.

8. **"Within three months."** — [1] When one creditor obtains a preference for himself by taking a mortgage or sale, it may operate to the prejudice of other creditors; but such transactions are perfectly valid unless they are within three months from the adjudication. 1927 Mad 1144 (1144) [AIR V 14] (DB).

[2] The expression "a petition presented within three months after the date thereof" in S. 54 is not only descriptive of the application but lays down a period of limitation. The Court fees Act is a fiscal enactment and is not in *pari materia* with the Limitation Act. Section 54 prescribes a period of three months for making an application for annulment. That application must be governed by the principles bearing on the construction of the statute of limitation as contra-distinguished from a fiscal enactment such as the Court-fees Act is. 1938 Nag 454 (455) [AIR V 25]: ILR (1939) Nag 377.

[3] Creditor taking security from insolvent — Adjudication after three months— No suspicious circumstances — Transaction is valid. 1927 Mad 1090 (1091) [AIR V 14] (DB).

[4] In the case of a transfer of immovable property of the value of rupees one hundred or upwards the period of three months prescribed in S. 54 should be calculated from the date of registration of the deed of transfer and not from the date of execution of the deed. 1933 Mad 185 (187) [AIR V 20] ✣ 1938 Mad 801 (803, 804) [AIR V 25] (DB) ✣ 1934 Mad 637 (638) [AIR V 21]: 58 Mad 166 (DB) ✣ 1938 Nag 454 (454) [AIR V 25]: ILR (1939) Nag 377 ✣ 1937 Nag 197 (198) [AIR V 24]: ILR (1937) Nag 403.

[But see 1938 Cal 417 (419) [A I R V 25]: ILR (1938) 2 Cal 275 (DB) ✣ 1937 Rang 446 (447, 448) [AIR V 24]: 1937 Rang L R 375 (FB). (AIR 1934 Rang 216, *Overruled.*)]

[5] For purposes of S. 54, date of transfer is the date of registration of the document and not the date of execution. The transfer cannot be ante-dated by operation of S. 47, Registration Act. 1954 Mad 93 (Pr 5) [AIR V 41 C 33]. (AIR 1953 Mad 682, *Dissented from*; AIR 1937 Rang 446 (FB), *Not Foll*; AIR 1938 Mad 801 & AIR 1934 Mad 637 (2), *Foll.*) ✣ 1957 Andh Pra 535 (Prs 4, 6) [AIR V 44 C 181]. (AIR 1938 Mad 801, *Foll.* The registration is complete only after the certificate of registration is signed, sealed, and dated by the Registrar and the registration cannot date back to the date of the presentation of the document.)

[But see 1953 Mad 682 (Prs 2, 5) [AIR V 40 C 258].]

[6] Where the transferor had executed a sale deed more than three months before the insolvency petition filed by his creditor, and it was shown that he had no reason to expect that the creditor would file the petition, and although he knew that the document would have to be registered he had no reason to think that it would not be registered until within three months of the filing of the insolvency application, and he was not a party to the registration of the deed which was done compulsorily within three months before the insolvency petition, *Held*, that, under the circumstances the act of registration was not an act of the transferor within the meaning of S. 54. 1948 Mad 430 (431) [AIR V 35 C 207]: ILR (1948) Mad 872 (DB). (A I R 1938 Mad 801, *Considered.*)

[7] Section 54 deals with transfers which are voidable at the option of the creditors. A transfer made after the presentation of the creditor's petition on which an order of adjudication was passed is void *ab initio* and is not covered by S. 54. 1939 Nag 207 (209) [AIR V 26]: ILR (1939) Nag 540 ✣ 1938 Mad 801 (802) [AIR V 25] (DB). (The existence of a contract to mortgage entered into more than three months before insolvency would be no bar to the official receiver selling the property though it might furnish a cause of action in a suit for specific performance. The existence of such a contract does not constitute a dan-

Section 54 — Note 8 *(contd.)*

ger which the official receiver is bound to forestall by an application under S. 54.)

[8] Where a sale is effected within 3 months of the insolvency in consideration of the balance of account due since over 2 years to the purchaser-creditor the transaction may be void under S. 54. 1922 Nag 260 (260) [A I R V 9].

[9] The conditions precedent to the applicability of S. 54, are that the act complained of which is to be deemed fraudulent and void against the receiver should have been done by the insolvent with a view to give preference to a creditor over others and that such act should have been done within three months of the presentation of the petition. Where more than three months before presentation of the petition for insolvency, a consent decree has been passed in favour of one creditor, the proceedings taken in execution of that decree cannot be impugned as fraudulent under S. 54, even if the proceedings had been instituted within three months of the presentation of the petition. The execution proceedings taken against the insolvents or the *ex parte* orders for payment passed against them cannot afford fresh starting point for computing the period of limitation of three months under S. 54. 1932 Sind 3 (7) [AIR V 19]: 25 Sind L R 371 (DB).

[10] Mortgage document executed prior to presentation of insolvency petition but registered subsequently does not render registration impossible because the executant is deprived of transferable interest subsequent to execution of deed but before its registration. 1935 Rang 133 (135) [AIR V 22] (DB).

[11] The creditors of a debtor applied on 15th December 1926 that the debtor be adjudged insolvent. The total debt payable by the debtor to the two creditors did not amount to Rs. 500. On 28th January 1927, a third creditor was joined. The total debt payable to the three creditors then amounted to over Rs. 500. The debtor was then adjudged an insolvent. *Held*, that 28th January 1927 must be taken to be the date of the petition upon which the insolvent was adjudged as such and transfers more than three months before that date could not be questioned under S. 54 (1). 1928 All 676 (676, 677) [AIR V 15] (DB).

9. "Void". — [1] The word "void" in Section 54 means voidable. 1917 Mad 102 (105) [AIR V 4] (DB).

[2] A transfer stands till it is annulled and till then the transferee has all the rights in the property transferred and he is competent to exercise them. Sub-sections (2) and (7) of S. 28 cannot have the effect of vesting the property in the receiver till its transfer has been annulled. Even where the order of adjudication is based on an act of insolvency constituted by a transfer of property found to be a fraudulent preference, the transfer stands till it is set aside. A separate order annulling the transfer would be necessary even in such a case. 1960 S C 70 (Prs 11, 13, 18) [AIR V 47 C 12]: 1960-1 S C R 616.

10. Effect of annulment of transfer.— [1] The effect of the order setting aside the transfers is to restore the *status quo ante* between all the parties concerned. The mere fact that some of the creditors managed to get certain debts of the insolvent assigned in their favour, which assignments have been annulled subsequently cannot make the assignees liable to pay the entire amount of the debts to the receiver from their own pocket. 1937 Lah 913 (914, 915) [AIR V 24].

[2] Insolvency of firm— Accounts showing payment of dues of some creditors—Payments found to be void under S. 54 — Creditor *held* must refund payments even though they had accepted only *havalas* from debtors of firm and not cash in satisfaction of their dues. 1933 Sind 85 (87) [AIR V 20] (DB).

[3] Execution of mortgage by debtor a fraudulent preference — Mortgage set aside under Ss. 53 and 54 — Fraudulent preference not carried out — Mortgagee is not prevented from proving in insolvency the debts covered by mortgage as unsecured creditor. 1952 Mad 504 (2) (Pr 11) [AIR V 39] (DB).

[4] Joint Hindu family — Sale by father for himself and as guardian for his minor sons along with major sons, of family property for payment of family debt—Subsequent adjudication of father —Application by creditor under Ss. 53 & 54 challenging sale as bogus and without consideration — Sons not parties to application — Sale with regard to son's interest cannot be impugned in such proceedings — Finding of Insolvency Court that sale was bogus and without consideration would only affect father's interest in property transferred and not those of the sons. 1949 Nag 223 (Prs 16, 19, 21) [AIR V 36 C 90]: ILR (1949) Nag 155 (DB).

[5] Sale by Hindu father on his own behalf and on behalf of two minor sons — Adjudication of father as insolvent — Setting aside of sale — Official Receiver gets back only the insolvent father's share of the property when the alienation is set aside —No order of Insolvency Court under S. 54 would get back from the alienee and vest in the Official Receiver the interest of persons who had not been adjudicated namely the minor sons. 1955 Mad 51 (Prs 6, 10 [(S) AIR V 42 C 11]: ILR (1955) Mad 1039 (DB). (The view of Sundaram Chetty, J., in AIR 1935 Mad 246, held good law; AIR 1937 Mad 791 and AIR 1943 Mad 303, *Diss.*)

11. Mesne profits.—[1] Section 54, does not in itself give power to the Insolvency Court to award mesne profits but the Insolvency Court has the same jurisdiction as the ordinary Civil Courts to pass such orders as equity may require. Mesne profits can be granted whenever the other party has been in wrongful possession and possession obtained by fraud is wrongful. If, therefore, a transaction is set aside as fraudulent under S. 54, the Court, in its equitable jurisdiction, attempts to put the parties in the same position as if the fraud had not been committed and this can only be done by awarding mesne profits from the date of the transaction as if it were

Section 54 — Note 11 *(contd.)*
a void transaction. 1945 Mad 253 (254) [AIR V 32].

[2] The word 'void' in S. 54 means 'voidable'. It is clear from S. 54 (2) that a transfer that may be deemed void under this section is not necessarily void ab initio, and it is void only as against the receiver remaining valid as between the parties to the transaction. Consequently such a transfer is not void ab initio but is merely voidable. The transfer is valid until set aside and being in lawful possession, the transferee is not liable for mesne profits. 1936 Nag 139 (139) [AIR V 23] : 31 Nag L R (Sup) 178.

[3] Application under, by official receiver —Transfers by insolvent prior to adjudication set aside—Subsequent application by receiver for mesne profits and interest against transferee held not barred by res judicata — Receiver held entitled to mesne profits and interest for three and six years respectively prior to date of application for same. 1946 Mad 207 (208) [AIR V 33 C 116] (DB).

12. Bar of suit.— [1] Order under S. 54 is not a summary but a considered order. No separate suit lies to cancel the order of the Insolvency Court. 1922 Lah 214 (214) [AIR V9](DB). (AIR 1919 Mad 161 and AIR 1918 All 346, *Followed* ; AIR 1917 Lah 75, *Overruled.*)

13. Limitation. — [1] An application under S. 54 is not governed by Art. 181, Limitation Act. The Court if it so desires can take action under S. 54 at any time during the pendency of the proceedings, when a transfer open to objection under the said section is brought to its notice. 1924 Lah 331 (333) [AIR V 11] (DB).

[2] Application for annulment can be made at any time during the pendency of the insolvency proceeding. Even Art. 181, Limitation Act, would have no application. The right to move the Court accrues from day to day so long as the proceedings continue. ('57) 1957-27 Com Cas 581 (586) (Punj).

14. Movable property.—[1] So far as movable property is concerned mere preference of one creditor at the expense of another if he is not injuriously affected will not make the transaction void or voidable under any law except insolvency law. 1929 Rang 110 (111) [AIR V 16].

15. Effect of annulment of adjudication. — [1] Adjudication annulled under S. 43 for failure to apply for discharge – Custodian under S. 37 can continue receiver's application under S. 54 for setting aside a fraudulent alienation. 1944 Bom 72 (73, 75) [A I R V 31] (DB)+1935 Mad 826 (834) [AIR V 22] : 58 Mad 908 (FB) (But fresh proceedings cannot be initiated.)+1930 Mad 278 (281, 282) [A I R V 17] : 52 Mad 648 (DB).

[**But see** 1938 Nag 312 (313) [A I R V 25] : I L R (1940) Nag 204 (DB). (Adjudication annulled—Proceedings under S. 54 cannot be continued).]

[2] Sale of property prior to his adjudication by Hindu father on his behalf and on behalf of his minor sons, for valuable consideration to discharge antecedent debt, set aside at instance of Official Receiver as offending provisions of Act – Properties not effectively sold by Official Receiver — Annulment of adjudication — Sale in favour of alienee is restored. 1956 Mad 341 (Pr 4) [A I R V 43 C 105]. (AIR 1930 Mad 278, *Dissented from.*)

16. Estoppel.—[1] Creditor alleging mortgage by debtor as act of insolvency — Subsequent withdrawal of this allegation — Adjudication — Official receiver is not estopped from impeaching the mortgage under S. 54. 1933 Lah 354 (355) [AIR V 20].

17. Procedure. — [1] When parties have notice and there is thorough investigation, order passed under S. 54 will not be questioned simply because no formal application was filed. 1935 Cal 190 (191) [AIR V 22] (DB).

[2] Order, first annulling transfer, and then adjudicating debtor insolvent, is not illegal, though wrong in sequence. 1929 Lah 79 (81) [AIR V 16].

[3] Except when the alienations are the outcome of a scheme of fraud and conspiracy between the insolvent on the one hand and the alienees on the other, a joint application or joint trial is not the proper procedure to be adopted. 1951 Trav-Co 55 (Pr 48) [AIR V 38 C 20] : 1950 Trav-Co L R 707 (DB).

18. Appeal. — [1] No second appeal lies from the decision of the Insolvency Court under S. 54. 1940 Lah 6 (6) [A I R V 27]. (But revision lies under S. 75 first proviso—Second appeal can be treated as revision.)+1940 Bom 51 (53) [AIR V 27] : ILR (1940) Bom 1 (DB)+1933 Mad 653 (653) [AIR V 20]. (Revision lies.)+1932 Lah 321 (321) [A I R V 19] (Do)+1935 Mad 432 (433) [AIR V 22]+1930 Nag 272 (272) [AIR V 17].

[2] The finding of the lower appellate Court on the question of fraudulent preference would ordinarily be one of fact and outside the province of the High Court in the second appeal. 1941 Nag 188 (191) [AIR V 28] : I L R (1942) Nag 441 (DB)+1943 Mad 303 (306) [AIR V 30].

[3] Whether on the question of fraudulent preference the burden of proof has been correctly laid or not is a question of law which can be considered in second appeal. 1941 Nag 188 (191) [AIR V 28] : ILR (1942) Nag 441 (DB).

[4] The point that the proceedings under S. 54 are ultra vires for want of leave of Court under S. 54-A is an objection on the ground of jurisdiction which can be taken even on revision under S. 75 provided no evidence is required to support it. 1942 Pesh 90 (91) [AIR V 29].

[5] Any order setting aside a transfer under either S. 53 or S. 54 presupposes an existing insolvency. Where soon after the dismissal of an application by the receiver to set aside a transfer the adjudication is annulled, there is no existing insolvency upon which an order in favour of the receiver or the scheduled creditors as such can be based. The receiver has ceased to exist and hence no appeal is competent by the receiver or a creditor from the order of dismissal. 1935 Rang 498 (500) [AIR V 22] (DB).

[a][54A. By whom petitions for annulment may be made.

A petition for the annulment of any transfer under section 53, or of any transfer, payment, obligation or judicial proceeding under section 54, may be made by the receiver or, with the leave of the Court, by any creditor who has proved his debt and who satisfies the Court that the receiver has been requested and has refused to make such petition.]

[a] *Inserted* by the Provincial Insolvency (Amendment) Act, 1926 (XXXIX of 1926), S. 3.

Section 54 — Note 18 *(contd.)*

[6] Where in challenging transfer by the debtor, the receiver does not press his case under S. 53 before the Judge and does not allow the transferee to adduce any evidence as to the fairness of the price but confines his case to one of fraudulent preference under S. 54, he should not, in appeal, be allowed to adduce fresh evidence as to inadequacy of price. 1935 Cal 650 (654) [AIR V 22] (DB).

[7] An appeal from an order refusing to annul a transfer under S. 54 can only be filed either by the leave of the District Judge or of the High Court under S. 75 (3). 1931 Lah 651 (652) [AIR V 18].

[8] A creditor has a right of appeal from an order passed on an application by the official receiver under S. 54 (4). 1933 Lah 856 (856) [AIR V 20].

[9] Under the first schedule to the Act, only an order annulling a transfer under S. 54 is made appealable as of right. An order refusing to annul a transfer for any reason whatsoever would be covered by S. 75 (3) and can be appealed from only with the leave of the Court. An order dismissing the official receiver's application under S. 54 and directing him to have recourse to an ordinary civil suit is not appealable as of right but only with the leave of the Court under S. 75 (3). 1933 Lah 242 (243) [AIR V 20].

[10] In an appeal by the official receiver against the dismissal of his application under S. 54 it is not open to the District Judge in those proceedings to annul the order of adjudication passed against the insolvent. The Judge having seisin of the Insolvency proceedings is the trial Judge and he alone can deal with such a matter unless it comes before the District Judge on appeal. 1942 Mad 483 (484) [AIR V 29] : ILR (1942) Mad 862 (DB).

[11] Transfer of debts due to insolvent during pendency of application for adjudication—Application by receiver for refund of amounts realised by transferees and for making them personally liable for entire debts is not covered by S. 54 but by S. 4 — Second appeal from order on application is competent. 1937 Lah 913 (914) [AIR V 24].

[12] Insolvents had given fraudulent preference to a Bank who was also a creditor. After the order of adjudication and the appointment of a Receiver, the bank made an application that no notice under S. 19 (2) was issued by the Court and therefore the Bank could not appear and contest the petition and show to the Court that the transfer in its favour was not a fraudulent preference. Application was dismissed on the ground that no notice under S. 19 (2) was necessary when the application was by a creditor. In an appeal by the Bank it was held that as a result of the order of adjudication the creditors would be able to make an application under S. 53 or S. 54 and that would very prejudicially affect the rights of the Bank who was said to be a creditor to whom fraudulent preference was given. The Bank was therefore a person aggrieved by the order of adjudication and had a right to appeal. 1958 Raj 223 (Pr 3) [AIR V 45 C 73] : ILR (1958) 8 Raj 221 (DB).

[13] At the stage of adjudication, neither the Insolvency Court nor the appellate Court is required to say what the effect of the adjudication would be on the annulment proceedings and it is unnecessary for transferees to take an appeal to the Supreme Court from the decision of the High Court in appeal on such point at that stage. High Court will not grant certificate of fitness under Art. 133 (1) (c). A case is not fit one for appeal to the Supreme Court if the question agitated is one which is only academic at the particular stage though it may assume importance at a subsequent stage. 1961 Madh Pra 172 (Pr 10) [AIR V 48 C 58] (DB).

Section 54A — Note 1

[1] Section 54-A read along with S. 53 makes it clear that before an application by a creditor for annulment of a transfer referred to in S. 53 is entertained the Court must give a permission to him under S. 54-A. Without the permission the proceedings are ultra vires. 1942 Pesh 90 (91) [AIR V 29].

[2] Where a Court holds that a creditor has no locus standi to present a petition for annulling a transaction under S. 53 because it violates S. 54-A the Court cannot decide on merits and decision given is ultra vires. 1930 Rang 332 (332) [AIR V 17] (DB).

[3] In the absence of receiver the scheduled creditor can apply for setting aside a transfer under Ss. 53 and 54 and it must be deemed that Insolvency Court has granted him necessary leave when it entertains his application. 1940 Nag 393 (396) [AIR V 27] : I L R (1940) Nag 564 ✣ 1925 Nag 225 (228) [A I R V 12] ✣ 1931 Pat 14 (15) [AIR V 18] : 9 Pat 839 (DB).

[4] The restrictions imposed by S. 54-A of the Provincial Insolvency Act apply only where a Receiver has been appointed in the case. If there is no receiver, any creditor can make an application for annulment of a transfer. 1951 Nag 268 (269) [A I R V 38 C 72] : ILR (1950) Nag 331.

[5] Where on adjudication no receiver is appointed, the Insolvency Court can itself move under S. 53 to set aside transfer by insolvent if the fact of transfer is brought to its notice by any creditor. 1933 Nag 365 (366) [AIR V 20] : 30 Nag L R 35 ✣ 1924 Nag 361 (363) [AIR V 11].

55. Protection of bona fide transactions.

Subject to the foregoing provisions of this Act with respect to the effect of insolvency on an execution, and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency—

(a) any payment by the insolvent to any of his creditors;

(b) any payment or delivery to the insolvent;

(c) any transfer by the insolvent for valuable consideration; or

(d) any contract or dealing by or with the insolvent for valuable consideration :

Provided that any such transaction takes place before the date of the order of adjudication, and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.

[P. I., 1907—S. 38; P. T. I., 1909—S. 57.]

Section 54A — Note 1 *(contd.)*

[6] Debtor dying before adjudication and proceedings continuing under S. 17 — Official Receiver or creditors can apply to set aside settlement and alienations under Ss. 53 and 54. 1933 Mad 25 (27) : [AIR V 20].

[7] The right of a creditor to move the Court under the section is not "a right to sue" the transferee of the insolvent's property. It is merely a right to move the Court to take a particular action for the benefit of the general body of creditors. 1951 Nag 268 (269) [A I R V 38 C 72] : ILR (1950) Nag 331.

[8] Exercise of right conferred by S. 54-A by creditor under S. 53—Transfer established as wholly fictitious — Creditor cannot be deprived of his right on ground that declaration as to fictitiousness could not be given except on receiver's application—Aforesaid objection not taken in the trial Court—Appellate Court should treat proceedings as merely defective in form. 1941 Cal 298 (302) [AIR V 28].

[9] It is the official receiver at whose instance an enquiry into fictitious nature of transaction should be made and it is he who should be the principal party representing whole body of the creditors. 1926 All 29 (29, 30) [A I R V 13] : 47 All 864 (DB) ✣ 1924 Cal 827 (828) [AIR V 11] : 51 Cal 663 (DB).

[10] Fraudulent alienation—Application to annul cannot be made by creditor unless receiver refuses to make it himself. 1922 Mad 246 (246) [AIR V 9] : 45 Mad 189 (DB) ✣ 1924 Lah 553 (554) [A I R V 11] ✣ 1924 Mad 345 (347) [AIR V 11] : 47 Mad 673.

[11] A previous gratuitous transferee cannot challenge the validity of transfer where neither the receiver nor the Court challenges its validity. 1927 All 731 (733) [AIR V 14].

[12] Fraudulent transfer of property belonging to company — Unsecured creditor may challenge transfer with leave of Court if official liquidator refuses to move. 1942 Oudh 417 (420) [AIR V 29] : 18 Luck 110 (DB).

[13] Fraudulent execution of mortgage in favour of *B* — Insolvency Court declaring mortgage void and adjudicating mortgagor as insolvent in absence of *B*—Suit by assignee of mortgagee *B* to declare that mortgage was valid—*Held*, that Insolvency Court ought not to avoid such alienations until moved by official receiver or by aggrieved party. 1932 Mad 233 (233) [AIR V 19].

[14] Transfer by insolvent to a person other than creditor — Proper person to apply for annulment is the receiver. 1921 Lah 81 (81) [AIR V 8]. (Case before introduction of Section 54-A.).

[15] A creditor cannot take action under S. 54-A, after the insolvent has been given an absolute discharge. 1943 Mad 592 (592, 593) [AIR V 30] : ILR (1944) Mad 92 (DB).

[16] The right of a creditor to move the Court under the section does not fall within the purview of O. 22, Rr. 3 and 4, Civil P. C., so as to make the applications of persons claiming through a creditor untenable by reason of his death pending an application for annulment, as in these cases no question of abatement arises. 1951 Nag 268 (269) [A I R V 38 C 72] : ILR (1950) Nag 331.

SECTION 55 — SYNOPSIS

1. **Scope.**
2. **Clause (a) — Payment to creditor.**
3. **Clause (b) — Payment or delivery to insolvent.**
4. **Clause (c) — Transfer for valuable consideration.**
5. **Proviso.**
6. **Transaction—Meaning of.**
7. **Illustrative cases.**

1. Scope. — [1] Section 55 protects only payments by or to insolvent or transfer by insolvent for valuable consideration without notice of insolvency petition. 1935 Mad 817 (820) [AIR V 22] : 58 Mad 1032 (DB) ✣ 1936 Nag 28 (29) [A I R V 23] : 31 Nag L R (Sup) 121 ✣ 1923 Nag 290 (291) [A I R V 10] : 19 Nag L R 144.

[2] The substantive part of S. 55 validates payments made by or to insolvents by persons who do so bona fide. The proviso takes out of the protection payments and transactions which would not be bona fide. 1958 Mad 486 (488) [AIR V 45 C 164].

[3] The test of bona fides is knowledge of the presentation of the petition in insolvency and that knowledge must necessarily be factual

Section 55 — Note 1 *(contd.)*
knowledge. 1958 Mad 486 (488) [A I R V 45 C 164].

[4] The title of the Receiver relates back to the date of the filing of the Insolvency application and generally speaking, transactions entered into by the insolvent at any time between commencement of insolvency and date of the order of adjudication will not prevail against him. Under S. 55 the Law however protects certain transactions between the date of commencement of insolvency and the date of the order of adjudication provided the person with whom such transaction takes place has not at the time notice of the presentation of the insolvency petition. 1957 Pepsu 22 (23) [AIR V 44 C 6].

[5] There is no such hard and fast rule that any arrangement or agreement made by a petitioning creditor with his debtor, after the institution or under the shadow of bankruptcy proceedings, whereby the creditor is able to get more than that to which he was legally entitled amounts to extortion in Bankruptcy law, notwithstanding the absence of mala fides or anything amounting to oppression in fact. (1955) 1955-2 All E R 65 (78).

[6] An Insolvent has a right to the surplus remaining after the administration of his estate and can validly dispose it by will or deed or otherwise during the pendency of the insolvency even before the surplus is ascertained, although such disposition will of course be ineffectual unless in the event there is proved to be a surplus upon which it can operate. 1924 Bom 49 (50, 51) [A I R V 11] (DB).

2. Clause (a)—Payment to creditor.—[1] Payment by insolvent to creditor in violation of S. 55 (a)—Court can order refund of money so paid as it continues to belong to estate of insolvent. 1936 Nag 28 (29) [A I R V 23] : 31 Nag L R (Supp) 21.

3. Clause (b) — Payment or delivery to insolvent. — [1] Order XX, Rule 13 (2) Civil P. C., provides that when it appears in an administration suit that the estate of the deceased is insolvent, the rules that are in force for the time being with respect to the estates of persons adjudged or declared insolvent shall apply as regards the respective rights of secured and unsecured creditors and the debts and liabilities provable. Under the Insolvency Law, protection is given to payments made prior to the presentation of the petition of insolvency which when applied to an administration suit would be the date of the institution of the suit. The rule of relation back does not relate to a period anterior to the presentation of the insolvency petition. Transactions which do not come under that rule are prima facie valid unless they can be avoided under some express statutory provision of the Insolvency Act and therefore the validity of payments made before the institution of the administration suit to non-prized kuri subscribers under the directions of the deceased kuri foreman after his default can not be questioned unless the transactions impugned fall within the mischief of Insolvency law. 1953 Trav-Co 321 (323) [A I R V 40 C 119] : ILR (1953) Trav-Co 326 (DB).

4. Clause (c) — Transfer for valuable consideration. — [1] Section 55 (c) does not affect the avoidance of transfer under general law or under S. 53, T. P. Act. 1932 Cal 642 (647) [AIR V 19] : 59 Cal 1135 (DB).

[2] Where a transfer is made subsequent to the presentation of the insolvency petition but in performance of a prior valid agreement, it would be beyond the purview or mischief of the Insolvency law. Prior agreements in pursuance of which transfers are effected must have been made contemporaneously with the advance of the loan or with the debtor incurring an obligation in any other manner in order to attract the protection afforded by the section. 1951 Trav-Co 55 (67) [AIR V 38 C 20] : 1950 Trav-Co L R 707 (DB).

[3] If the original transfer is found to be sham or fictitious the subsequent transfer must also fall with it. In a proper case it may however, be possible to protect a subsequent transfer if it falls within the purview of S. 55 (c). 1956 Trav-Co 61 (62) [A I R V 43 C 21] : ILR (1955) Trav-Co 764 (DB).

5. Proviso.—[1] The proviso takes out of the protection given by the substantive part of the section payments and transactions which would not be bona fide. 1958 Mad 486 (488) [AIR V 45 C 164] (Test of bona fides is factual knowledge of the presentation of the insolvency petition.)

[2] The person claiming the benefit of the proviso to S. 55 has to prove (i) that the transfer in his favour was for valuable consideration, and (ii) that he had no notice of the presentation of the insolvency petition. 1957 Pepsu 22 (23) [AIR V 44 C 6].

[*See also* 1933 Sind 85 (86) [A I R V 20] (DB).]

[3] The constructive notice which S. 19 (2) postulates would be wholly an insufficient basis for depriving a person of the protection afforded by S. 55. The notice prescribed in S. 19 (1) is limited for the purpose of the assertion of rights as creditors, and from that constructive notice it cannot be held that an actual knowledge of the pendency of the insolvency proceedings could be imputed sufficient to bring it within the proviso to S. 55. 1958 Mad 486 (488) [AIR V 45 C 164].

[4] Execution of mortgage as security for payment of rent to Government — Rent not paid — Adjudication — Government selling properties without notice to receiver—Application by receiver for setting aside sale—*Held* if Crown wished to rely on protection given by S. 55 it should have pleaded it and proved that it had no notice of the presentation of insolvency petition at the date of the transaction. 1935 Rang 273 (274) [AIR V 22] (DB).

6. Transaction — Meaning of. — [1] 'Transaction' in S. 55 contemplates something done by insolvent and not where he is passive. 1935 Mad 817 (820) [A I R V 22] : 58 Mad 1032 (DB).

[2] Suit for specific performance of agreement to execute mortgage — Plaint filed after

Realisation of Property

56. Appointment of receiver.

(1) The Court may, at the time of the order of adjudication, or at any time afterwards, appoint a receiver for the property of the insolvent, and such property shall thereupon vest in such receiver.

(2) Subject to such conditions as may be prescribed, the Court may—

(a) require the receiver to give such security as it thinks fit duly to account for what he shall receive in respect of the property; and

(b) by general or special order, fix the amount to be paid as remuneration for the services of the receiver out of the assets of the insolvent.

Section 55 — Note 6 *(contd.)*

presentation of insolvency petition but prior to adjudication—Suit held not a transaction protected by S. 55. 1935 Mad 817 (819) [AIR V 22] : 58 Mad 1032 (DB).

7. Illustrative cases. — [1] After filing of insolvency petition but before order of adjudication insolvent obtaining money from third person and depositing it under O. 21, R. 89, Civil P. C., for setting aside sale of his property — Decree-holder auction-purchaser having notice of insolvency petition cannot claim protection under S. 55 even if deposit be regarded as payment to him — Money deposited vests in receiver under S. 28. 1943 Cal 555 (556) [AIR V 30] : I L R (1943) 2 Cal 397 (DB).

[2] A purchased properties belonging to insolvent by sale-deed executed by insolvent pending insolvency proceedings with knowledge of same and purchase-money was deposited by A at instance of insolvent in Court to set aside court sale of same in execution of decree obtained against insolvent prior to insolvency proceedings—Official receiver applied for sum paid in Court and got it— Later receiver sought to sell properties sold to A — *Held* he was entitled to do so and A could not claim protection under S. 55. 1944 Mad 278 (280, 281) [AIR V 31] : I L R (1944) Mad 779 (DB).

[3] Mortgage during pendency of insolvency proceedings against mortgagor, effected prior to Act V of 1920 came into force — Transaction protected by S. 38 of Act III of 1907 even though mortgagee had taken it with notice of insolvency petition — Protection not lost by subsequent change in law by Act V of 1920. 1934 Lah 819 (821) [AIR V 21] (DB).

[4] Mortgage by insolvent during pendency of insolvency proceedings but before his adjudication—Mortgagee having notice of insolvency petition is not protected under S. 55. 1934 Lah 819 (820) [AIR V 21] (DB).

[5] Generally it is incompetent for the Court in proceedings under S. 53 to inquire into the validity of transfers by transferees from insolvents. But in proceedings properly framed under that section it may be convenient and sometimes necessary to have the parties before the Court whose interests will necessarily be affected by the decision. It would be extremely inconvenient and expensive if when transfers are sought to be avoided under Ss. 53. to 55, transferees from those transferees even though the sub-transferees were subsequent to the petition or to the order of adjudication could maintain that they should not be impleaded and that the receiver should proceed against them by a separate suit. 1932 Mad 513 (515, 516) [A I R V 19].

SECTION 56 — SYNOPSIS

1. Appointment of receiver.
2. Vesting of property in the receiver.
3. Status of receiver.
4. Remuneration of receiver — Sub-section (2).
5. Delivery of insolvent's property from the possession of any person to the receiver—Sub-section (3).
6. Remedies against the receiver — Sub-section (4).
7. Appeals.

1. Appointment of receiver. — [1] There is no prohibition in S. 56 against the appointment of a person other than the official receiver as receiver for a special purpose. 1939 Mad 374 (374, 375) [AIR V 26] : I L R (1939) Mad 194 (DB).

[2] Person who has purchased the property of the insolvent before or after insolvency petition is not fit to be appointed receiver. ('42) 1942 Nag L Jour 82 (84) (DB).

[3] Ordinarily, it is objectionable to appoint pleader who represents party in insolvency proceedings as receiver. 1938 Nag 230 (231) [AIR V 25] : I L R (1940) Nag 161. (Special circumstances may permit such an appointment.)

[4] Receiver can be appointed without setting aside an order of discharge at any time when it is found that there is property of the insolvent to which S. 28 is applicable. 1940 Rang 156 (156) [AIR V 27] : 1940 Rang L R 392.

[5] A receiver could not be appointed as to part only of insolvent's property. 1925 Rang 224 (224) [AIR V 12] (DB).

[6] Refusal to appoint receiver to insolvent's property on ground of lapse of seven years after order for adjudication is not legal. 1924 Cal 849 (849) [AIR V 11] (DB).

[7] Appointment of receiver in insolvency —Subsequent appointment of a receiver in the mortgagee's pending suit against the debtor cannot be made. 1936 Pat 357 (358) [AIR V 23] (DB).

2. Vesting of property in the receiver.— [1] The word vest has not got a fixed connota-

(3) Where the Court appoints a receiver, it may remove the person in whose possession or custody any such property as aforesaid is from the possession or custody thereof :

Provided that nothing in this section shall be deemed to authorize the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove.

(4) Where a receiver appointed under this section—

(a) fails to submit his accounts at such periods and in such form as the Court directs, or

(b) fails to pay the balance due from him thereon as the Court directs, or

(c) occasions loss to the property by his wilful default or gross negligence, the Court may direct his property to be attached and sold, and may apply the proceeds to make good any balance found to be due from him or any loss so occasioned by him.

(5) The provisions of this section shall apply, so far as may be, to interim receivers appointed under section 20.

[P. I., 1907—S. 18; P. T. I., 1909—S. 77.]

Section 56 — Note 2 *(contd.)*

tion, meaning in all cases that the property is owned by the person or the authority in whom it vests. It may vest in title, or it may vest in possession or it may vest in a limited sense, as indicated in the context in which it may have been used in a particular piece of legislation. Under S. 56 the property vests in the receiver for the purpose of administering the estate of the insolvent for payment of his debts after realising the assets. The property of insolvent vests in the receiver not for all purposes but for the purposes of the Insolvency Act and the Receiver has no interest of his own in the property. 1957 S C 344 (Pr 19) [(S) AIR V 44 C 51] : 1957 S C R 1 : I L R (1957) Punj 850.

[2] Vesting order made by a competent foreign Court operates upon the property of the insolvent within British India creating a title in the official receiver so invested with effect from the date of the order and such vesting order prevails against prior attachment effected by British Indian Courts. 1931 Mad 474 (476, 477) [AIR V 18] : 54 Mad 727 (DB).

[3] Decree of judgment-debtor against another attached in execution — Attachment gives only right to execute decree—Insolvency subsequent vests decree in receiver who can only execute decree. 1918 All 324 (324) [AIR V 5] : 40 All 86 (DB).

[4] Prior to the amendment of the section by Act XXXIX of 1926, vesting order was *held* to be necessary for vesting property in the receiver. But as the section stands at present the vesting takes place statutorily as soon as a receiver is appointed. Hence the following cases decided under the section before the amendment are not good law. 1917 Mad 102 (103) [AIR V 4] (DB) ✣ 1920 Mad 790 (791) [AIR V 7] : 43 Mad 869 ✣ 1921 Mad 642 (643) [AIR V 8] (DB) ✣ 1924 Mad 461 (462) [AIR V 11] (DB) ✣ 1924 Mad 550 (552) [AIR V 11]: 47 Mad 462 (DB).

3. Status of receiver. — [1] A receiver in bankruptcy is a trustee for creditors. 1934 Rang 112 (115) [AIR V 21] (DB).

[2] A receiver is an officer of the Court appointed under statutory provisions. The mere fact that the official receiver of the district where there is one is appointed as the receiver in a particular case does not make the receiver a servant of the Secretary of State for India. 1936 All 89 (90) [AIR V 23] (DB) ✣ 1929 Nag 338 (339) [AIR V 16] : 26 Nag L R 46.

[3] Receiver is not only representative of insolvent but may also be representative of creditors as where he sues to set aside a fraudulent transaction effected by the insolvent. 1931 Oudh 405 (407) [AIR V 18] (DB).

[4] Suit for arrears of rent against the insolvent — The receiver is not a necessary party to the suit. 1919 Cal 960 (961) [AIR V 6] (DB). (Case decided under Act of 1907).

[5] Suit by son to establish his right to property vested in the receiver on father's adjudication — Receiver is a necessary party. 1917 Lah 351 (352) [AIR V 4] : 1917 Pun Re No. 54 (DB). (Case decided under Act of 1907.)

[6] Suit to establish right to property already sold by receiver — Receiver is not a necessary party. 1917 Lah 360 (361) [AIR V 4] : 1917 Pun Re No. 55 (DB).

[7] Interim receivers have much the same rights and liabilities as a receiver. 1928 Mad 454 (455) [AIR V 15).

4. Remuneration of receiver — Sub-section (2). — [1] Where the order appointing a receiver does not specify the source from which remuneration is to be paid, nor any particular time for payment though it fixes the rate, the remuneration must be paid out of the assets of the insolvent. 1938 Nag 230 (232) [AIR V 25] : I L R (1940) Nag 161.

[2] Rule 16 of chapter 23 of the Manual of Circulars issued by the Bombay High Court directs that the remuneration of receiver, other than official receivers shall be in such proportion to the amounts of the dividends distributed as the Court may direct provided that it does not exceed five percentum of the amount of dividends. 1925 Bom 472 (2) (472) [AIR V 12] (DB).

Section 56 — Note 4 *(contd.)*

[3] 'Assets' means all of a person's property of whatever kind which may be used to satisfy debts or demands existing against him. 1938 Nag 230 (232) [AIR V 25] : I L R (1940) Nag 161.

[4] Property under mortgage sold by receiver — The whole of the proceeds is not assets available for distribution — Receiver entitled to remuneration only on such part of it as remains in his hands, after paying off the mortgagee. 1928 Rang 23 (24) [AIR V 15] : 5 Rang 623 (DB) ✠ 1932 All 260 (261) [AIR V 19] (DB). (The word "assets" means effects of an insolvent-debtor or bankrupt applicable to the payment of his debts. Therefore the interest of the mortgagee should not be taken into account in considering what are the assets of the insolvent.) ✠ 1923 Nag 150 (150) [AIR V 10]. (Only the right to redeem can be the assets available for distribution where property is under mortgage.) ✠ 1934 Rang 112 (116) [AIR V 21] (DB) ✠ 1929 Rang 168 (170) [AIR V 16] : 7 Rang 126 (DB).

[**See however** 1931 All 723 (725) [AIR V 18] (DB) ✠ 1931 All 94 (95) [AIR V 18].]

[5] Remuneration of Receiver fixed on realizations and distribution — Receiver prevented from making realizations and disbursements owing to delaying tactics of debtor — Tenure of Receiver ending as result of order of annulment — Court has no power to compensate Receiver for his services on principle of quantum meruit for work done during period of receivership — But he can be compensated on basis of quantum meruit during the period of his appointment as appointee under S. 37 after annulment, when there was no express agreement for the period, on the question of remuneration. 1948 Nag 92 (Prs 5, 6) [AIR V 35 C, 35] : I L R (1947) Nag 397.

5. Delivery of insolvent's property from the possession of any person to the receiver —Sub-section 3.—[1] Section 56 provides for a summary remedy in insolvency for the recovery of the assets of the insolvent. It has no application to a case where suits are instituted in the interest of the general body of creditors by a receiver, and such suits for recovery of the insolvent's property from third parties in whose possession it may be, are not barred by the section. 1946 Mad 202 (203) [AIR V 33 C 113] : ILR (1946) Mad 727 (DB).

[2] The power to remove property from the possession of any person is reserved to the Court. The receiver himself has no such power under S. 56 to remove property from the possession of others than the insolvent. 1926 Pat 291 (291, 292) [AIR V 13].

[3] Section 56 (3) is not limited in applicability to cases of application by receiver only—A purchaser from the receiver also can obtain an order for delivery of property from the Court against a third party who resists it. 1922 Mad 147 (148) [AIR V 9] : 45 Mad 434 (DB) ✠ 1948 Cal 343 (Pr 11) [AIR V 35 C 139] ✠1933 Mad 609 (610) [AIR V 20]. (Adjudication of father — Properties sold by receiver—Obstruction to delivery—*Held* the Insolvency Court was entitled to remove obstruction.) ✠ 1935 All 546 (548) [AIR V 22] ✠ 1944 Mad 481 (483) [AIR V 31] : ILR (1945) Mad 10 (FB). (AIR 1928 Mad 531, *Overruled.*)

[4] Receiver to recover possession must show that the assets belong to the insolvent. Where he cannot do so he must file a separate suit. 1938 Nag 546 (548) [AIR V 25] : I L R (1940) Nag 293 (DB) ✠ 1921 Mad 204 (208, 209) [AIR V 8] : 44 Mad 524 (DB). (Property of insolvent sold in execution after adjudication — Fact that there has been a Court sale not a ground for holding that the insolvent has present right to the property and delivery thereof therefore can be ordered.)

[5] No person who has a present right to retain possession of the property against the insolvent can be removed from such possession. 1934 Lah 1006 (1008) [AIR V 21] (DB) ✠ 1935 Cal 460 (462) [AIR V 22] : 62 Cal 483 (DB). (Person appointed as receiver for the benefit of the mortgagee at his instance cannot be removed.) ✠ 1925 Rang 224 (224) [AIR V 12] (DB). (Transfer by insolvent of properties shortly before the application for insolvency was filed — Transfer not annulled — Until annulment the insolvent not entitled to remove from the transferee the possession or custody of property and hence the receiver appointed in respect of the property also cannot do so.)

[**See however** 1917 All 373 (374) [AIR V 4]: 39 All 633 (DB). (Benami sale of insolvent's property—Receiver can have delivery without getting sale annulled.)]

[6] The words 'has not a present right so to remove' in S. 56 (3) does not mean 'has not a present right to remove' except under decree of Civil Court. 1940 Nag 233 (234) [A I R V 27] : ILR (1941) Nag 757 (DB).

[7] In order that the property of insolvent should vest in the receiver, it is essential that the insolvent should have an interest in praesenti to dispose of the same. The power of disposition must be unconditional. Where according to the provident fund rules of the company, the member has no disposing power over his fund except under certain conditions and the member cannot compel the trustees to make payment of the fund, upon the insolvency of the member, the receiver or the Court cannot remove the trustees from the custody of the same as enjoined by the proviso to S. 56 (3). 1951 Pat 488 (Prs 6, 7) [AIR V 38 C 136] : 29 Pat 713 (DB). (AIR 1946 Pat 430 & AIR 1949 Pat 337, *Dissented from.*)

[8] Third person put in position to realise certain decree debts due to a person so that he could hold the realisation for the benefit of original debtor, embezzling the amounts—His liability to recoup the money is a tortious liability and cannot be treated as amounting to his being in possession or custody of property belonging to the insolvent where the original decree-holder is adjudicated — The Insolvency Court cannot initiate proceedings against him for the recovery of that money from him. 1930 All 622 (624) [AIR V 17] (DB).

[9] An order under S. 56 (3) cannot be passed against a person who claims adversely to insolvent however flimsy that title may be.

Section 56 — Note 5 *(contd.)*
1926 Mad 363 (363, 364) [AIR V 13] : 49 Mad 762 (DB) * 1939 Nag 10 (12) [AIR V 26] : ILR (1941) Nag 655 * 1919 Cal 965 (967, 968) [AIR V 6] (DB). (Case decided under Act of 1907.) * 1919 Mad 595 (595, 596) [AIR V 6] (DB). (Do.)

[10] Where a title is set up against the insolvent, the Insolvency Court can act under S. 4 and try the issue whether insolvent has title to property or not. But before it can do so there must be a proper application by the receiver or by a creditor or any other person who is interested in preserving insolvent's estate. 1939 Nag 10 (12) [AIR V 26] : ILR (1941) Nag 655

[11] In disputes of the kind which cannot be tried summarily by affidavit under S. 56(3) if the Insolvency Court decides to take the powers of a Civil Court under S. 4 and decides to try the matter itself it would have to proceed as a Civil Court would have proceeded—That is it would have to record full and proper pleadings, frame issues and take evidence in the ordinary way. 1940 Nag 233 (235) [AIR V 27] : ILR (1941) Nag 757 (DB).

[12] Once possession of property had been given to the receiver Court cannot order its redelivery except in consequence of an order under S. 4 on the question of title. 1941 Mad 75 (76) [AIR V 28].

[13] Section 56 (3) read with S. 54 gives jurisdiction to Insolvency Court to pass order against creditor to refund amount which appertained to estate of insolvent. 1936 Nag 28 (29) [AIR V 23] : 31 Nag L R (Sup) 121.

[14] On an application made to it under S. 56 (3), the Court can consider whether the person in possession is one whom the insolvent has a present right to remove and is not bound to throw out the application merely on finding that such person is claiming a title in himself. If the Court finds that the claimant has a plausible case, it must direct a proper enquiry under S. 4, to which the receiver ought to be made a party, if the application is not by him. If in such enquiry the Court finds that the claimant has no title, it will be entitled to hold that he is a person whom the insolvent has a present right to remove and it can then make against him an order for possession under S. 56 (3). 1948 Cal 343 (Pr 11) [AIR V 35 C 139].

[15] A Court sale of insolvent's property at the instance of an unsecured creditor is void if the sale has been conducted after the order of adjudication. In such a case it is open to the official receiver to request the Court for an order directing the auction purchaser to put the official receiver in possession of the property sold under S. 4 and it is open to the Court to grant such relief under S. 56 (3). 1951 Trav-Co 193 (Pr 6) [AIR V 38 C 78] : 1950 Trav-Co L R 125 (DB).

[16] Official receiver asking Court for permission to sell properties free from all incumbrances but Court permitting sale subject to mortgage—By mistake, receiver selling property free from incumbrances — Adjudication cancelled but properties remaining vested in receiver — Creditor's application under Ss. 4 and 56 (3), requesting cancellation of sale and holding fresh sale subject to encumbrances, declaring properties sold to belong still to estate of insolvent — Application held could not be granted — Receiver had power to sell property free from mortgage in spite of administrative order of the Court — S. 4 held was not applicable. 1949 Mad 834 (Pr 4) [AIR V 36 C 375].

6. Remedies against the receiver — Subsection (4). — [1] The Court can and should enquire at any time into the conduct of the receiver who has withheld sums which properly belonged to the creditors. 1934 Rang 112 (115) [AIR V 21].

[2] The Court can proceed against a receiver who has not accounted for all the properties vested in him including property sold after date of application of insolvency and before adjudication. ('42) 1942 Nag L Jour 82 (87).

[3] In the matter of taking action against the receiver the Court has a discretion. ('42) 1942 Nag L Jour 82 (87).

[4] It is the duty of the receiver and Court to preserve the estate of the insolvent while administering his estate. 1915 All 389 (390) [AIR V 2] : 38 All 37 (DB).

[5] The receiver is personally liable for loss or damage caused by his negligence. He cannot bind the Secretary of State with his acts. 1932 All 575 (579, 580) [AIR V 19] : 54 All 879 (DB).

[6] The personal liability of the receiver in insolvency is enacted in the same words as the liability of a receiver appointed under the Civil P. C. The receiver under the Civil P. C. is entitled to apply for directions to Court in all important matters and is protected from such personal liabilty where he obtains directions from Court. Similar right to ask for direction is available to the receiver in insolvency who will be protected from the personal liability by such directions obtained properly. ('11) 6 Sind L R 286 (286). (Case decided under Act of 1907.)

[7] The loss contemplated is loss to the property and not the loss to the insolvent. Therefore the Court has to determine the loss to the property occasioned by the receiver. ('42) 1942 Nag L Jour 82 (83).

[8] Official receiver paying dividend payable to creditor to third party on account of gross negligence — Court can direct it to be paid to creditor. 1946 Mad 382 (383) [AIR V 33 C 196].

[9] Official receiver allowing a decree for partition to be passed due to negligence—Suit by creditors to declare that decree was not binding on the estate — *Held* that the provision for remedy against receiver in S. 56 (4) does not bar the suit. 1936 Mad 161 (163)[AIR V 23] : 59 Mad 770 (DB).

[10] A summary order directing the legal representatives of the deceased Official Receiver to refund certain amounts which he had received by way of commission is wrong. The proper course to enforce the liability, if any, is by way of a regular suit. ('59) 1959 Ker L R 222 (223) (DB).

57. Power to appoint Official Receivers.

(1) The State Government may appoint such persons as it thinks fit (to be called "Official Receivers") to be receivers under this Act within such local limits as it may prescribe.

(2) Where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under this Act, he shall be the receiver for the purpose of every order appointing a receiver or an interim receiver issued by any such Court, unless the Court for special reasons otherwise directs.

(3) Any sum payable under clause *(b)* of sub-section *(2)* of section 56 in respect of the services of an Official Receiver shall be credited to such fund as the State Government may direct.

(4) Every Official Receiver shall receive such remuneration out of the said fund or otherwise as the State Government may fix in this behalf, and no remuneration whatever beyond that so fixed shall be received by the Official Receiver as such.

[P. I., 1907 — S. 19 ; P. T. I.. 1909 — S. 81.]

Section 56 *(contd.)*

7. Appeals. — [1] Where the Court finds that the receiver had been wrongly given possession it should direct him to deliver possession to the proper person. Where it does not pass such order the aggrieved person may appeal and the appellate Court should pass the order. Mere delay in asking to be put in possession is not a ground on which the appeal can be dismissed. 1929 Nag 338 (339) [AIR V 16] : 26 Nag L R 46.

[2] Application of receiver in insolvency for direction that certain properties in the custody of receiver appointed in mortgage suit be delivered to him rejected — No appeal lies from the order of rejection. 1935 Cal 460 (461) [AIR V 22] : 62 Cal 483 (DB).

Section 57 — Note 1

[1] Official receiver has two capacities as representing insolvent and the other as representing creditors. But he does not represent the creditors under all circumstances. In the insolvency he represents both but in proceedings outside insolvency he represents only the insolvent. 1941 Lah 6 (7, 8) [AIR V 28] : ILR (1940) Lah 345 (DB). (Decree in proceedings outside insolvency — Receiver is bound only as representing the insolvent.)

[2] The official receiver in so far as ordinary civil Courts are concerned is only a suitor. 1940 Mad 733 (735) [AIR V 27]. (He should file plaint or a written statement or a counter affidavit in the proper form where he desires to do so.)

[3] A receiver is an officer of the Court appointed under statutory provisions, and the fact that an official receiver is provided for a particular district and the Insolvency Court appoints him to act as a receiver in a certain case cannot make the receiver a servant of the Secretary of State for India nor is the latter responsible for the receiver's wrongful acts in the discharge of his duties. 1936 All 89 (90) [AIR V 23] (DB) ✣ 1932 All 575 (579, 580) [AIR V 19] : 54 All 879 (DB). (Secretary of State is not bound by his contracts—Effect of contract entered into with an official receiver will be where such contract is entered into with permission of the Court the insolvent's estate will be liable and in the absence of permission he will be personally liable.)

[4] Special receiver may not only be appointed at an initial stage but the Court can remove an official receiver and appoint a special receiver for valid reasons — Reasons connected with the personality of the official receiver are valid reasons for removal. 1923 Mad 355 (357) [AIR V 10]:46 Mad 405 (DB) ✣ 1938 Cal 627 (634) [AIR V 25]. (Administration of estate requiring skill in accounts — Official receiver's knowledge of law not of any advantage—Official receiver could be removed and a chartered accountant appointed in his place as receiver.)

[5] Where a suit is sought to be instituted against an official receiver, it is necessary to give him the two months notice prescribed by S. 80, Civil P. C. 1932 All 575 (577) [AIR V 19] : 54 All 879 (DB) ✣ 1925 All 241 (242) [AIR V 12] : 47 All 291 (DB). (Official receiver is a public officer within the meaning of S. 2, sub-s. (17) of Civil Procedure Code.)

[6] A vesting order is necessary before the property of an insolvent could vest in official receiver of the area where the insolvent is resident. The order is invariably in writing and in the absence of a written order or the verbal instructions of Court no presumption can be drawn that a particular estate has vested in him. 1921 Mad 642 (643) [AIR V 8] (DB).

[7] It is of general importance that all insolvencies should be kept within the control of the Official Receiver, unless very exceptional reasons such as reasons connected with the personality of the Official Receiver are put forward to deprive him of the control, Where no application or affidavit has been submitted to remove the official receiver assigning any special reasons, the mere statement of the Court that the creditors have complained against him that he is not acting with diligence is not enough to justify removal. 1954 Hyd 160 (160) [AIR V 41 C 49] ILR (1954) Hyd 218 (DB).

58. Powers of Court if no receiver appointed.

Where no receiver is appointed, the Court shall have all the rights of, and may exercise all the powers conferred on, a receiver under this Act.

[P. I., 1907 — S. 23.]

59. Duties and powers of receiver.

Subject to the provisions of this Act, the receiver shall, with all convenient speed, realise the property of the debtor and distribute dividends among the creditors entitled thereto, and for that purpose may—

(a) sell all or any part of the property of the insolvent ;

(b) give receipts for any money received by him ;

and may, by leave of the Court, do all or any of the following things, namely :—

(c) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same ;

Section 57 — Note 1 *(contd.)*

[8] Decree against receiver — Discharge of insolvent pending appeal by receiver — Discharge conditional continuing vesting of property in receiver — Decree-holder taking out execution — Discharged insolvent impleaded — Contention by discharged insolvent that decree is not executable against his property since he was not made party to decree — Decree held executable against property which still continued to be vested in receiver who was a party to the suit throughout. 1952 All 399 (Pr 7) [AIR V 39] (DB).

[9] Remuneration of official receiver — See notes under S. 56.

Section 58 — Note 1

[1] Where no receiver is actually appointed the Court is the receiver. 1918 All 402 (403) [AIR V 5] : 40 All 197 (DB). (Case decided under Act of 1907.)

[2] Insolvency petition transferred to official Receiver for adjudication and administration of the estate—Official receiver after adjudicating assigning interest of insolvent—No separate vesting order by Court in favour of receiver —*Held*, that even if it could be taken that the official receiver was validly appointed the assignment was valid as the Court can be deemed to have acted under S. 23 read with S. 20 (e). 1921 Mad 216 (217) [AIR V 8]: 44 Mad 547 (DB). (Case decided under the old Act.)

[3] On the death of receiver if no other receiver appointed insolvent's estate vests in the Insolvency Court. 1936 Cal 521 (523) [AIR V 23] : 63 Cal 1210.

[4] The Court acting under S. 23 (corresponding to S. 58 of the Act of 1920) cannot be said to act privately. The proceeding is a proceeding in Court. 1921 Nag 25 (26, 27) [AIR V 8] : 17 Nag L R 49. (Case decided under Act of 1907.)

[5] The Insolvency Court obtains powers to realise the estate of an insolvent only under S. 58 read with S. 59. Hence it cannot have powers while realising the estate which would not be available to the receiver. In the same way as a sale by receiver is not a proceeding under the Civil Procedure Code sale by the Court also is not a proceeding under the Code. 1940 Rang 186 (187) [AIR V 27] : 1940 Rang L R 263 (DB).

[6] Insolvency Court managing the estate has the same powers as the receiver. Therefore a Court exercising insolvency jurisdiction has no power to inquire into and judicially ascertain claims by or on behalf of the insolvent's estate. ('13) 9 Nag L R 182 (183).

[7] Order for costs in favour of insolvent against creditor — Estate of insolvent vesting in the Court on death of receiver — Insolvent or on his death his heirs cannot execute unless they obtain leave of Court recognising them as agents — Mere leave to execute the order does not invest them with the status. 1936 Cal 521 (523) [AIR V 23] : 63 Cal 1210.

[8] Court by written order directing one *G* who was not appointed receiver to find ways and means to pay off debts of the insolvent— On report by *G* Court giving him permission to mortgage property belonging to insolvent— *Held G* was acting as the agent of the Court in effecting the mortgage of the property and that the mortgage was not a nullity. 1934 Lah 867 (870) [AIR V 21] (DB).

[9] A decree obtained by a secured creditor against an adjudged insolvent without impleading insolvency court as a defendant after an adjudication has been passed under S. 27 but before a receiver is appointed to take charge of the insolvent's estate, is ineffective and does not bind the receiver. The fact that the creditor had obtained permission of the Insolvency Court to file the suit is not sufficient to validate the decree. 1953 Nag 268 (Prs 15, 16) [AIR V 40 C 114]: I L R (1952) Nag 662 (DB).

SECTION 59 — SYNOPSIS

1. Scope and applicability.
2. Receiver to realise and distribute assets.
3. Sale by receiver.
4. Receiver can continue the business of the insolvent.
5. Power to institute and defend suits.
6. Sale for deferred payments.
7. Compromise by receiver.
8. Power to acknowledge debts.

(d) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent ;

(e) employ a pleader or other agent to take any proceedings or do any business which may be sanctioned by the Court ;

(f) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time subject to such stipulations as to security and otherwise as the Court thinks fit ;

(g) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts ;

(h) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon ; and

(i) divide in its existing form amongst the creditors, according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot readily or advantageously be sold.

[P. I., 1907 — S. 20 ; P. T. I., 1909 — S. 68.]

Section 59 *(contd.)*

1. Scope and applicability. —[1] Section 59 even assuming that it is exhaustive as to the duties and powers of a receiver does not control the powers of the Court under S. 4. ('35) 18 Nag L Jour 14 (16).

[2] Duties and powers of a receiver are stated in S. 59. It is not within his competence to enter into a transaction which will involve the estate into unnecessary litigation or which is not for the benefit of the insolvent estate. 1946 Nag 24 (26) [AIR V 33 C 7]: ILR (1945) Nag 826.

[3] Contention raising very important matter between the insolvent and general body of creditors should be decided by Court and not by officer that may be appointed by Court, 1924 Pat 259 (262) [AIR V 11]: 2 Pat 724 (DB).

[4] Receiver is not merely representative of insolvent — He is Court officer and sometimes represents insolvent's creditors. 1931 Oudh 405 (407) [AIR V 18] (DB).

[5] Official receiver acting under this section is not a Court. S. 47 (S. 4 of this Act) does not apply to his acts. 1918 Mad 702 (703) [AIR V 5]: 41 Mad 440 (DB). (Case decided under Act of 1907.)

2. Receiver to realise and distribute assets. — [1] The official receiver cannot simply receive what the creditors discover as assets of their debtor. His duty is to collect the assets and for this purpose he must make enquiries to find what assets there are to be collected. 1937 Rang 276 (280) [AIR V 24]: 14 Rang 704 (DB).

[2] It is the duty of receiver to realize the property of the debtor with all convenient speed. It would be most inconvenient and unjust if neither the creditors nor the receiver knew for 18 years exactly what the insolvent's estate consisted of. These are matters to be taken up and settled "as speedily as possible". 1948 Nag 392 (Pr 14) [AIR V 35 C 135]: ILR (1948) Nag 530 (DB).

[3] So long as the insolvent is not discharged and so long as there are assets of the insolvent available, any creditor can apply to the court and it is the bounden duty of the court to realise and distribute the assets among the creditors and no question of limitation can arise. ('49) 54 Mys H C R 261 (264) (DB).

[4] In order to allow a receiver to go into the affairs of a debtor it is necessary for him to investigate the books and to come to some conclusion. Without the books it would be impossible to say the exact amount of debts and the value of assets. 1934 Pat 526 (530) [AIR V 21] (DB).

[5] A decree against judgment-debtor is not binding against Receiver in insolvency, since there is possibility of its being collusive. He must enquire whether the decretal debt is genuine or not. If it turns out to be fictitious, no dividend will be payable in respect of it. 1923 All 33 (33) [AIR V 10] (DB).

[6] Partition without provision for payment of family debts — Insolvency of principal members of the family — Property received in partition by other non-insolvent members can be seized by receiver to pay the family debts. 1931 All 512 (522, 532) [AIR V 18] : 53 All 868 (FB). (Mukerji J. Contra: AIR 1927 All 714, *Overruled.*)

[7] Receiver appointed by Resident's Court, Aden — Appointment not under this Act — Receiver cannot make an order against the debtors of insolvent — He can call on them to pay but if they do not his only remedy is by way of suit. 1923 Bom 233 (234) [A I R V 10]: 47 Bom 548 (DB).

[8] Realisation and distribution of assets of insolvent should be entirely carried out by official agency. Purchaser from official assignee of insolvent's assets should be never allowed to pay creditors direct out of his purchase money. 1937 Mad 962 (963, 964) [AIR V 24]: ILR (1938) Mad 426 (DB).

[9] It is only the official receiver who has been appointed that should move in the matter of attachment of debtor's salary though a creditor can bring any matter to the notice of official receiver or of the Court. 1933 All 153 (153) [AIR V 20].

3. Sale by receiver.—[1] Sale by receiver of insolvent's properties before vesting order in his favour is invalid.. 1927 Mad 1 (2) [AIR V 14] : 50 Mad 135 (FB). (Such sale cannot be validated by Court subsequently ratifying sale.)✠1927 Mad 1091 (1092) [AIR V 14] (DB). (Subsequent vesting order validates the sale.)

Section 59 — Note 3 *(contd.)*

[2] Receiver derives his authority to deal with the property of the insolvent from the order of adjudication and when he proceeds to sell it he is acting in "enforcement" of that order. 1943 Lah 19 (20) [A I R V 30] : I L R (1943) Lah 242 (FB). (Section 60 (1) (ccc), C. P. C. applies to the sale and the residential house cannot be sold even though the house vested in the receiver before the proviso to S. 60 (1) (ccc) came into force.)

[But see 1936 Lah 35 (37) [AIR V 23] (DB). (Property sold by receiver subject to right of pre-emption.)]

[3] The sale of property of an insolvent lies within the discretion of the receiver. ('13) 18 Cal L Jour 564 (565) (DB).

[4] The receiver cannot sell the properties in a manner prejudicial to the insolvent's estate. 1927 Mad 232 (233) [AIR V 14] (DB).

[5] Rules of Civil P. C. relating to sales under that Code are not applicable to sales by official receiver under the Insolvency Act. 1932 Lah 320 (320) [A I R V 19]. (Sale by official receiver held in his office and not at the spot is not irregular.)✣1920 Cal 935 (936) [AIR V 7] (DB). (The sale may be held either by public auction or by private treaty.)

[But see 1927 Nag 262 (263) [AIR V 14]. (Provisions of O. 21 are applicable to insolvency proceedings — Time for setting aside sale by receiver is 30 days.)]

[6] The sale by the receiver is not a Court sale but a private sale. There is no provision requiring a receiver to conduct such a sale in accordance with the provisions of O. 21, Civil P. C. 1951 Nag 388 (Pr 4) [AIR V 38 C 120] : ILR (1951) Nag 511.

[7] An official receiver need not attach the property as a preliminary to sale. He can sell it as any private individual. He can advertise the sale and sell to the highest bidder. It is the distinct act of receiver which can be questioned before the Insolvency Court. 1937 All 226 (227) [AIR V 24].

[8] Act does not empower receiver to sell anything more than property of insolvent which vests in receiver by adjudication. 1936 Pat 115 (118) [AIR V 23] : 15 Pat 363 (DB).

[9] When a Hindu father is adjudicated insolvent the interest of his son or sons in the family property does not vest in the Court or the receiver, but the Court or the receiver has power to sell the joint family property including the interest of the minor son or sons of the insolvent for the payment of his antecedent debts not incurred for immoral or illegal purposes. 1937 Pat 185 (189) [AIR V 24] : 16 Pat 60 (FB). (AIR 1936 Pat 115, *Overruled.*)✣1931 Bom 50 (52) [A I R V 18] : 55 Bom 110 (DB). (Residue left after satisfaction of the father's debts can be claimed by the son.)✣1934 Oudh 1 (4, 5) [AIR V 21] : 9 Luck 304 (FB).

[10] Power to sell son's share should have been possessed by the father at the time property vested in the receiver—Also mere existence of such power will not show that the receiver actually exercised it. 1938 Mad 299 (300) [AIR V 25] (DB) ✣ 1924 Mad 550 (551) [A I R V 11] : 47 Mad 462 (DB). (Recital in deed showing that property belonging to all the members was sold — No specific recital that shares belonging to various members sold separately — Vendee gets title to son's share also.)

[11] Manager of Hindu joint family declared insolvent—Partition suit subsequent to insolvency petition—Partition decree does not prevent receiver from selling property allotted to other members. 1931 All 512 (532, 533) [AIR V 18] : 53 All 868 (FB). (*Mukerji J.*, contra.)

[12] Receiver cannot execute a conveyance which would result in valuable part of insolvent's estate being lost to the general body of creditors without the purchase price being utilised to satisfy their claims. 1934 Pat 514 (515) [AIR V 21] (DB).

[13] Property of insolvent under mortgage sold without reference to the rights of mortgagee — Insolvent has no right to protest against it. 1933 Lah 1008 (1008) [AIR V 20].

[14] Mortgagee consenting to sale free of mortgage—Receiver reporting under bona fide mistake that sale was subject to mortgage — Agent of mortgagee who was present at sale buying the property—*Held*, property was sold free from mortgage. 1934 Rang 367 (368) [AIR V 21] (DB).

[15] Official Receiver asking Court for permission to sell properties free from all encumbrances — Court, however, permitting sale subject to encumbrances — Official Receiver by mistake selling properties free from encumbrances—Official Receiver held had right to so sell the properties — Adjudication cancelled but properties remaining vested in Receiver — Creditor's application under Ss. 4 and 56 (3) requesting cancellation of sale and holding fresh sale subject to encumbrances declaring properties sold to belong still to the estate of the insolvent — Request held could not be granted — Section 4 held not applicable. 1949 Mad 834 (Pr 4) [AIR V 36 C 375].

[16] Sale of property—Mistake as to encumbrance in proclamation due to error committed by Official Receiver — Property fetching low price — Though the case does not fall under S. 68, the sale can be set aside at the instance of the Official Receiver, by the Insolvency Court under its inherent powers. 1950 Mad 311 (Prs 6, 9) [AIR V 37 C 142].

[17] Where the sale by the receiver is irregular, having been held without notice to the petitioning creditor and is not fair and just and the petitioning creditor offers to pay nearly 50 per cent. more than the price offered by the auction purchaser the sale is liable to be set aside and a fresh sale ordered. 1954 Mad 79 (Pr 4) [AIR V 41 C 21].

[18] If a secured creditor agreed to have the sale conducted free of his encumbrance and the receiver conducted the sale accordingly such a procedure cannot be said to be not warranted by law. If at such a sale the secured creditor offered the highest bidding and that was accepted and a sale-deed executed in his favour without any objection either from the insolvent or the other creditors such a sale cannot be assailed. The mere fact that the amount realised was sufficient only to satisfy the claim of the secured credi-

Section 59 — Note 3 *(contd.)*

tor and there was nothing available to satisfy the claim of the simple creditors cannot render the sale invalid. 1957 Ker 144 (Pr 2) [AIR V 44 C 78] : ILR (1957) Ker 808 (DB).

[19] A sale of a property which in substance is merely a right to litigate even assuming that it did not come under the prohibition of S. 6 (e) of Transfer of Property Act is open to the same objections and should be deprecated. 1927 P C 252 (254) [A I R V 14] : 55 Ind App 7 : 6 Rang 29. (Property sold by insolvent prior to insolvency and in possession of the purchaser — Sale of such property by official assignee is in substance a sale of right to litigate.) ✣ 1937 All 317 (320) [A I R V 24] (DB). (Mortgagee contracting to pay certain sum on behalf of mortgagor — Breach of contract by mortgagee—Mortgagor subsequently becoming insolvent, sale of equity of redemption by receiver to third person—Right to sue held was not conveyed to the vendee.)

[20] The Court cannot set aside a sale held or made by the receiver in the absence of proof of fraud or collusion or material illegality or irregularity in conducting the sale or misconduct on his part causing injury to estate. The sale may be set aside if the receiver acts beyond his authority or in excess of powers conferred upon him. 1928 Rang 60 (61) [AIR V 15] : 5 Rang 768 (DB).

[21] In the absence of fraud or collusion the sale by receiver cannot be set aside on the ground that he had stopped in the house of the purchaser when he had gone to the village to effect the sale. 1951 Nag 388 (Prs. 5, 8) [AIR V 38 C 120] : ILR (1951) Nag 511.

[22] Official receiver as officer of Court is bound to bring to notice of the District Court before which appeal against his order refusing to confirm sale of insolvent's property may be pending facts likely to affect its decision. He should also represent insolvent's estate in the appeal. 1924 Mad 147 (148) [A I R V 11] (DB).

[23] Title to property sold being questioned in a pending litigation — Purchaser kept in ignorance of the fact and misled into purchasing it. The sale is liable to be set aside. 1927 Cal 834 (836) [AIR V 14] (DB).

[24] Where prior to the execution of a formal conveyance in respect of a sale of the official receiver for which the entire consideration had been deposited by the purchaser, a third party establishes his title in a civil Court to the property sold and obtains possession, then the purchaser from the receiver is entitled to a refund of price paid by him. 1942 All 39 (41) [AIR V 29] : ILR (1942) All 120 (DB).

[25] The practice of official receivers in making the highest bids at the auction subject to further bids by creditors is objectionable. Confirmation of sale in favour of the highest bidder at sale at which it was made clear that the sale would not be confirmed if higher bids were forthcoming from creditors and where in fact a slightly higher offer was given was held to be not irregular. 1941 Mad 827 (828) [AIR V 28] (DB).

[26] Official receiver has no power to set aside a sale held by him of insolvent's property. 1926 Mad 1080 (1080) [AIR V 13] (DB).

[27] Sale by receiver is not exempted from the operation of S. 54 of the Transfer of Property Act and execution of sale-deed is necessary. 1942 Oudh 424 (424, 425) [AIR V 29] : 18 Luck 433 (DB). (Purchaser is not entitled to a sale certificate from Court—AIR 1939 Oudh 55, *Overruled.*) ✣ 1919 Cal 193 (193) [AIR V 6] : 46 Cal 887 (DB).

[28] Sale by official Receiver in insolvency is a voluntary transfer and is subject to pre-emption. 1948 Cal 353 (Pr 15) [AIR V 35 C 142] : ILR (1949) 1 Cal 371.

[29] Sale by the official receiver is not a sale by Court and requires registration. 1942 All 39(41) [AIR V 29]:ILR(1942) All 120(DB).

[30] Adjudication in British India — Title obtained by sale effected by official receiver would have preference over attachment and sale under Civil P. C. 1935 Mad 882 (883, 884) [AIR V 22].

[31] Ancestral property of insolvent leased by official receiver—Reversioners can ask only for a declaration that the lease would not bind them on the death of insolvent in a separate suit and for this they must prove that debts for which lease was given were immoral or illegal debts. 1935 Lah 952 (952) [A I R V 22].

4. Receiver can continue the business of the insolvent. — [1] Insolvent's business can be carried on by the receiver for the purpose of winding up but not for making a profit. ('13) 40 Cal 678 (683) (DB).

[2] Official receiver continuing to take on lease the premises in which the printing press of the insolvent is worked, acts under S. 59 (c) and must enter into the arrangement with the leave of the Court. 1932 All 575 (577) [AIR V 19] : 54 All 879 (DB).

5. Power to institute and defend suits.— [1] Insolvent cannot sue in his own name after adjudication. ('38) 40 Bom L R 956 (957) ✣ 1920 Pat 277 (277) [A I R V 7] (DB). (Even where receiver has refused to sue in respect of deferred dower of his daughter.) ✣ 1937 Pesh 42 (43) [AIR V 24]. (Insolvent can file a suit for declaration that mortgage properties were already redeemed—The property not vesting in receiver by virtue of S. 28 (5)—Receiver can be made party to suit.)

[**See however** 1935 All 675 (677, 678) [AIR V 22] : 58 All 132 (FB). (Suit by insolvent in respect of properties which do not vest in receiver — No prohibition exists against such suits — Receiver should always be made a party.) ✣ 1914 All 542 (542) [AIR V 1]. (Decree against insolvent — He can sue defend or continue any proceedings to set it aside.) ✣ 1937 Mad 165 (167) [AIR V 24]. (An undischarged insolvent cannot file a suit without previous application to the official receiver or without requesting him to file the plaint on his behalf unless permitted to do so by Court. Court should not grant such permission where the suit is barred on the date of permission.) ✣ 1932 Sind 33 (33) [AIR V 19] : 26 Sind L R 21. (Suit for damages for defamation.)]

Section 59 — Note 5 *(contd.)*

[2] Property of insolvent vested in official receiver—Court subsequently appointing additional receiver—No fresh vesting order passed vesting property in the three receivers—The official receiver can by himself maintain suits for recovering insolvent's estates. 1938 Lah 264 (265) [AIR V 25] (DB).

[3] The official receiver should always describe himself in the plaint as suing as receiver of the estate of the insolvent who should be mentioned by name. A plaint defective in this respect should be returned for amendment. 1935 Rang 327 (327) [AIR V 22] (DB).

[4] The obtaining of leave before instituting a suit is a matter between the receiver and the Insolvency Court and a third party cannot claim the absence of such leave as a valid defence to the suit. 1926 Nag 156 (158) [AIR V 13]. (Permission need not be in writing.) ✠ 1922 Mad 51 (53) [A I R V 9] : 45 Mad 167 (DB).

[5] In an action started by the receiver on behalf of the insolvent in absence of an express order to the contrary, the receiver is personally liable for costs to the opposite party who succeeds in the action. 1932 All 288 (289) [AIR V 19] : 54 All 444 (DB). (Even where the receiver may have a right to be reimbursed out of the insolvent's estate.) ✠ 1922 Mad 51 (53) [AIR V 9] : 45 Mad 167 (DB). (Cannot charge the estate of the insolvent.)

[6] The receiver-in-insolvency is not liable personally if a liability for costs is incurred in connection with a contract made with the sanction of the Court. 1952 All 399 (Prs 9, 10) [AIR V 39] (DB).

[7] Where a person obtains leave to sue *in forma pauperis* in a suit commenced before his insolvency the receiver can continue the suit in the same way. 1918 All 177 (1) (177) [AIR V 5] (DB).

[8] Insolvent filed suit for return of deposit money for breach of contract on defendant's part—Official receiver is entitled to continue suit. 1926 Mad 1133 (1136) [A.I R V 13] : 50 Mad 161 (DB).

[9] Official receiver taking possession of insolvent's property—Suit by insolvent's son that property in suit belonged to him under will of his grand-father and was not liable to attachment and sale in insolvency proceedings—Official receiver pleading that property in suit being ancestral, plaintiff's grand-father could not will it away to plaintiff according to custom—Official receiver as representative of insolvent held could resist suit on ground that will was not valid. 1939 Lah 262 (263) [AIR V 26] (DB).

[10] The official receiver has discretion to contest a suit or not. 1917 Mad 411 (414) [AIR V 4] (DB). (In a case where the receiver has thought it unnecessary but a creditor desires that he should contest he should do so after taking indemnity from the creditor for payment of costs in the event of losing the case.) ✠ 1937 Pesh 42 (43) [AIR V 24]. (Cannot be compelled at the instance of insolvent.)

[11] Status of receiver—Decree against official receiver in proceedings outside insolvency binds him only as representing insolvent and not creditors. 1941 Lah 6 (7, 8) [AIR V 28] : ILR (1940) Lah 345 (DB).

[12] Suit relating to mortgage property which has vested in receiver—Mortgagee cannot bring or continue suit for foreclosure without making receiver defendant. 1937 Lah 402 (403) [AIR V 24] (DB). (Decree obtained in receiver's absence is not *res judicata* against him.)

[13] Suit for debt or damages due from insolvent — Receiver cannot be made party to suit — He is neither a necessary party nor a proper party. 1935 Rang 439 (445) [A I R V 22].

[14] Personal liability created by decree — Insolvent can appeal himself. 1937 Mad 915 (917) [AIR V 24] (DB).

[15] A suit or appeal which the receiver is required to continue is one relating to the property of the insolvent and therefore an appeal which relates to a money decree passed against the insolvent does not amount to a legal proceeding relating to the property of the insolvent. If therefore the receiver declines to continue the appeal, the insolvent is entitled to continue it. 1953 Sau 82 (Pr 2) [AIR V 40 C 36] (DB).

[16] Section 59 does not authorise official receiver to appeal against decree against insolvent in suit for damages. 1926 Mad 1133 (1136) [AIR V 13] : 50 Mad 161 (DB).

[17] Where person has been declared insolvent in execution proceedings, he has no *locus standi* to appeal from order confirming sale. 1936 Lah 368 (368) [A I R V 23]. (Principle applies to sale under O. 21, R. 90, Civil P. C.)

[18] Decree against Receiver—Discharge of insolvent pending appeal — Property ordered to continue to vest in Receiver — Decree-holder taking out execution impleading discharged insolvent—Insolvent contending that decree was not executable against property since he was not a party to the decree—*Held*, that decree was executable against property which remained vested with Official Receiver who was a party to the suit throughout acting in his duty as Official Receiver with sanction of Court — The fact that insolvent was impleaded at execution stage did not alter position. 1952 All 399 (Pr 7) [A I R V 39] (DB).

[19] Section 28 (2) does not bar the insolvent from continuing legal proceeding against his debtor. A decree passed in favour of undischarged insolvent without Official Receiver being brought on record is not void, since the properties acquired by reason of the decree will vest in the Official Receiver—The decree can be executed by the Official Receiver or his assignee. 1957 Trav-Co 241 (Pr 5) [A I R V 44 C 90] : ILR (1956) Trav-Co 575 (DB).

[20] Upon adjudication insolvent's estate vests in Official Receiver for purposes of distribution of the estate amongst the creditors. Debtor has no power of disposition over it—Surplus in the hands of the receiver after payment of the debts vests in the Official Receiver and the property in it is vested in him — Appeal by creditors against order of

[a][**59A.** Power to require information regarding insolvent's property.

(1) The Court, if specially empowered in this behalf by an order of the State Government, or any officer of the Court so empowered by a like order, may, on the application of the receiver or any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in the prescribed manner any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court or such officer, as the case may be, may deem capable of giving information respecting the insolvent or his dealings or property, and the Court or such officer may require any such person to produce any documents in his custody or power relating to the insolvent or to his dealings or property.

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court or such officer at the time appointed, or refuses to produce any such document, having no lawful impediment made known to and allowed by the Court or such officer, the Court or such officer may, by warrant, cause him to be apprehended and brought up for examination.

(3) The Court or such officer may examine any person so brought before it or him concerning the insolvent, his dealings or property, and such person may be represented by a legal practitioner.]

[P. T. I., 1909 — S. 36.]

[a] *Inserted* by the Provincial Insolvency (Amendment) Act, 1926 (XXXIX of 1926), S. 4.

Section 59 — Note 5 *(contd.)*

District Judge in matter of distribution of surplus towards interest amongst creditors—Death of some of debtors-respondents—Legal representatives not brought on record within time — Appeal does not abate — Real person who is interested in appeal is the Official Receiver — Debtors are not necessary parties. 1949 Pat 63 (Prs 6, 7, 8) [AIR V 36 C 14] : 26 Pat 648 (DB).

[21] Where a receiver appointed under the Provincial Insolvency Act is joined as a defendant as representing the estate of the insolvent, but the suit is not in respect of anything done by him in his official capacity, no notice to him under S. 80, Civil P. C. is necessary. ('54) I L R (1954) 4 Raj 812 (817) (DB).

6. Sale for deferred payments.—[1] The purchaser of property belonging to an insolvent cannot impugn the sale on the ground that the receiver, who sold the property, entered into an arrangement with the purchaser for deferred payment of the purchase-money without leave of the Court. ('12) 15 Ind Cas 368 (369) (DB) (Rang).

7. Compromise by receiver.—[1] A compromise effected by an official receiver without sanction of Court is not invalid, and will be binding until set aside. Sanction is obtained by official receiver for his own protection. 1929 Sind 41 (42) [A I R V 16].

8. Power to acknowledge debts.—[1] A combined reading of S. 28 (2) and S. 59 (g) makes it clear that when the property of the insolvent is vested in the Official Receiver, he can mortgage or sell the property or renew the existing mortgage for a further term. Under clause (g) of S. 59 the Official Receiver has power to acknowledge a binding debt of an insolvent. 1957 Mad 1 (Pr 6) [A I R V 44 C 1] : ILR (1957) Mad 344 (DB). (A I R 1951 Mad 814, *Overruled.*)

[2] Under S. 28 (2) all the properties of the insolvent vest in the Official Receiver and therefore he is the party against whom such property or right can be claimed and hence under S. 19, Limitation Act an acknowledgment of liability by the Official Receiver will furnish a fresh starting point for limitation. 1957 Mad 1 (Pr 8) [A I R V 44 C 1] : I L R (1957) Mad 344 (DB). (A I R 1951 Mad 814, *Overruled* ; A I R 1933 Bom 91, *Dissented from.*)

[3] Official Receiver can either renew the mortgage or give life to a mortgage by making a payment towards it. As by operation of S. 28 the title to the insolvent's estate vests in him, he is a "person who is liable to pay the debt" within the meaning of S. 20 of the Limitation Act. 1959 Andh Pra 518 (Pr 8) [AIR V 46 C 150] : ILR (1959) Andh Pra 780 (DB).

[4] Official Receiver in whom the estate of the insolvent mortgagor vests, comes within the description of "a person liable to pay" the mortgage debt within meaning of S. 20 (1) of the Limitation Act and the payment made by him towards the mortgage debt and endorsed by him with his signature gives a fresh start of limitation for the suit on the mortgage. 1957 Andh Pra 437 (Prs 4, 5) [(S) A I R V 44 C 136].

Section 59A — Note 1

[1] It was held in an English case that the Insolvency Court can in proper cases, examine a person who had dealings with the insolvent, in camera. (1958) 1958-1 W L R 405 (406).

STATE AMENDMENT

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in section 59A after sub-section *(3) add* the following new sub-sections, namely,—

"*(4)* If on his examination any such person admits that he is indebted to the insolvent, the Court or such officer may, on the application of the receiver, order him to pay to the receiver at such time and in such manner as to the Court or to such officer seems expedient, the amount in which he is indebted, or any part thereof, either in full discharge of the whole amount or not, as the Court or the officer, as the case may be, thinks fit with or without costs of the examination.

(5) If on his examination any such person admits that he has in his possession any property belonging to the insolvent, the Court or such officer may, on the application of the receiver, order him to deliver to the receiver that property or any part thereof, at such time, in such manner and on such terms as to the Court or, to the officer, as the case may be, may seem just.

(6) Orders made under sub-sections *(4)* and *(5)* shall be executed in the same manner as decrees for the payment of money, or for the delivery of property, under the Code of Civil Procedure, 1908, respectively.

(7) Any person making any payment or delivery in pursuance of an order made under sub-section *(4)* or sub-section *(5)* shall by such payment or delivery be discharged from all liability whatsoever in respect of such debt or property."

—U. P. Act XXIV of 1954, S. 2 and Schedule [30-11-1954].

60. Special provisions in regard to immovable property.

(1) In any local area in which a declaration has been made under section 68 of the Code of Civil Procedure, 1908, and is in force, no sale of immovable property paying revenue to the Government or held or let for agricultural purposes shall be made by the receiver; but, after the other property of the insolvent has been realised, the Court shall ascertain—

(a) the amount required to satisfy the debts proved under this Act after deducting the monies already received ;

(b) the immovable property of the insolvent remaining unsold ; and

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Section 60 — Note 1

[1] Sub-sections (1) and (2) of S. 60 are independent of each other. Sub-section (1) relates to immovable property of the particular description mentioned therein ; while sub-section (2) is much wider in scope and applies to immovable property of whatever description, against which execution is prohibited or restricted by statute. 1943 Lah 19 (22) [AIR V 30] : ILR (1943) Lah 242 (FB).

[2] Under S. 60, the Insolvency Court does not make any order for the sale of any property. All that it is required to do is to collect certain "information and to forward a statement containing that information to the Collector". The Collector, after that, proceeds to sell the property or otherwise to raise money on the security thereof, or by letting it in farm, not by virtue, or in pursuance, of any order made by the Insolvency Court to that effect, but by reason and in exercise of the statutory obligation imposed on him to do so. Hence the sale by the Collector cannot be said to be a sale in execution of any decree or order. ('45) 47 Pun L R 62 (64).

[3] After the sale proceedings have been transferred to the Collector the Insolvency Court has no authority to interfere with the proceedings of the sale officer or to sanction a sale made by the Collector or his subordinate. The sale officer also has no authority to refer the case to the Insolvency Court and ask for instruction. 1927 All 203 (204) [A I R V 14] : 49 All 272.

[4] Sale by Collector in a case sent to him under S. 60, Provincial Insolvency Act—S. 65, Civil P. C., applies even if sale is otherwise than in execution of decree — Title of purchaser relates back to date of sale. 1949 Nag 127 (Pr 4) [A I R V 36 C 48] : I L R (1948) Nag 610.

[5] Section 60 (1) does not apply to the case of a sale by the receiver under directions given in an arbitration between himself and the secured creditors of the insolvent even though the property would have fallen under the mischief of S. 60 (2) if they were not secured to the creditors. 1926 All 501 (504) [AIR V 13] : 48 All 475 (DB).

[6] The first clause of S. 21 of the Act of 1907 (now S. 60 (1)) is not applicable to Punjab. Therefore the Insolvency Court itself can alienate property of the kind contemplated in this sub-section. 1921 Lah 44 (45) [A I R V 8] : 2 Lah 78 (DB). (Only temporary alienation.) ✠ 1929 Lah 66 (67) [A I R V 16]. (Permanent alienation in proper cases not barred.) ✠ ('26) 92 Ind Cas 949 (950) (Lah). (Ordinarily such a course should not be adopted.)

[7] Before applying a restrictive enactment under S. 60 (2) to the receiver it should be seen that the restrictive enactment must only be applied in the insolvency to the same extent that it could operate in favour of the judgment-debtor outside the insolvency and also that it can be so applied without departing from its substantial purpose. 1946 All 444 (445) [AIR V 33 C 115] : I L R (1946)

(c) the incumbrances (if any) existing thereon ;

and shall forward a statement to the Collector containing the particulars aforesaid ; and thereupon the Collector shall proceed to raise the amount so required by the exercise of such of the powers conferred on him by paragraphs 2 to 10 of third Schedule to the said Code as he thinks fit, and subject to the provisions of those paragraphs so far as they are applicable, and shall hold at the disposal of the Court all sums that may come to his hands by the exercise of such powers.

(2) Nothing in this Act shall be deemed to affect any provisions of any enactment for the time being in force prohibiting or restricting the execution of decrees or orders against immovable property ; and any such provisions shall be deemed to apply to the enforcement of an order of adjudication made under this Act as if it were such a decree or order.

[P. I., 1907—S. 21.]

STATE AMENDMENT

PUNJAB

In its application to the whole of the State of Punjab, after sub-section *(2)* of section 60 the following new sub-section shall be *added*, namely :—

"*(3)* In particular, and without prejudice to the generality of sub-section *(2)*, when the whole or any part of the estate of an insolvent consists of land as defined in the Punjab Tenancy Act, 1887, no such land shall be temporarily alienated by the receiver; but after the other property of the insolvent has been realised the Court shall proceed in the manner provided in sub-section *(1)*, and the Collector shall thereupon proceed to raise the amount required by means of a temporary alienation in such form and for such period as may be legally permissible and as he thinks fit ; and shall hold at the disposal of the Court all sums which may thereby come to his hands :

Provided that such portions of the land shall be exempted from alienation as in the opinion of the Collector, having regard to the income of the judgment-debtor from all sources except such income as is dependent on the will of another person, is sufficient to provide for the maintenance of the insolvent and the members of his family who are dependent on him, and such portion shall be deemed not to form part of the estate under administration."

—Punj. Act III of 1939, S. 2 [20-4-1939] read with XXX of 1958, S. 4 (1) [7-11-1958].

Section 60 — Note 1 *(contd.)*

All 336 (DB). (Section 17 (1) (A) of U. P. Debt Redemption Act is not such an Act.)

[8] The expression 'for the time being in force' in S. 60 (2) means in force when the receiver is proceeding to sell the property. The restrictive or prohibitory law need not have been in force at the time the vesting order was passed. 1943 Lah 19 (21) [A I R V 30] : I L R (1943) Lah 242 (FB).

[9] Section 16 of the Punjab Alienation of Land Act overrides the provisions of the Provincial Insolvency Act in respect of all matters which are done in enforcement of the order of adjudication. It applies to sale by receiver. 1930 Lah 1034 (1039) [A I R V 17] : 12 Lah 367 (DB).

[10] While applying S. 16 of the Punjab Alienation of Land Act the status of the insolvent at the time of the sale of the property must be considered. The insolvent acquiring the status of a member of an agricultural tribe after the adjudication does not prevent the operation of sub-section (2) of S. 60 at the time of sale of property. 1939 Lah 346 (348, 349) [AIR V 26] : ILR (1940) Lah 40.

[11] The provisions of sub-section (2) of S. 60 of the Provincial Insolvency Act puts the adjudication order, on the basis of which the property vests in the Official Receiver, on the same level as a decree and provides that any enactment for the time being in force prohibiting or restricting the execution of decrees would apply to the adjudication order. Hence, it follows that the benefit of S. 17 of the U. P. Debt Redemption Act would be available to the insolvent. 1948 All 297 (Pr 4) [AIR V 35 C 118] : ILR (1948) All 276 (DB).

[12] Property consisting of a share in two villages the title of which was alleged to have been acquired by insolvent but not in the possession of insolvent sold by receiver — Purchaser's suit for possession — *Held*, that if the transaction was treated as a sale of immovable property he must fail by reason of S. 60 and if it was treated merely as a right to sue he must fail by reason of S. 6, T. P. Act. 1925 Oudh 299 (300, 301) [AIR V 12] (DB).

[13] *R*, a member of Hindu family and in possession of revenue paying grove adjudicated insolvent — During pendency of appeal by creditors against adjudication, official receiver selling property to *P* when declaration contemplated by S. 60 was in force— Adjudication subsequently annulled and *R* withdrawing amount of sale consideration— Sale held not void but voidable—*R's* ratification of it was good against other members also. 1947 All 293 (294, 295) [A I R V 34 C 115].

[14] Sale of property by receiver in private manner at instance of insolvent discovered to be in contravention of S. 60 after conditional discharge of insolvent under S. 41 (2) (c)— Assuming sale to be null and void, property

Distribution of Property

61. Priority of debts.

(1) In the distribution of the property of the insolvent, there shall be paid in priority to all other debts—

(a) all debts due to the Government or to any local authority ; and

(b) all salary or wages, not exceeding twenty rupees in all, of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition.

(2) The debts specified in sub-section *(1)* shall rank equally between themselves, and shall be paid in full, unless the property of the insolvent is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

(3) Subject to the retention of such sums as may be necessary for the expenses of administration or otherwise, the debts specified in sub-section *(1)* shall be discharged forthwith in so far as the property of the insolvent is sufficient to meet them.

(4) In the case of partners, the partnership property shall be applicable in the first instance in payment of the partnership debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts. Where there is a surplus of the separate property of the partners, it shall be dealt with as part of the partnership property; and where there is a surplus of the partnership property, it shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property.

(5) Subject to the provisions of this Act, all debts entered in the schedule shall be paid rateably according to the amounts of such debts respectively and without any preference.

(6) Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per centum per annum on all debts entered in the schedule.

[P. I., 1907—S. 33; P.T.I., 1909—S. 49.]

Section 60 — Note 1 *(contd.)*

reverts to Official Receiver in whom it had vested at time of sale in case the creditors were not fully paid — Insolvent after the discharge cannot be said to have become owner of property on account of sale being discovered null and void and is not entitled to recover possession over the same. 1957 All 262 (Pr 8) [A I R V 44 C 77] (DB).

SECTION 61 — SYNOPSIS

1. **Scope and applicability.**
2. **Priority of debts due to Crown or local authority—Sub-section (1) (a).**
3. **Expenses of administration — Sub-section (3).**
4. **Distribution of partnership property — Sub-section (4).**
5. **Distribution of property among scheduled creditors—Sub-section (5).**
6. **Interest—Sub-section (6).**

1. Scope and applicability. — [1] Section 61 applies only to cases of insolvency, and neither sub-s. (4) nor any other subsection applies when composition scheme is sanctioned under S. 38 and is in force and insolvency has been annulled. 1943 Sind 76 (78) [AIR V 30] : ILR (1942) Kar 506 (DB).

[2] Decisions of all questions of priority of debts arising under the Companies Act are confined to S. 230 of that Act; S. 230 supersedes S. 61. 1931 Lah 351 (352) [AIR V 18] : 12 Lah 678 (DB).

[3] The question whether one creditor is entitled to appropriate the money which is intended for the distribution among all the creditors in priority to other creditors can only be adjudicated in the presence of the creditors by the Court which has jurisdiction in insolvency and the official receiver cannot be held to represent creditors in regard to decision on the question of priority. 1941 Mad 753 (759) [AIR V 28].

[4] It is the policy of the insolvency law to distribute the estate among creditors fairly and unless a preference was given by the Act to any particular debt, no priority can legitimately be claimed in regard to the same. 1939 Mad 276 (278) [AIR V 26].

[5] The Insolvency Court undoubtedly has power to give directions as to the distribution of the assets among the creditors who have proved in the insolvency. The discharge of the insolvent does not put an end to the

Section 61 — Note 1 *(contd.)*
Court's power to give such directions. 1929 Rang 168 (169) [AIR V 16] : 7 Rang 126 (DB).

[6] The interpretation of the clear language of S. 61 cannot be controlled either by the marginal notes or by the heading. 1954 All 742 (744) [AIR V 41 C 294] (DB).

2. Priority of debts due to Crown or local authority—Sub-section (1) (a).—[1] Execution of mortgage as security for payment of rent to Government — Rent not paid — Adjudication — Proper course for Crown to pursue is to prove in insolvency amount due on account of rent as debt, and then to claim priority under S. 61 (1) (a). 1935 Rang 273 (275) [AIR V 22] (DB).

[2] Since in a Hindu joint family the sons are liable to pay their father's suretyship debt, upon the insolvency of the father and the sons, the interests of the sons also in the joint family are answerable in the discharge of such debt to a public body in priority over all the debts, whether of the sons or of the joint family. The priority is not restricted to the interest of the father alone. 1930 Sind 244 (246) [AIR V 17].

3. Expenses of administration—Sub-section (3). — [1] Rent for premises in which the insolvent's goods are stored after adjudication clearly comes under expenses of administration within the meaning of S. 61 (3) and should take priority even over the debts of a secured creditor. But where the premises are vacated before the order of adjudication, the owner of the premises is not entitled to claim priority under S. 61 (3) for the amount due to him on account of rent. 1937 Lah 96 (96) [AIR V 24].

[2] In cases where the interim Receiver appointed in Insolvency Proceedings before adjudication is not authorised to be in possession of the rented premises in which the debtor's moveables are kept and no order is passed till the date of adjudication vesting the insolvent's property in him, the rent due upto the date of the order of adjudication will not constitute "expenses of administration or otherwise" within the meaning of S. 61 (3); but where an interim Receiver appointed prior to adjudication is directed then alone to take possession of the debtor's property and by virtue of such direction he takes possession of the machinery belonging to the debtor kept in a rented house by locking and sealing the premises, and the Court orders him to continue as Receiver even after adjudication, the rent due to the owner from the date on which the Receiver took possession of the property before adjudication upto the date of sale of the machinery will be treated as "expenses of administration or otherwise" within the meaning of S. 61 (3). 1955 Mys 29 (30) [AIR V 42 C 10] : ILR (1954) Mys 327.

[**See however** 1960 Andh-Pra 53 (53, 54) [AIR V 47 C 16] (DB). (Where there is no vesting, no question of expenses of administration arises. Debtor's property does not vest in an interim Receiver appointed under S. 20 of the Act. Expenses incurred by interim Receiver are not expenses of administration under S. 61 (3). These are covered by O. 40, R. 1, Civil P. C. Under Bankruptcy law, authorisation to invest is not conferred on Official Receiver.)]

4. Distribution of partnership property —Sub-section (4). — [1] In sub-s. (4) of S. 61, the expression 'separate debt' is used as opposed to 'partnership debt.' A partnership debt means a debt which is due from a partnership and the fact that the insolvent partner is also personally liable for the debt would not deprive the debt of the character of a partnership debt for the purposes of S. 61 (4). 1933 Lah 639 (640) [AIR V 20].

[2] The exception which is allowed in English law in favour of a petitioning creditor should not be allowed in applying the provisions of S. 61 (4). 1934 All 521 (523) [AIR V 21] : 56 All 1041 (DB).

[3] Where there are partnership debts and separate debts and some members of the partnership are those who are liable in respect of separate debts, a creditor of the partnership in respect of a pro-note executed by one of the partners has the right to elect to go in insolvency against the partnership assets or against the separate assets of the executant, but having once elected, he is bound by the choice and is not entitled to take up the other position without showing good reason for the change of election. ('36) 1936 Mad W N 1070 (1071).

[4] Decree against partnership property and also against one of partners personally can in the event of insolvency of partnership and partners be executed against the separate property of partner. 1930 Bom 380 (381) [AIR V 17].

[5] Where a partner is adjudicated insolvent a creditor to whom that partner is indebted jointly with other partners cannot receive a dividend out of the separate property until all the separate creditors have received the full amount of their separate dues. 1930 Sind 127 (129) [AIR V 17] (DB).

[6] Where the insolvent firm is only one firm with different branches, there is no provision in the Act that the creditors who had dealings with the foreign branch must realise their debts as far as possible from the foreign property before being entitled to share rateably with creditors in British India. 1934 Lah 33 (34) [AIR V 21].

5. Distribution of property among scheduled creditors—Sub-section (5).—[1] Where a debtor is adjudicated insolvent, a creditor is entitled to receive a pro rata distribution of the proceeds of the insolvent's property equally with his other creditors. 1942 Mad 474 (476) [AIR V 29].

[2] A creditor of an insolvent debor held two decrees but in the insolvency proceedings he proved only one decree, reserving the other for settlement after the discharge of the debtor. The Court excluded the decree that had been proved from the benefits of the conditions imposed on the discharge of the insolvent under S. 44 (2) (c) of the Act of 1907 — *Held* that in view of the provision for equal division of assets contained in Ss. 33 and 39 of

Section 61 — Note 5 *(contd.)*

that Act the order of exclusion was incompetent. ('12) 6 Sind L R 163 (164) (DB).

[3] Where persons have sent their goods to debtors to be sold by them as commission agents and same are sold before insolvency, debtors are in possession only of proceeds and owners of goods are not preferential creditors. 1943 Sind 76 (79) [AIR V 30] : ILR (1942) Kar 506 (DB).

[4] Joint Hindu family — Father and son adjudicated insolvents by one order—Creditor holding debts incurred by father as manager has no priority over debts of son. 1939 Mad 276 (278) [AIR V 26].

[5] Where the interim Receiver appointed prior to adjudication takes possession under directions from Insolvency Court of the premises in order to keep the debtor's machinery in safe custody and he is bound to pay the rent for the premises, such rent and other incidental expenses have to be deducted out of the gross proceeds of the sale of the insolvent's property and the rent must be paid to the owner out of the amount realised and then only the net proceeds must be arrived at. 1955 Mys 29 (30) [AIR V 42 C 10]: ILR (1954) Mys 327.

[**See however** 1960 Andh-Pra 53 (54) [AIR V 47 C 16] (DB). (Expenses incurred by interim Receiver appointed under S. 20 of the Act are not expenses of administration and no priority can be claimed in respect thereof. Owner of premises in possession of interim Receiver is entitled only to rateable distribution.)]

[6] Insolvent permitted by official assignee or creditors to trade — Person advancing money to insolvent for carring on business — Official assignee and creditors cannot claim upon such person to have these assets applied for their own benefit — Claim of such person has prior charge over that of receiver. 1939 Rang 186 (187) [AIR V 26] : 1940 Rang L R 352 (DB).

[7] Where advances were made to a company whose agency consisted in soliciting orders for the Hudson cars whose direct importers were the Rayala Corporation, Madras, and where the petitioners handed over advances to the agent company for the supply of those cars. which were misappropriated by the company, and where the company was subsequently ordered to be wound up on the application of a creditor it is not open to the petitioners to claim any priority or preferential treatment with reference to the advances they had made. The respective legal position of the petitioners and the company is one of promisee and promisor and not that of a beneficiary and a trustee since there is no fiduciary relationship. The petitioners were entitled to rank only as ordinary creditors. 1955 Trav-Co 139 (141) [(S) AIR V 42 C 50] : ILR (1954) Trav-Co 1342 (DB).

[8] Where the advocate had notice of the prior charge in favour of the Bank earlier to the Insolvency Proceedings in which he earned his costs, his lien, if any, has to be postponed to the prior charge. 1952 Mys 141 (143) [AIR V 39] : ILR (1952) Mys 270.

[9] *B* has a claim upon *A*, but in respect of that claim, *A* has a right to be indemnified by *C*. *A* goes bankrupt. *A's* trustee in bankruptcy can force *C* to pay the amount of the claim to him but the sum recovered by virtue of the indemnity must be applied exclusively in paying that debt against which the debtor was entitled to be indemnified. 1929 Cal 208 (208, 209) [AIR V 16] : 56 Cal 262.

[10] It will not be a proper exercise of discretion on the part of the Court to revest the properties in the insolvents while annulling their adjudication on the ground of their own default. The effect of such revesting would be to deprive the creditors who have proved their debts of the benefit conferred by S. 61 (5) and cause them serious prejudice. 1946 Mad 388 (389) [AIR V 33 C 199] (DB).

6. Interest —Sub-section (6).—[1] Under insolvency, the ordinary rule is that all interest ceases once there is an insolvency, and no interest is ordinarily permissible to be granted after the presentation of a petition. It is only under Ss. 48 and 61 read together that insolvency Court has jurisdiction to grant interest under certain circumstances. The scheme of the Act is that the debts have to be paid in the manner provided by S. 61 and interest is to be paid only if there is a surplus and that too at the rate of 6 per cent. per annum. 1945 Nag 276 (277) [AIR V 32] : ILR (1945) Nag 1009.

[2] Section 61 (6) is intended to provide that if there is a surplus after payment of all the debts entered in the schedule then all the creditors are to be treated equally and for the deprivation during the pendency of the Court proceedings they are to be compensated at a fixed rate. The section therefore applies to all debts entered in the schedule whether there was or was no stipulation between the creditors and the debtors as regards some of the debts about payment of interest. 1954 All 742 (744, 745) [AIR V 41 C 294] (DB).

[3] As soon as the debtor is adjudged an insolvent, his entire estate vests in the Court or the receiver, and his estate becomes liable to distribution at once. Ordinarily, therefore, interest ceases to run automatically, and for purposes of dividend the rate of interest for all creditors is a uniform rate of 6 per cent. per annum. When however all the debts entered in the schedule have been paid off, the creditors are entitled to a further amount by way of interest at 6 per cent. per annum. But after this amount also has been paid the surplus goes to the insolvent. 1926 All 361 (364) [AIR V 13].

[4] Section 61 (6) is primarily intended to provide for cases where the surplus does not admit payment of more than 6 per cent. The object is not to vary the rates fixed by contract or decree but to afford some recompense to the creditors for keeping their money frozen during the period subsequent to the adjudication if the surplus held by the Receiver justifies such a course. 1947 Oudh 202 (203) [AIR V 34 C 69] : 22 Luck 478.

[5] Under S. 61 (6) creditors are entitled to get interest at the rate of 6 per cent. to be

62. Calculation of dividends.

(1) In the calculation of dividends, the receiver shall retain in his hands sufficient assets to meet—

(a) debts provable under this Act and appearing, from the insolvent's statements or otherwise, to be due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs;

(b) debts provable under this Act, the subject of claims not yet determined;

(c) disputed proofs or claims; and

(d) the expenses necessary for the administration of the estate or otherwise.

(2) Subject to the provisions of sub-section *(1)*, all money in hand shall be distributed as dividends.

[P. I., 1907—S. 39 (1), (2); P. T. I., 1909—S. 71.]

63. Right of creditor who has not proved debt before declaration of a dividend.

Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid, out of any money for the

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Section 61 — Note 6 *(contd.)*

calculated on the aggregate of debts entered in the schedule from the date of the adjudication of the insolvent. 1949 Pat 63 (68) [AIR V 36 C 14] : 26 Pat 648 (DB).

[6] The expression "all debts entered in the Schedule" in sub-s. (6) of S. 61 has reference not merely to the principal but also to the interest added to it. 1949 Pat 63 (67) [AIR V 36 C 14] : 26 Pat 648 (DB).

[7] The words "all debts entered in the schedule" can be interpreted only to mean that the legislature had intended that all debts so entered must carry interest at 6 per cent. per annum and as the proceedings after the date of adjudication affect all the creditors in the same way there is no reason why a difference should be made between one set of creditors and another set of creditors. 1954 All 742 (744) [AIR V 41 294] (DB).

[8] Where a secured creditor who appears in the Insolvency proceedings, is paid the value of the security and is scheduled for the balance he will, unless it is shown that every creditor has been paid in full, be entitled only to interest on the amount for which he was scheduled and that too at the rate of 6 per cent. per annum. 1945 Nag 276 (277) [AIR V 32] : ILR (1945) Nag 1009.

[9] Interest at 6 per cent. provided in S. 61 (6), according to the rates now prevailing, is excessive. The Civil Courts do not now award interest at a rate higher than 3 to 3 1/2 per cent. per annum as *pendente lite* and future interest. 1954 All 742 (745) [AIR V 41 C 294] (DB).

Section 62 — Note 1

[1] Section 47 must be read as corollary to and subject to S. 62. Before the official receiver is required to make any reserve, the claim must be submitted in the required form and further the official receiver cannot reasonably be expected to retain assets when he is not in a position to know the extent of the debt he is to provide for. Hence, where there is no compliance by a creditor with S. 47, there is no debt provable in respect of which the official receiver can have retained moneys in his hand. 1935 Sind 57 (59) [AIR V 22] : 29 Sind L R 241.

[2] Once a dividend has been declared and moneys allocated to the payment of that dividend, those moneys cease to be, in any sense, the property of the debtor. They become the property of the creditor; and if for any reason, the creditor cannot be paid, they lapse to Government. 1935 Bom 310 (312, 313) [AIR V 22] : 59 Bom 600 (DB).

[3] There is clear distinction between the process of declaration and the process of distribution of dividend. But there is nothing, either in the Act or the rules which makes the Court's sanction necessary before the dividend is declared by the official receiver. It is the distribution statement which requires the sanction of the Court before the disbursement is made. Consequently, where, before the commencement of the Mad. Agri. Relief Act, the official receiver had definitely declared a dividend due under the insolvency to proved creditors under S. 62, Provincial Insolvency Act, the insolvent is not entitled to relief under the Mad. Agri. Relief Act by reason of S. 21 of that Act, even though the actual statement of distribution of dividend to the several creditors was placed before the Court for sanction after the Mad. Agri. Relief Act came into force. 1943 Mad. 556 (557, 558) [AIR V 30].

[4] The expression "debts provable" in the Act means the debts whose proof is offered with a view to entitle the creditors to be included in the schedule with a view to their participating in the assets of the insolvent and not the proof for any other purpose. 1960 Andh Pra 257 (258) [AIR V 47 C 79].

Section 63 — Note 1

[1] It is the general policy of the Court not to interfere with the distribution already made in the case where a creditor comes in late. 1935 Sind 57 (59) [A I R V 22] : 29 Sind L R 241.

time being in the hands of the receiver, any dividend or dividends which he may have failed to receive before that money is applied to the payment of any future dividend or dividends; but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

[P. I., 1907—S. 39 (3); P. T. I., 1909—S. 72.]

64. Final dividend.

When the receiver has realised all the property of the insolvent or so much thereof as can, in the opinion of the Court, be realised without needlessly protracting the receivership, he shall declare a final dividend; but before so doing, he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified but not proved, that if they do not prove their claims within the time limited by the notice, he will proceed to make a final dividend without regard to their claims. After the expiration of the time so limited, or if the Court, on application by any such claimant, grants him further time for establishing his claim, then on the expiration of such further time, the property of the insolvent shall be divided among the creditors entered in the schedule without regard to the claims of any other persons.

[P. I., 1907—S. 39 (4); P. T. I., 1909—S. 73.]

Section 63 — Note 1 *(contd.)*

[2] The expression "any creditor" in S. 63 includes all creditors who come in late and prevents them from disturbing the dividends already declared. There is nothing in the section to suggest that it purports to deal with equities between creditors who are late. 1933 Sind 370 (371) [AIR V 20].

[3] Section 63 is not controlled by S. 64 and the unexpected event that the first dividend happened to be the final dividend would not entitle a negligent creditor to re-open distribution in contravention of the provisions of S. 63. 1931 Bom 210 (212) [AIR V 18] : 55 Bom 200 (DB)✣ 1935 Sind 57 (59) [AIR V22]: 29 Sind L R 241.

[4] Although in insolvency proceedings, a creditor may come in and prove as long as there are assets to distribute, yet where such creditor has failed to submit his claim before the schedule of creditors has been framed, he may only do so upon terms and if no injustice would be caused thereby. What terms the Court will impose will depend upon the circumstances of each case. 1933 Sind 370 (370, 371) [AIR V 20] ✣ 1936 Sind 186 (187) [AIR V 23] : 30 Sind L R 161 (DB).

[5] Principle of rateable distribution applies to all claims pending for admission before official receiver—Claims admitted first are not entitled to any preference. 1936 Sind 186 (186) [AIR V 23] : 30 Sind L R 161 (DB).

Section 64 — Note 1

[1] Section 64 requires a receiver before declaring a final dividend to serve notice in the manner prescribed to persons whose claims to be creditors have been notified but not proved; and if such persons come and prove their claims within the time limited by the notice, then they will be entitled to a share in the final distribution. That contemplates that creditors who have not proved already can come in and prove their debts in time before the final dividend is declared and distributed by the receiver. The time of the discharge of an insolvent has no relation to and can have no relation to, in any case, the time for declaring the final dividend. 1936 Cal 434 (436, 437) [AIR V 23] : I L R (1937) 1 Cal 127.

[2] The official receiver is bound to give notice under S. 64 of the Act not only to those creditors who have notified their claims, but to all such creditors whose claims have been notified to the official receiver either by the creditors themselves or by the insolvent that is to say, the notice is not to be confined to debts referred to in S. 62, cl. (1) sub-cls. (b) and (c) etc., but extends to debts referred to in sub cl. (a) of that section. 1928 Sind 105 (106) [AIR V 15] : 22 Sind L R 475.

[3] Where no notice as required by the section is given to a creditor, he should be allowed to re-open the matter and should be given an opportunity of proving his debts. 1924 Mad 769 (770) [AIR V 11] : 47 Mad 916 (DB).

[4] Insolvency petition by debtor — Court ordering summary administration and transferring to official receiver for disposal — Application by creditor to prove his debt before the declaration of the dividend, under S 33 and Proviso to S. 74 of the Act—*Held*, application was not barred by any provisions of Insolvency Act, whether the administration was summary or ordinary, as notice under S. 64 had not been sent to the creditor. ('37) 1937 Mad W N 1160 (1161) (DB).

[5] At the time of the declaration of the first dividend, it is not possible for the receiver to be sure whether it will or will not be the final dividend. Unless it is quite clear that it is the final dividend, it is not incumbent on him to give individual notice under S. 64. The unexpected event that the first dividend happened to be the final dividend would not entitle the negligent creditors guilty of delay in proving their debts to disturb the distribution of any dividend already declared, though they may be entitled to be

65. No suit for dividend.

No suit for a dividend shall lie against the receiver; but where the receiver refuses to pay any dividend, the Court may, on the application of any creditor who is entered in the schedule, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld, and the costs of the application.

[P. I., 1907—S. 39 (5); P. T. I., 1909—S. 74.]

66. Management by and allowance to insolvent.

(1) The Court may appoint the insolvent himself to superintend the management of the property of the insolvent or of any part thereof, or to carry on the trade (if any) of the insolvent for the benefit of the creditors, and in any other respect to aid in administering the property in such manner and on such terms as the Court may direct.

(2) The Court may, from time to time, make such allowance as it may think just to the insolvent out of his property for the support of himself and his family, or in consideration of his services if he is engaged in winding up his

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Section 64 — Note 1 *(contd.)*

paid the dividend or dividends which they have failed to receive out of any money which may be in the hands of the receiver before the declaration of any future dividend. 1931 Bom 210 (212) [AIR V 18] : 55 Bom 200 (DB).

[6] Under S. 64 of the Provincial Insolvency Act a creditor entered in the schedule is entitled to be paid his dividend out of the assets of the insolvent and S. 4 of the Succession Certificate Act is not applicable to the payment of dividends by the receiver. 1926 Mad 899 (899) [AIR V 13] : 49 Mad 952 (DB).

[7] Creditor filing affidavit in time specifying amount and particulars of decretal debt —Affidavit returned for re-presentation along with copy of decree — Affidavit re-presented with copy of decree when final dividend was declared and distributed among creditors — Creditor's name omitted from schedule of creditors—Application by creditor for including his name in schedule—*Held* creditor must be deemed to have proved his debt and was entitled to dividend — Court held could order re-distribution after calling back the amount distributed. 1946 Mad 500 (501, 502) [AIR V 33 C 255].

[8] The provisions of S. 64 are subject to the rule laid down in S. 33 (3). Hence, after the discharge of the insolvent, it is not open to a creditor to go to the Insolvency Court to tender proof of his debt and make an application that his debt should be entered in any schedule and should be discharged by the disposal of any property which might then be found to belong to the insolvent. 1942 All 344 (347) [AIR V 29] : ILR (1942) All 848.

Section 66 — Note 1

[1] Section 66 only gives discretion to the Court to make an allowance to the insolvent for the maintenance of himself and his family. The section does not give any independent right to the members of the family of the insolvent to ask for any separate maintenance. 1935 Lah 952 (952, 953) [AIR V 22] ✠ 1940 Mad 675 (677) [AIR V 27].

[2] The Insolvency Court is not bound to order that the portion of the salary of the insolvent which can be attached under S. 60, Civil P. C. be given to the Receiver for distribution among the creditors. Having regard to wording of S. 66 (2) the Court has absolute jurisdiction to make a further allowance appropriate to the conditions and circumstances of the insolvent out of the portion of the salary which is otherwise divisible among the creditors. 1935 Lah 810 (811) [AIR V 22] ✠ 1923 All 466 (468) [AIR V 10] : 45 All 364 (DB).

[**But see** 1917 Upp Bur 1 (1) [AIR V 4] : 2 Upp Bur Rul 132].

[3] It is not possible to hold that an application where a lump sum is claimed on behalf of the insolvent for meeting the marriage expenses of his daughter will come strictly within the scope of S. 66 (2). But under the category of "allowance for the support of himself and his family" the expenses that may be necessary for celebrating the marriage of the daughter of the insolvent may be brought. Therefore, the proper course for the insolvent to adopt is to ask for an increase in his allowance for the period during which he contemplated celebrating the marriage of his daughter. Such an application would be dealt with by the Court bearing in mind the considerations that ought to prevail in disposing of applications under S. 66 (2). 1940 Mad 675 (677) [AIR V 27].

[4] The wife and children of the insolvent have no legal right under the general law for any provision being made for their maintenance out of the immovable property of the insolvent. Section 60 (2) is not meant for reserving the immovable property of the insolvent for the residence and maintenance of the insolvent's wife and children. That section is meant only for the purpose of reserving a money allowance for them. 1939 Lah 39 (40) [AIR V 26] ✠ ('38) 40 Pun L R 151 (152) ✠ ('30) 31 Pun L R 661 (662).

estate; but any such allowance may, at any time, be varied or determined by the Court.

[P. I., 1907—S. 40; P. T. I., 1909—S. 75.]

67. Right of insolvent to surplus.

The insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest as provided by this Act, and of the expenses of the proceedings taken thereunder.

[P. I., 1907—S. 41; P. T. I., 1909—76.]

[a][67A. Committee of inspection.

(1) The Court may, if it thinks fit, authorize the creditors who have proved their debts to appoint a committee of inspection for the purpose of superintending the administration of the insolvent's property by the receiver.

(2) The persons appointed to a committee of inspection shall be creditors who have proved their debts or persons holding general powers-of-attorney from such creditors.

(3) The committee of inspection shall have such powers of control over the proceedings of the receiver as may be prescribed.]

[P. T. I., 1909—S. 88.]

[a] *Inserted* by the Provincial Insolvency (Amendment) Act, 1926 (XXXIX of 1926), S. 5.

Appeal to Court against Receiver

68. Appeal to Court against receiver.

If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may apply to the Court, and the Court

Section 67 — Note 1

[1] Sections 48, 61 and 67 should be read together and if possible such construction should be placed on them as would make the said provisions not inconsistent with each other. 1931 Mad 729 (736) [AIR V 18] (DB).

[2] Sufficient surplus left in hands of official receiver after payment of debt in schedule — Creditor is entitled to get contract rate of interest although higher than 6 per cent. from date of adjudication till date of payment unless it is reduced for special reasons. 1931 Mad 729 (734, 739) [AIR V 18] (DB).

[3] Where a Hindu father becomes insolvent and the receiver sells the share not only of the father but also of his son for payment of the father's debt, if there is a residue left out of the sale proceeds after satisfaction of the father's debts, the son can claim that residue. 1931 Bom 50 (52) [AIR V 18] : 55 Bom 110 (DB).

[4] Bankrupt has not ordinary right of cestui que trust to intervene until surplus has been ascertained to exist. He cannot trouble trustee by taxing bill of costs or interfere with administration of estate. His right to surplus is contingent interest which he can dispose of by will, deed or otherwise even before surplus is ascertained. 1924 Bom 49 (50, 51) [AIR V 11] (DB).

[5] Section 67 gives the insolvent only a contingent right to the surplus left after the satisfaction of the debts but so long as the debts have not been completely discharged, no question of his retaining any interest in the property can arise. The property, for the purpose of the payment of debts, vests completely in the receiver to the complete divestment of the debtor. 1952 All 328 (329) [A I R V 39].

[6] The effect of the order of conditional discharge under S. 41 (2) (c) is that subject to the conditions laid down in the order the insolvents are free men after the order of discharge. They are not bound by the debts incurred by them or proved against them up to the date of discharge. But they do not get back the property which has vested in the official receiver because that property is to be distributed amongst the creditors and the insolvents are entitled only to the surplus that may remain after the claims of the creditors and of the expenses of the insolvency proceedings have been satisfied as provided in S. 67. 1957 All 262 (263) [AIR V 44 C 77].

[7] Person taking conveyance from insolvent before adjudication — Official Receiver getting conveyance set aside under S. 53 but in appeal entering into compromise with alienee — Alienee depositing in Court certain amount for payment to creditors according to terms of compromise — After payment to creditors certain amount remaining to credit of administration—Alienee held had more equitable claim to balance than insolvent — S. 67 held inapplicable. 1949 Mad 709 (710) [A I R V 36 C 311].

SECTION 68 — SYNOPSIS

1. Scope and applicability.
2. Other remedies if barred.
3. Who can appeal.
4. Act or decision.
5. Powers of Court.
6. Inherent powers.

may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just :

Provided that no application under this section shall be entertained after the expiration of twenty-one days from the date of the act or decision complained of.

[P. I., 1907—S. 22; P. T. I., 1909—S. 86.]

Section 68 — Synopsis *(contd.)*

7. Limitation.
8. Parties.
9. Appeal against order passed under this section.

1. Scope and applicability. — [1] The section applies only to matters which the receiver has done in course of insolvency matter in respect of the insolvent's estate. 1917 All 266 (269) [AIR V 4]: 39 All 204(DB).

[2] Section 68 does not apply to Court taking action under S. 50 (2). 1919 Mad 947 (948) [AIR V 6] : 42 Mad 13 (DB).

[3] Section 68 presupposes that the decision is by a receiver properly appointed. 1924 Mad 461 (462) [AIR V 11] (DB). (Sale by unauthorised person—Limitation under S. 68 does not apply).

[4] The right of appeal given by S. 68 is not confined only to such orders as are passed under Ss. 56, 57 and 59 but extends to an order of the receiver under S. 80. 1916 Mad 1014 (1015) [AIR V 3] : 38 Mad 15 (DB) ✠ 1939 Lah 460 (462) [AIR V 26].

[5] The District Judge has jurisdiction to deal with an application, by a person who purports to have purchased the property of an insolvent at a sale held by the official receiver, to the effect that his bid might be accepted and that the sale to another person be held to be invalid. A regular suit is not necessary. 1921 Mad 313 (314) [AIR V 8] (DB).

[6] Suit by receiver to set aside sale of insolvent's property for arrears of income-tax — Suit and first appeal dismissed - Receiver refusing to prefer second appeal — Proper remedy of creditor would be to apply under S. 68 for reversal of refusal by receiver to prefer second appeal or in alternative for permission to appeal himself in receiver's name. 1941 Mad 577 (579) [AIR V 28].

[7] When the official receiver is about to sell properties subject to mortgages which mortgages were liable to be scaled down under the Madras Agricultural Relief Act, an application can be made to the Insolvency Court to give directions to the official receiver to suspend the sale until the scaling down process is completed, and if the official receiver holds the sale in disobedience to such directions, that can be a ground under S. 68. 1942 Mad 254 (256) [AIR V 29].

[8] The District Judge has no jurisdiction to confirm the receiver's report except by consent of parties until twenty-one days have elapsed within which the creditors aggrieved can apply to the Court for the reversal or modification of the act or decision by which they are aggrieved. 1926 Cal 826 (827) [AIR V 13] (DB).

2. Other remedies if barred. — [1] The remedy under S. 68 is not the only remedy open to a person aggrieved by an act of the receiver. A stranger to insolvency proceedings may, at his option, seek his redress in the ordinary civil Court or he may apply under S. 68. 1934 Rang 97 (98) [AIR V 21] (DB) ✠ 1924 All 40 (43) [AIR V 11] : 46 All 16 (DB) ✠ 1917 Nag 149 (151) [AIR V 4] : 13 Nag L R 210 ✠ 1924 Oudh 294 (294) [AIR V 11] : 26 Oudh Cas 319 ✠ 1917 Sind 22 (23) [AIR V 4] : 10 Sind L R 179 (DB).

[2] The word "may" in S. 68 does not mean "must". 1924 All 40 (43) [AIR V 11] : 46 All 16 (DB).

[3] An application under S. 68 is in the nature of a suit and the decision thereon operates as res judicata in subsequent suit. 1918 All 346 (349) [AIR V 5] : 39 All 626 (DB) ✠ 1919 All 274 (275) [AIR V 6] (DB) ✠ 1919 All 229 (230) [AIR V 6] : 41 All 378 (DB).

[4] If a person does not elect to pursue his remedy under S. 68 and there is no determination on the merits before a suit is instituted he can seek his remedy by a regular suit. 1922 All 407 (408) [AIR V 9] : 44 All 620 (DB).

[5] Property alleged to be that of insolvent attached by receiver — Property claimed by two parties — Decision by Insolvency Court affirmed by High Court — Suit between rival claimants held not barred by res judicata as Insolvency Court had no jurisdiction to hear suit involving question of title. 1917 All 157 (157) [AIR V 4] : 39 All 353 (DB).

[6] Plaintiff's property attached in execution of decree against S — Subsequently S becoming insolvent — Plaintiff's objection dismissed by executing Court—Suit by plaintiff for declaration of his title — Receiver impleaded as defendant—Suit held not barred by S. 68. 1918 All 363 (363) [AIR V 5] : 40 All 582 (DB).

[7] A suit for a declaration that a property sold by official receiver belongs, exclusively to insolvent's father, without a prayer to set aside the sale and for possession is not untenable, where the question of title to property has not been decided either under S. 4 or by way of appeal under S. 68. 1935 Mad 297 (298) [AIR V 22] (DB).

[8] Insolvency—Sale by receiver—Objector claiming title to property sold and objecting to sale — Objection should be under S. 4 and not under S. 68. 1937 Lah 2 (3, 4) [A I R V 24] ✠ 1937 Lah 297 (298) [AIR V 24].

[**But see** 1936 Lah 502 (503) [AIR V 23]. (Mortgage by official receiver of occupancy rights of discharged insolvent — Application to set aside act of receiver — S. 4 does not apply.)]

Section 68 — Note 2 *(contd.)*

[9] Official receiver passing order on claim petition which he had no jurisdiction to do— No appeal preferred under S. 68 — Application under S. 4 is not barred. 1933 Mad 471 (473, 474) [AIR V 20].

[10] Where an aggrieved person chooses to apply under S. 68 he must comply with the terms of the section. He cannot be heard to say, in order to avoid the effect of the plain terms of the proviso to S. 68 that he makes his application under S. 4 and not under S. 68. 1934 Rang 97 (97, 98) [AIR V 21] (DB).

[But see 1936 Lah 149 (150) [AIR V 23].]

[11] The whole tenor of S. 68 is against the view that a creditor's only remedy against the refusal of the official receiver to take action under S. 53 or 54 of the Act is by way of appeal under S. 68. A creditor can at any time during the pendency of the Insolvency proceedings move the Court under S. 53 or 54 on the ground that the official receiver has refused to move in the matter as there is no period of limitation provided for such an application. 1924 Mad 345 (347) [AIR V 11] : 47 Mad 673 (DB).

[12] Where the aggrieved party does not appeal under S. 68 against the receiver's order that the party's objection to the sale of the insolvent's property should be merely notified to the bidders at the sale, the objection cannot be gone into at a late stage of the insolvency proceedings as an objection to the validity of sale. 1924 Mad 147 (148) [AIR V 11] (DB).

3. Who can appeal. — [1] The words "a person aggrieved" do not mean a man who is disappointed of a benefit which he might have received if some other order had been made. He must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something. 1917 All 160 (162) [AIR V 4] : 39 All 152 (DB) ✣ 1941 Bom 415 (416) [AIR V 28] ✣ 1918 Mad 1297 (1299) [AIR V 5] (DB) ✣ 1918 Mad 497 (498) [AIR V 5]. (Word "aggrieved" is wider than word "injured".)

[2] Any person who is entitled to demand a decision of the Court in respect of the insolvent's property and who would be damnified if the decision goes against him is a "person aggrieved". 1915 Mad 1177 (1179) [AIR V 2]: 39 Mad 479 (DB).

[3] The insolvent can in certain circumstances apply to the Court under S. 68 questioning the acts of the Official Receiver or appeal under S. 75 from an adverse order of the Court passed on such application. 1950 Mad 492 (Pr 25) [AIR V 37 C 212] : ILR (1951) Mad 77 (FB). (AIR 1926 Mad 556 (FB), *Overruled.* Instances where insolvent can be said to be aggrieved indicated — Unless there is fraud, illegality or serious irregularity resulting in substantial loss to estate, sales held by Receiver should not be interfered with.) ✣ 1939 Lah 499 (500) [AIR V 26] ✣ 1932 Lah 320 (320) [AIR V 19].

[See however 1943 Mad 266 (267) [AIR V 30]. (Even after the adjudication is annulled and the insolvent's property continued to vest in the receiver, the insolvent has no locus standi to apply to the Insolvency Court to have the sale by the receiver set aside.)]

[But see 1941 Bom 415 (416) [AIR V 28]. (An Insolvent has no locus standi to impeach a sale made by a receiver as all the property of the insolvent vests in the receiver. In such a case the insolvent cannot be said to have been aggrieved by the act of the receiver, as at the date of the sale the property does not belong to the insolvent but vests in the receiver for the benefit of his creditors.) ✣ 1936 Pesh 151 (151, 152) [AIR V 23].]

[4] Where the objection of the insolvent is only as regards the manner in which the estate is administered and no fraud or illegality or mutual mistake is alleged, he is not a person who is aggrieved by the order within the meaning of S. 68. 1944 Mad 184 (186) [AIR V 31].

[5] Where the receiver has done an act, that is to say, has decided that a certain debt is due by the insolvent, such a decision would, undoubtedly, aggrieve the insolvent and the insolvent has a right of appeal. 1921 Sind 36 (37) [AIR V 8] : 15 Sind L R 28.

[6] In an application to set aside sales under S. 68, it was contended that the petitioner had no *locus standi* as he had not proved his debt either by the date of the sales or by the date of the application — *Held* that the creditor having been added in the list of proved creditors on the date of the order his application was maintainable. 1946 Mad 89 (89) [AIR V 33 C 49].

[7] Application against insolvent's estate represented by receiver by person claiming adversely to estate – One of the creditors has no *locus standi* and has no right of appeal against decision in such application. 1917 All 160 (161) [AIR V 4] : 39 All 152 (DB).

[8] Where a creditor filed an application under S 68 o set aside a sale by the receiver but withdrew it collusively — *Heid*, that it was competent to another creditor who was aggrieved by the order, to prefer an appeal from the order dismissing the application though he was not a party to the application. 1932 Mad 162 (162) [AIR V 19] : 55 Mad 313 (DB).

[9] Where a receiver seizes certain property as being property of the insolvent, a person who claims such property as his own is in the position of a person aggrieved by an act of the receiver and his remedy is by an application under S. 68. 1914 All 212 (212) [AIR V 1]: 36 All 8 (DB) ✣ 1918 Cal 303 (303) [AIR V 5] (DB).

[10] *A*, an insolvent, whose property vested in the official receiver executed in 1908 a pronote and an agreement in favour of *B*, his father, providing that in case he was not discharged within a year, he would convey certain property to *B*. *A*, not being discharged within one year, *B* requested the receiver to execute a release deed in respect of the above property. The receiver having refused to do so, *B* applied to the Insolvency Court to give leave to the receiver to execute a release deed

Section 68 — Note 3 *(contd.)*
and the application was granted—*Held* that *B* was not an aggrieved person as the refusal of the receiver to execute the release deed was in no way a binding adjudication on his right and did not affect his remedy by suit. 1918 Mad 1297 (1299) [AIR V 5] (DB).

[11] A beneficiary under a promissory note can prefer an appeal if he is aggrieved. 1945 All 213 (214) [AIR V 32] : ILR (1945) All 260 (DB).

[12] Where a Hindu father who has been adjudicated insolvent has already sold the property including the interest of his sons acting as their guardian during their minority, then although the sales have been declared void as against the receiver, the sons have no *locus standi* to apply under S. 68 if the order setting aside the sale does not show that the sales were not binding on the interests of the sons. 1927 Mad 232 (233) [AIR V 14] (DB).

[13] Mortgaged property sold in execution of mortgage decree—Subsequently mortgagor declared insolvent — Receiver sending notice of proclamation to Court for sale of insolvent's property including property sold — Purchaser in execution held was not person aggrieved. 1914 Cal 885 (886) [AIR V 1] (DB).

[14] Mortgage executed by insolvent annulled under S. 54 (1) — Court, however, finding in same proceeding that mortgage-debt was true—Receiver declaring that he would not admit debt to schedule without further inquiry — Mortgagee applying under S. 68 against declaration — Mortgagee held was not entitled to make application before final decision of receiver. 1937 Mad 151 (152) [AIR V 24].

4. Act or decision. — [1] Section 68 is intended to provide an appeal to the Court against the acts of the receiver and not an appeal to the Court against the acts of the Court done through the receiver. 1938 Nag 320 (321) [AIR V 25].

[2] "Act" in S. 68 is not limited to act of the receiver in management of the estate but includes also statements made by him in Court in the course of insolvency proceedings. 1940 Nag 142 (143) [AIR V 27].

[3] The acts of an official receiver in holding a sale of the insolvent's assets, in confirming it and in executing a sale-deed in favour of the purchaser can all be the subject of an application under S. 68. 1941 Mad 827 (828) [AIR V 28] (DB).

[*See also* 1931 Rang 122 (124) [AIR V 18] : 9 Rang 231 (SB).]

[4] Attachment of property as belonging to insolvent by receiver is not an act or decision of the receiver. 1932 All 408 (408) [AIR V 19] (DB).

[5] Where the receiver considers that certain property belonging to a *deosthan* of which the insolvent is the trustee should be sold, and he merely invites bids under the instructions of the Court and refers these bids to the Court which accepts the highest bid, the sale, if a sale be held to have taken place, is not the action of the Receiver and S. 68 would not apply. 1938 Nag 320 (320, 321) [AIR V 25].

5. Powers of Court.—[1] The right conferred by S. 68 is a right of appeal and the Court to which the appeal is preferred is bound to investigate the claim on the merits unless its hands are otherwise tied. The Court, therefore, is bound to investigate on merits the matter complained of against the receiver 1940 Nag 142 (143) [AIR V 27].

[2] Where proper reasons are given by a Court for holding that the action of the receiver was irregular and has prejudiced the general interests of creditors, it should set aside the order passed by receiver. 1923 Mad 350 (351) [AIR V 10] (DB) ✣ 1915 Mad 1177 (1178) [AIR V 2] : 39 Mad 479 (DB).

[3] Sale of property by the Receiver is an act of the Receiver within S. 68. The Court would not readily set aside a sale held by the receiver of the property of the insolvent unless in the circumstances of the case, the Court is satisfied that it would not be fair and just that the sale should stand. If fraud or collusion is proved in connection with the sale, that would be a ground upon which the Court would set aside the sale, or again, if there is material irregularity in the conduct of the sale, the Court probably in that case also, would be disposed to set aside the sale But the Court is not fettered in its discretion to set aside the sale in any case in which it thinks that the sale was neither fair nor a just one. 1931 Rang 122 (124) [AIR V 18] : 9 Rang 31 (SB) (AIR 1928 Rang 60, *Overruled.*)

[4] Sale by receiver without notice to petitioning creditor—Sale is irregular - Petitioning creditor offering to pay nearly fifty per cent more than the price offered by auction-purchaser—Sale should be set aside and fresh sale ordered. 1954 Mad 79 (Pr 4) [AIR V 41 C 21].

[5] Receiver not holding sale on particular day in absence of one creditor — Sale held next day in absence of other creditor at earlier hour than at which sales are normally held—Two creditors being the only prospective bidders, *held* it was neither fair nor just to allow sale to stand and that court had power to set aside same. 1931 Rang 122 (123) [AIR V 18] : 9 Rang 31 (SB).

[6] Receiver changing sale proclamation at eleventh hour — If loss is caused, court has jurisdiction to set aside sale by receiver. 1915 Mad 1177 (1178) [AIR V 2]:39 Mad 479 (DB).

[7] Sale by official receiver — Application by insolvent's widow to set aside sale — Sale set aside on payment of amounts due to creditors and 5 per cent as compensation to purchaser — Order, held good and not beyond powers conferred by S. 68 upon Court. 1945 Mad 287 (287, 288) [AIR V 32] : ILR (1946) Mad 50 (DB).

[8] The insolvency Court cannot summarily set aside a registered sale-deed. Where, therefore, the official receiver sells a house of the insolvent at public auction and one person *R* offers the highest bid and deposits one-fourth of the price but subsequently, another person

Section 68 — Note 5 *(contd.)*

G offers a higher price and the official receiver, under order of the Court, executes a registered sale-deed in G's favour, it is not open to R to apply to the Insolvency Court for cancellation of the sale-deed. The matter in controversy should be settled in more appropriate proceedings, granting leave, if necessary, for a suit against the receiver and the third person claiming rights under the sale-deed. 1935 All 687 (688) [AIR V 22].

[9] A contract of sale completed by a receiver can be set aside by the Insolvency Court only upon an application under S. 68. It cannot do so upon an application under O. 20, R. 90, Civil P. C. 1918 Mad 136 (136) [AIR V 5] (DB).

6. Inherent powers. — [1] A receiver being an officer of the court if he is about to act in excess of his authority, it is competent even to a stranger to bring that fact to the notice of the court, which has inherent power to review the conduct of the receiver and to make an appropriate order so that the stranger may not be prejudiced by an unlawful act of its own officer and for this purpose the Court may hold a summary inquiry. 1914 Cal 885 (886) [AIR V 1] (DB) + 1920 Lah 361 (362) [AIR V 7] : 1 Lah 307 + 1946 Mad 89 (89) [AIR V 33 C 49].

[2] The Insolvency Court has inherent power to rectify the receiver's errors or mistakes or to reverse or modify his acts or decisions and the fact that the time for making an application under S. 68 has expired does not preclude the Court from exercising its powers. 1932 Lah 84 (84) [AIR V 19] + 1950 Mad 311 (Pr. 6) [AIR V 37 C 142].

[3] Official Receiver who discovers that a property has been sold under an erroneous procla ation of sale, due to an error committed by him, is entitled to have the sale set aside by an order of the Insolvency Court on the ground that owing to the said mistake the property fetched a very low price. 1950 Mad 311 (Prs. 6, 9) [AIR V 37 C 142].

[4] An Insolvency Court has powers of supervision over the receiver and can give him directions not to complete a contract of sale in exercise of such powers. 1918 Mad 136 (136) [AIR V 5] (DB).

7. Limitation. — [1] Where a person aggrieved by an act of the receiver applies under S. 68, he must comply with the terms of the section and take action within 21 days prescribed by the section. 1919 All 274 (275) [AIR V 6] (DB) + 1932 Lah 320 (320) [AIR V 19] + 1924 Oudh 294 (294) [AIR V 11] : 26 Oudh Cas 319 + 1934 Rang 97 (97) [AIR V 21] (DB).

[*See also* 1935 Lah 60 (61) [AIR V 22] (DB). (Even an application under S. 4 should be made within 21 days if it is one to set aside an order of the official receiver.)]

[2] The section contains a mandatory provision which requires the acts of the receiver to be questioned within 21 days. Such being the case there is no inherent power in a Court to receive a petition filed after the lapse of 21 days. Section 5 of the Limitation Act, cannot be extended to such applications as it is not applicable to those applications. 1958 Andh-Pra 426 (Prs. 3, 4) [AIR V 45 C 125] : ILR (1957) Andh-Pra 538.

[3] Although the act or decision of the receiver must be challenged, if at all, by an application presented within 21 days from date of such act or decision, there is nothing in the Act to show that all the grounds upon which it is challenged must be stated in that application, or that the grounds mentioned therein may not be supplemented or amplified later on. 1927 Cal 834 (835) [AIR V 14] (DB).

[4] Attachment and sale of insolvent's property by receiver — Objection by insolvent that it is not attachable and saleable can be made within 21 days from date of sale itself. The sale is a distinct act and is not in continuation of attachment. 1937 All 226 (227) [AIR V 24].

[5] An application under S. 68 to set aside a sale within 21 days of the execution of the sale-deed by the receiver in favour of the purchaser after confirmation of sale is within time. 1941 Mad 827 (828) [AIR V 28] (DB).

[6] Order rejecting proof of debt — Appellant apprised of order but formal notice not issued — Time runs from date of order. 1935 Mad 149 (150) [AIR V 22] : 57 Mad 1030 (DB).

[7] Insolvent's land sold by receiver — Sale proceedings submitted to Court for confirmation — Objection to sale raised by insolvent after expiry of 21 days from date of sale — *Held* that as proceedings were before Court for confirmation, no question of limitation arose and court had power to refuse to confirm sale on ground raised by insolvent. 1931 Lah 133 (133) [AIR V 18].

[8] By reason of the express terms of S. 29 (2) (a), Limitation Act, S. 4 of that Act applies to applications under S. 68. 1931 Rang 209 (209) [AIR V 18] : 9 Rang 150 (DB).

[9] The proceedings under S. 68 are more akin to an appeal than to a suit and the provisions of S. 22, Limitation Act, have no bearing on the question. 1937 Lah 611 (611) [AIR V 24].

8. Parties.—[1] The receiver ought to be made a party to any proceedings under S. 68 and all questions which arise between the insolvent and a person who is either a creditor or a stranger to the insolvency must be decided between such person and the receiver as representing the estate. 1917 All 160 (161) [AIR V 4] : 39 All 152 (DB).

[But see 1924 Mad 830 (831) [AIR V 11] (DB). (Receiver not necessary party — But he can appear and claim to be heard.)]

[2] There is no law which requires that certain parties should be formally mentioned as respondents in an application under S. 68. The phraseology of S. 68 negatives such a necessity. The application is directed against an action of the official receiver and normally he is the only necessary party to be heard against the application. But the Court may hear other parties who are interested, as for instance, a purchaser. But it is not necessary that the purchaser should be formally named

PART IV

PENALTIES

69. Offences by debtors.

If a debtor, whether before or after the making of an order of adjudication,—

(a) wilfully fails to perform the duties imposed on him by section 22 or to deliver up possession of any part of his property which is divisible among his creditors under this Act, and which is for the time being in his possession or under his control to the Court or to any person authorized by the Court to take possession of it, or

(b) fraudulently with intent to conceal the state of his affairs or to defeat the objects of this Act,—

(i) has destroyed or otherwise wilfully prevented or purposely withheld the production of any document relating to such of his affairs as are subject to investigation under this Act, or

(ii) has kept or caused to be kept false books, or

(iii) has made false entries in or withheld entries from or wilfully altered or falsified any document relating to such of his affairs as are subject to investigation under this Act, or

(c) fraudulently with intent to diminish the sum to be divided among his creditors or to give an undue preference to any of his creditors,—

(i) has discharged or concealed any debt due to or from him, or

(ii) has made away with, charged, mortgaged or concealed any part of his property of any kind whatsoever,

he shall be punishable on conviction [a][* * *] with imprisonment which may extend to one year.

[P. I., 1907 — S. 43 (2); P. T. I., 1909 — S. 103.]

[a] The words "by the Court" were *omitted* by the Repealing Act, 1927 (XII of 1927), S. 2 and Schedule.

Section 68 — Note 8 *(contd.)*

as a party at the hearing of the application. 1937 Lah 611 (611) [AIR V 24].

[3] As there is no express provision in the Act prescribing a procedure different from that laid down in the Civil P. C. or expressly excluding the application of that procedure to proceedings under S. 68. Section 5 attracts the provisions of the Civil P. C. Therefore a new party may be added to an application under S. 68, if conditions laid down in O. 1, R. 10, Civil P. C. are complied with. ('55) 1955 Andh W R 322 (323, 324).

9. Appeal against order passed under this section. — [1] An appeal lies to the High Court against an order of the District Judge under S. 68 confirming an order of the receiver dismissing an application for adjudication. 1918 Mad 964 (966) [AIR V 5]:40 Mad 752 (DB).

[2] An order passed by court under S. 68 read with S. 58 cannot be appealed against except with leave obtained under S. 75 (3). 1916 All 349 (350) [AIR V 3] (DB).

[3] Insolvency Court under S. 68 confirming act of Receiver—Appeal to District Court under S. 75 — Revision to High Court against order of District Judge — High Court setting aside order as being unsupported by facts and as being based on misconception of powers of insolvency Court — No appeal lies under S. 109, Civil P. C. to Supreme Court against orders of the High Court passed in revision. 1953 Nag 145 (Pr. 5) [AIR V 40 C 48] : ILR (1953) Nag 243 (DB).

SECTION 69 — SYNOPSIS

1. Clause (a).
2. Clause (c) (i).
3. Clause (c) (ii).

1. Clause (a). — [1] Unless orders have been issued regarding adjudication, insolvent is not bound to carry out duties imposed under S. 22 and prosecution must fail. ('35) 1935 Mad W N 919 (920).

[2] Where processes issued are full of defects and do not purport to give notice to debtor of admission of any insolvency petition at all, debtor cannot be fixed with liability under S. 69 (a), for failure to comply with them. The fact that he might have had shrewd idea of what proceedings really were is not sufficient to fix him with liability. 1936 Nag 237 (239) [AIR V 23] : ILR (1937) Nag 185 : 38 Cri L Jour 230.

[3] For failure to comply with the order of the Court to produce the account books and thereby failing to perform this duty which is cast upon him by the second part of S. 22 the accused can only be convicted under S. 69 (a). To fulfil the requirements of the word 'wilfully' in S. 69 (a), it will have to be proved that the account books required to be produced were in the possession or power of the petitioner to produce. 1934 Cal

[a][70. Procedure on charge under section 69.

Where the Court is satisfied, after such preliminary inquiry, if any, as it thinks necessary, that there is ground for inquiring into any offence referred to in section 69 and appearing to have been committed by the insolvent, the

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Section 69 — Note 1 *(contd.)*

409 (411) [AIR V 21] : 61 Cal 537 : 35 Cri L Jour 637 (DB).

[4] Insolvent receiving sums within 17 days after adjudication must be presumed to have derived them from assets in possession of insolvent when adjudicated. ('31) 1931 Mad W N 1312 (1313).

[5] Where an insolvent has a lease-hold interest in a certain land, which he possessed, he having an absolute disposing power, it falls within the definition of the word 'property' under S. 2 (d) of the Act. Therefore, if he transfers this right after the filing of the insolvency application and before he is adjudged an insolvent with a view to keep it away from the list of assets which has to be placed at the disposal of the Receiver, he commits an offence as provided in S. 69 (a) and (c) (ii). 1958 Andh-Pra 120 (Pr. 6) [AIR V 45 C 39] : 1958 Cri L Jour 159.

2. Clause (c) (i). — [1] Section 69 (c) (i) refers to debts incurred before the order of adjudication and not to debts incurred after that order. 1932 Nag 17 (18) [AIR V 19] : 27 Nag L R 304.

3. Clause (c) (ii). — [1] It is only when execution of mortgage deed is combined with fraudulent intent to defraud creditors of the executant that it can be brought within purview of the offence defined in S. 69. Gist of the offence is actual diminution of sum to be divided among the creditors. 1933 Nag 33 (34) [AIR V 20] : 34 Cri L Jour 1038.

[2] Words "made away with" in S. 69 are sufficiently wide to cover cases of gift of immovable property and, therefore, case of gift fraudulently made by insolvent with intent to diminish sum to be divided among his creditors is as much liable to punishment under section as case of charge or mortgage. 1932 Oudh 61 (63) [AIR V 19].

[3] A man in the position of an insolvent who has the means of ascertaining where property of his has been disposed of, even if he has not been actually a party to the making away with it, and who does not use the means, is just as guilty of concealment within the meaning of the section as if he actively concealed the locality in which the property actually is. 1921 All 87 (87) [AIR V 8]: 43 All 406 : 22 Cri L Jour 725 (DB).

[4] Judgment-debtor applying to be adjudged insolvent — Insolvency Court putting to sale flour mill of insolvent — Mill purchased by one *M* but no delivery made — Insolvent subsequently removing essential parts of machinery — Conviction under S. 69 (c) (ii) legal. 1939 All 166 (167) [AIR V 26] : 40 Cri L Jour 347.

[5] Petitioner had Rs. 7,500 in bank. He withdrew Rs. 4,000 and made re-deposit in name of wife. He then operated the account. Wife brought suit against bank for return of Rs. 4,000. Petitioner filed insolvency petition and when he filed his schedule, he concealed his *benami* interest in four thousand rupees in the hands of bank. He was convicted — *Held*, that it was impossible to say that petitioner had concealed property which, at time of the filing of schedule, was not his property in absence of decision by competent Court. 1937 Cal 234 (235) [AIR V 24] : 38 Cri L Jour 710.

[6] Insolvent was in jail and had only omitted to mention the equity of redemption of certain property which he had mortgaged many years ago. He admitted mortgage when fact was brought to his notice — *Held*, that prosecution under S. 69 was hardly warranted. 1937 Lah 432 (432) [AIR V 24].

[7] Lease-hold interest in land—Its transfer after insolvency petition and before adjudication with a view to keep it away from the list of assets—He commits an offence as provided in S. 69 (a) and (c) (ii). 1958 Andh Pra 120 (Pr 6) [AIR V 45 C 39] : 1958 Cri L Jour 159.

[8] Before directing prosecution of insolvent for concealing assets, in the proper exercise of Judge's judicial discretion, there should be some sort of proportion between value of property alleged to have been concealed and that of indebtedness of insolvent. 1935 Pat 126 (127) [AIR V 22] (DB).

[9] *A* was adjudicated insolvent on his own petition. A certain plot of land belonging to *A* which was adversely in possession of *B* was not disclosed. After the order of discharge had become absolute, *A* filed a suit against *B* for declaration of title and for possession of the land on ground that *B* had dispossessed *A* sometime after order of discharge had become absolute, *B* contended that *A* had committed fraud in concealing the property in the insolvency proceedings and could not take advantage of it — *Held*, that the transactions between *A* and his creditors were in no way connected with the trespass by *B*—*A*'s cause of action was his title and *B*'s trespass. Moreover forfeiture of title was not one of the punishments under the Act for offence under S. 69 and the fraud upon creditors did not disentitle *A* to relief — Maxims ex turpi causa non oritur actio and in pari delicto potior est conditio defendantis which belonged to the domain of contract had no application to the case. 1961 Andh-Pra 219 (Prs 14, 15, 16) [AIR V 48 C 55] (DB).

SECTION 70 — SYNOPSIS

1. "Where the Court is satisfied."
2. "May record a finding".
3. Jurisdiction of Magistrates.
4. Notice to debtor.
5. Procedure.
6. Appeal.
7. Revision.

1. "Where the Court is satisfied." — [1] Considering the history of S. 70, Provin-

Court may record a finding to that effect and make a complaint of the offence in writing to a Magistrate of the first class having jurisdiction, and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898.]

[P. T. I., 1909 — S. 104.]

[a] *Substituted* by the Insolvency (Amendment) Act, 1926 (IX of 1926), S. 11, as amended by the Repealing and Amending Act, 1927 (X of 1927), S. 3 and Schedule II.

Section 70 — Note 1 *(contd.)*

cial Insolvency Act, it would appear that the legislature intended that the Judge should satisfy himself in any way he thinks proper before ordering a prosecution of the insolvent; and this interpretation is justified by the omission from the amending Act of the direction which made it necessary for the Court to serve a notice on the debtor and hear him before ordering his prosecution. 1928 Cal 211 (213) [AIR V 15] : 55 Cal 783 (DB).

[2] It is unnecessary under S. 70, to establish, before launching a prosecution, the various offences referred to in S. 69. All that S. 70 requires is that the Court should be satisfied that there is ground for enquiring into any offences referred to in S. 69. It is not necessary, and the Court is not bound, so far as the language goes, to make a preliminary enquiry even. 1951 Mad 686 (1) (Pr 1) [AIR V 38 C 215].

2. "May record a finding."—[1] *(Obiter)* —The words actually used are "The Court may record a finding to that effect and make a complaint". The word 'may' applies both to 'record' and to 'make.' On the words of the the statute, it would certainly be legitimate to say that the recording of a finding is optional and it is not obligatory on the Court to record such a finding. ('55) 1955-1 Mad L Jour 366 (367).

[2] *Held*, that in the context in which it was made, the direction of the Subordinate Judge to send a complaint to the First Class Magistrate was tantamount to the requisite finding though the Subordinate Judge had not in so many words stated that there was ground for inquiring into the offence which the insolvent appeared to have committed. ('55) 1955-1 Mad L Jour 366 (367).

3. Jurisdiction of Magistrates.—[1] When the Insolvency Court, under S. 70, Provincial Insolvency Act, makes a complaint to a Criminal Court, such Criminal Court does not derive its jurisdiction to try the offence from the Insolvency Court but from the Criminal Procedure Code. In determining whether particular Magistrate has jurisdiction to try offence about which complaint is laid before him, Court has to be guided entirely by provisions of Criminal Procedure Code. Complaint must be made to nearest First Class Magistrate having jurisdiction. When a mortgage deed is executed at *A* with intent to defraud creditors at *B* and the consequence of diminution of the sum available for division among the creditors actually ensues from it, the Court at *B* will have jurisdiction to try the offence. 1933 Nag 33 (33, 34, 35) [AIR V 20] : 34 Cri L Jour 1038.

4. Notice to debtor.—[1] Under S. 70, as amended by Act IX of 1926, it is not obligatory on Insolvency Judge to give notice to insolvent before holding that there are *prima facie* grounds for enquiry into offence under S. 69 against insolvent. Amended section leaves it to discretion of Judge even to hold preliminary enquiry into matter. 1936 Lah 871 (872) [AIR V 23].

5. Procedure.—[1] It would be an assistance to Judges dealing with offences under the Insolvency Act to frame the charges strictly in the language of the section, which defines the offence, together with the particulars of the conduct of the insolvent relied upon to establish the charges, just as is done in a formal charge of an offence, particularly an offence of embezzlement or falsification of books under the Penal Code. 1927 All 352 (352) [AIR V 14] (DB).

[2] The elements of offences contemplated by S. 69 (a) and S. 69 (b) are not the same and the Court cannot convict a person under S. 69 (a) as prejudice will be caused thereby to him. 1934 Cal 409 (410) [AIR V 21] : 61 Cal 537 : 35 Cri L Jour 637 (DB).

[3] On a proper interpretation of Ss. 69 and 70 it should be held that although a debtor may commit offences mentioned in S. 69 prior to the order of adjudication, it is not permissible for the insolvency Court to make a complaint against him regarding such offences until the debtor becomes an insolvent by the order of adjudication. 1959 Cal 74 (Pr 5) [AIR V 46 C 20] : 1959 Cri L Jour 41 (DB).

[4] Proceedings under S. 69, cannot be taken after a petition for adjudication has been dismissed and it is known that the alleged debtor is not going to be made insolvent at all. An order to prosecute passed under those circumstances is entirely *ultra vires*. 1931 Cal 508 (510) [AIR V 18] : 58 Cal 334 (DB).

[5] Official receiver is merely an ordinary litigant who may be entitled to move the Court in the usual manner that is, by presentation of a proper application which is to be heard in the presence of the parties and proceedings taken in his absence by the Court must be set aside on the proper application before the Court. 1929 Lah 805 (806) [AIR V 16].

6. Appeal.—[1] Order passed by Insolvency Judge under S. 70 recording finding that there are *prima facie* grounds for inquiry into offence referred to in S. 69 and appearing to have been committed by insolvents and making complaint of offence in writing to Magistrate of competent jurisdiction is appealable. 1936 Lah 871 (871) [AIR V 23].

[2] Right to appeal from order of prosecution under S. 70 arises only when finding is completed by forwarding of complaint. ('39) 1939 Nag L Jour 495 (495).

71. Criminal liability after discharge or composition.

Where an insolvent has been guilty of any of the offences specified in section 69, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved.

[P. T. I., 1909 — S. 105.]

72. Undischarged insolvent obtaining credit.

(1) An undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine or with both.

(2) Where the Court has reason to believe that an undischarged insolvent has committed the offence referred to in sub-section *(1)*, the Court, after making any preliminary inquiry that may be necessary, may send the case for trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance before such Magistrate ; and may bind over any person to appear and give evidence on such trial.

[P. I., 1907 — S. 53 ; P. T. I., 1909 — S. 102.]

Section 70 — Note 6 *(contd.)*

[3] Where creditor's application to prosecute insolvent for offence under S. 69 has been rejected, he has no right to appeal against order, as he is not person aggrieved by the decision of the Judge. 1933 Nag 9 (10) [AIR V 20] : 28 Nag L R 286 ✣ 1937 Lah 432 (432) [AIR V 24] ✣ 1937 Rang 472 (472) [AIR V 24]: 1937 Rang L R 264✣ 1930 Sind 2 (2, 4) [AIR V 17] (DB).

[But see 1932 Oudh 61 (62) [AIR V 19].]

[4] Neither a creditor nor the Official Receiver is a "person aggrieved" by a decision of the Insolvency Court declining to make a complaint against a debtor under S. 70 and has no right of appeal under S. 75 (1). The case of a debtor against whom a complaint is made under S. 70 of the Act might stand on a different footing. 1951 Mad 935 (Prs 2, 5) [AIR V 38 C 330] : I L R (1952) Mad 82 (FB).

[5] Small Cause Court with insolvency jurisdiction refusing to proceed under S. 69— Small Cause Court being subordinate to District Court, under S. 3 (2) appeal under S. 75 (1) and not revision lies from its order. 1937 Oudh 247 (248) [AIR V 24].

[6] No appeal lies from order of an Insolvency Court refusing to convict an insolvent for an offence under S. 69. 1932 All 4 (5) [AIR V 19] (DB).

[7] Where a District Judge, sitting in insolvency, has made a preliminary enquiry and consequent on that, a complaint to the Magistrate, so that the Magistrate should deal with it under S. 69 of the Act, no appeal lies. It is really an attempt to appeal against an order of the District Judge, sitting in insolvency made under S. 70. If there is any appeal against such an order, it must be under S. 75, sub-s. (3) of the Act, and only by leave of either the District Court or the High Court and a very strong case will be needed to justify the granting of such leave because it would be tantamount to stopping the proceedings under S. 69 and S. 70 *in limine* and before the facts have been fully enquired into by a Magistrate. Where no such leave has been obtained, the appeal is incompetent, nor does an appeal lie from the order under S. 476-B, Criminal P. C. 1939 Cal 264 (264, 265) [AIR V 26] : I L R (1938) 2 Cal 478 : 40 Cri L Jour 335 (DB).

[8] Sessions Judge is not prohibited from hearing an appeal from a conviction by a Magistrate in a case where as an Insolvency Judge, on the application of a creditor, he allowed the prosecution to proceed. 1923 All 193 (193) [AIR V 10] : 24 Cri L Jour 144.

7. Revision.—[1] No revision lies against order of Judge exercising insolvency jurisdiction refusing to take proceedings against insolvent under S. 69 on application of creditor, inasmuch as order in question is appealable to District Court under S. 75 (1). ('37) 1937 Oudh W N 762 (764) (DB).

Section 71 — Note 1

[1] Section 71 provides for the criminal liability of the insolvent after his discharge but only for the offences under S. 69 and not for the offence specified in S. 72. 1934 Cal 764 (764) [AIR V 21] : 61 Cal 605 (DB)✣ 1932 Nag 17 (18) [AIR V 19] : 27 Nag L R 304.

Section 72 — Note 1

[1] Questions to be considered under S. 72(1) are : *(a)* Is opponent an undischarged insolvent; *(b)* Did he obtain credit of Rs. 50 or upwards ? *(c)* Did he inform person from whom he obtained credit that he was undischarged insolvent ? 1928 Sind 114 (115) [AIR V 15] : 23 Sind L R 63.

[2] The Insolvency Acts render the very person who obtains credit liable to be prosecuted; and it is immaterial if he obtains such credit solely on his own behalf or on behalf of himself and another person or if he joins another person and both together obtain such credit. The fact that the words "either alone or jointly with any other person" have not

73. Disqualifications of insolvent.

(1) Where a debtor is adjudged or re-adjudged insolvent under this Act, he shall, subject to the provisions of this section, be disqualified from—

(a) being appointed or acting as a Magistrate ;

(b) being elected to any office of any local authority where the appointment to such office is by election or holding or exercising any such office to which no salary is attached ; and

(c) being elected or sitting or voting as member of any local authority.

(2) The disqualifications which an insolvent is subject to under this section shall be removed, and shall cease if—

(a) the order of adjudication is annulled under section 35, or

(b) he obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part.

(3) The Court may grant or refuse such certificate a it thinks fit, but any order of refusal shall be subject to appeal.

[P.T.I., 1909—S. 103A.]

Section 72 — Note 1 *(contd.)*

been re-produced in S. 72 does not limit the scope of that section, but, if at all, it is intended to expand its scope. 1928 Sind 114 (116) [AIR V 15] : 23 Sind L R 63.

[3] Section 72 lays down the only mode by which a person accused of an offence under the first sub-section may be proceeded against, that is, by the method laid down in sub-s. (2). Both clauses of S 72 should be read together and no prosecution under the first clause can be initiated without the Insolvency Court sending the case for trial to the nearest Magistrate of the First Class. 1927 Cal 149 (150, 155) [A I R V 14] : 53 Cal 929 : 27 Cri L Jour 1268 (SB).

[4] Order under S. 72 (2) can be made only at some time prior to the date of discharge of insolvent and during insolvency. Court has no jurisdiction to pass order under S. 72 (2) against discharged insolvent who obtained credit during his insolvency but before his discharge. 1934 Cal 764 (764) [AIR V 21] : 61 Cal 605 (DB).

[5] After insolvent has been discharged, no action can be taken against him under S. 72 in respect of offence referred to in that section committed before order of discharge. Remedy of aggrieved party in such case is to proceed against insolvent in ordinary course of law. 1932 Nag 17 (18) [AIR V 19]: 27 Nag L R 304.

[6] Insolvency Court prosecutes undischarged insolvent under S. 72 (2) — Before dismissal of his appeal against prosecution insolvent obtains discharge — Discharge cannot render proceedings against insolvent void. 1941 Mad 285 (286, 287) [AIR V 28].

[7] Under S. 72 (2). there is power given to Court on being satisfied that offence of kind contemplated had been committed to send case to Magistrate. This power is conferred, not in the interests of this or that party, but in order that Court may prevent offence against insolvency law. There can be no question of bar of *res judicata* operating against Court. The Insolvency Court can, therefore, consider a decision of its own not to prosecute in the light of a second application from the creditor, although the Court will not ordinarily prosecute on the strength of information on which it has previously declined to act. 1941 Mad 285 (286) [AIR V 28].

[8] The only person who can appeal against an order under S. 72 is the debtor himself in the case where his prosecution has been ordered. An order by an Insolvency Court refusing to take proceedings against an undischarged insolvent obtaining credit without disclosing the fact is therefore final. 1933 Nag 9 (10) [AIR V 20] : 28 Nag L R 286.

[9] Provisions of S. 72 (2) are analogous to S. 476, Criminal P. C., and Insolvency Courts should ordinarily give notice to insolvent before directing his prosecution. 1941 Mad 285 (285) [AIR V 28].

Section 73 — Note 1

[1] "Undischarged insolvent" in S. 55, Madras Local Boards Act, 1920, is not controlled by S. 73. 1941 Mad 22 (23) [AIR V 28].

[2] Where under S. 73, a candidate is not eligible for municipal elections, not having applied for a certificate that his insolvency was not due to any misconduct on his part, but was due to misfortune, the fact that since the election he has obtained the necessary certificate and has got rid of his disqualification does not help him as the provisions of the law must be strictly followed. The disqualification mentioned in S. 73, Provincial Insolvency Act is a disqualification under S. 15, Bombay District Municipal Act and applies to candidates for election to a municipal council. 1933 Sind 416 (417) [AIR V 20].

PART V

SUMMARY ADMINISTRATION

74. Summary administration.

When a petition is presented by or against a debtor, if the Court is satisfied by affidavit or otherwise that the property of the debtor is not likely to exceed in value five hundred rupees, the Court may make an order that the debtor's estate be administered in a summary manner, and thereupon the provisions of this Act shall be subject to the following modifications, namely :—

(i) unless the Court otherwise directs, no notice required under this Act shall be published in the Official Gazette ;

(ii) on the admission of a petition by a debtor, the property of the debtor shall vest in the Court as a receiver ;

(iii) at the hearing of the petition, the Court shall inquire into the debts and assets of the debtor and determine the same by order in writing, and it shall not be necessary to frame a schedule under the provisions of section 33 ;

(iv) the property of the debtor shall be realised with all reasonable despatch and thereafter, when practicable, distributed in a single dividend ;

(v) the debtor shall apply for his discharge within six months from the date of adjudication ; and

(vi) such other modifications as may be prescribed with the view of saving expense and simplifying procedure :

Provided that the Court may at any time direct that the ordinary procedure provided for in this Act shall be followed in regard to the debtor's estate, and thereafter the Act shall have effect accordingly.

[P. I., 1907—S. 48; P.T.I., 1909—S. 106.]

STATE AMENDMENTS

PUNJAB

In section 74, for the words "five hundred rupees" the words "two thousand rupees" shall be *substituted* — Punj. Act VII of 1934, S. 4 [19-4-1935].

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in section 74 for the words "five hundred rupees" *substitute* the words "one thousand rupees".

— U. P. Act XXIV of 1954, S. 2 & Sch. [30-11-1954].

Section 74 — Note 1

[1] Where Judge of Insolvency Court passes order that there should be summary administration of estate it is incumbent upon him when he makes order of adjudication to determine by order in writing debts of insolvent. 1942 All 344 (346) [A I R V 29] : I L R (1942) All 848 (DB).

[2] In summary administration, it is for Judge to enquire into debts and assets and to determine same by order in writing and to distribute property in single dividend and he cannot transfer petition to an official receiver for disposal. ('37) 1937 Mad W N 1160 (1161) (DB).

[3] In a case of summary proceedings under S. 74, there is no need for the creditor to prove his debt. 1956 Mad 580 (581) [A I R V 43 C 179].

[4] There is nothing in S. 74 which prevents any creditor from coming before the Court at any time before the single dividend under cl. 4 is distributed and proving his claim to a share in the amount realised. ('37) 1937 Mad W N 1160 (1161) (DB).

[5] A creditor who fails to appear and object to the omission of his name and debt in the schedule of creditors framed by the Insolvency Court in summary proceedings under S. 74 is not entitled to file an execution petition for the arrest of the debtor in cases where the Court frames a schedule, distributes the assets and grants discharge to the insolvent since that would amount to trying to undo what has been done by the Court; but in cases where the adjudication itself is annulled without the Court framing a schedule of creditors and the proceedings are dropped midstream without completion, the creditor is competent to file an execution petition for the arrest of the judgment-debtor. 1956 Mad 580 (582) [AIR V 43 C 179].

[6] In a summary administration, the property of the debtor vests in the Court as a Receiver on the date of the admission of the insolvency petition under S. 74 (2) of the Act in the same manner as property vests in the Court or Receiver under S. 28 (2) on an adjudication. 1956 Andh Pra 243 (246) [(S) AIR V 43 C 69]: ILR (1956) Andh 230 (FB).

[7] Under S. 74 (ii), when the property is vested in the Court, as receiver, it holds it,

PART VI
APPEALS

75. Appeals.

(1) The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final :

Provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit :

Provided, further, that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub-section *(1)* of section 100 of the Code of Civil Procedure, 1908.

(2) Any such person aggrieved by any such decision or order of a District Court as is specified in Schedule I, come to or made otherwise than in appeal from an order made by a subordinate Court, may appeal to the High Court.

(3) Any such person aggrieved by any other order made by a District Court otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court by leave of the District Court or of the High Court.

(4) The periods of limitation for appeals to the District Court and to the High Court under this section shall be thirty days and ninety days, respectively.

[P. I., 1907—S. 46; P.T.I., 1909—S. 8 (2) (b).]

Section 74 — Note 1 *(contd.)*

not as interim receiver, but as a full receiver in the sense in which the term is used in S. 28 (2). Such property cannot be the subject of execution sale but if a sale takes place, the purchaser in good faith is entitled to retain the property and the creditors of the insolvent are entitled only to the sale proceeds of that as assets for distribution among them. 1927 Mad 983 (983, 984) [A I R V 14] ✣ 1956 Andh 243 (246) [(S) AIR V 43 C 69]:ILR (1956) Andh 230 (FB). (Where property vested in Insolvency Court under S. 74 (2) is sold in execution sale by another Court, *bona fide* purchasers are protected under S. 51 (3) and creditors are entitled only to sale proceeds for distribution among them.)

[8] The Act nowhere prohibits a debtor who is not possessed of substantial assets from applying to be adjudged an insolvent. Section 74 provides that where the debtor's property is not likely to exceed the value of Rs. 500 summary administration of the debtor's estate may be ordered by the Insolvency Court. 1957 Andh Pra 375 (376) [A I R V 44 C 119].

[9] Insolvency Court has no jurisdiction to stay execution proceedings elsewhere. ('36) 63 Cal 535 (536) (DB).

SECTION 75 — SYNOPSIS

1. Applicability and scope.
2. Who may appeal.
3. "Order of Court subordinate to District Court."
4. "Order of District Court upon such appeal shall be final."
5. Section 75 (1)—Proviso 1 — Powers of revision.
6. Section 75 (1) — Proviso 2 — Second appeal.
7. Section 75 (2)—Orders of District Court specified in Schedule I made otherwise than in appeal.
8. Section 75 (3)—Orders appealable with leave of Court.
9. Appeal to Privy Council and Supreme Court.
10. Parties.
11. Procedure.
12. Limitation.

1. Applicability and scope. — [1] In the matter of appeals in insolvency cases, the High Court must be governed by S. 75 (1) of the Provincial Insolvency Act. It must not look to the Civil Procedure Code. 1946 Nag 42 (43) [AIR V 33 C 11] : ILR (1945) Nag 719 (DB).

[2] When right of appeal is expressly regulated by S. 75, it should not be taken to be governed by provisions of Order 47, Rule 7 Civil Procedure Code. 1937 Lah 568 (569) [AIR V 24]✣1955 Trav-Co 49 (Pr 10) [(S) A I R V 42 C 22] : I L R (1954) Trav-Co 1042 (DB). (AIR 1935 Pat 177, *Not Foll.*)

[3] Section 75 overrides Order 47, Rule 7, Civil Procedure Code. 1941 Mad 588 (589) [AIR V 28].

Section 75 — Note 1 *(contd.)*

[4] The District Judge as an appellate Court in insolvency jurisdiction can exercise the same powers under Civil Procedure Code which he would exercise ordinarily. He also can grant a review. The High Court will be guided by the procedure laid down in Civil Procedure Code in dealing with an appeal preferred under S. 75 (3) of the Provincial Insolvency Act, from an order of the District Judge granting review of judgment in an appeal, and it will not interfere with the order under appeal unless it is one to which objection could be taken under the provisions of R. 7, O. 47 Civil P. C. 1922 All 206 (207) [AIR V 9] : 44 All 605 (DB).

[5] An order dismissing an application for review of an earlier conditional order allowing the insolvents' praver for an order of discharge is not appealable. 1960 Ker 146 (Pr 1) [AIR V 47 C 68] (DB).

[6] Court may record a finding under S. 70 and make a complaint—Right to appeal arises when finding is completed by forwarding of complaint. ('39) 1939 Nag L Jour 495 (495).

[7] No appeal lies from an order rejecting an application made by the receiver in insolvency praying that certain mortgaged properties which are in the custody of the Court, through a receiver appointed by Court, be made over to the receiver in insolvency. 1935 Cal 460 (461) [AIR V 22] : 62 Cal 483 (DB).

[8] Person aggrieved on a preliminary decision as to jurisdiction may appeal even though final order of adjudication has been passed—Adjudication order becomes nullity if it is decided that proceedings were without jurisdiction. 1940 Cal 244 (246) [AIR V 27] : ILR (1940) 1 Cal 344 (DB).

[9] "Decision" on S. 75 (1) has no technical or artificial meaning. It is to be interpreted in its ordinary and natural meaning. It means decision whether it is final or otherwise. 1946 Nag 42 (44, 45) [AIR V 33 C 11] : ILR (1945) Nag 719 (DB).

[10] The word 'decision' occurring in S. 75 (1), come to by Insolvency Court in exercise of its insolvency jurisdiction, means a decision whether it is final or otherwise. Accordingly, an order passed by the Insolvency Judge deciding questions arising on the merits of an application under S. 4 of the Act is appealable. 1952 Punj 49 (Prs 7, 9) [AIR V 39] : I L R (1951) Punj 313.

[11] Section 75 of the Act enables "any person aggrieved by a decision come to or an order made in the exercise of the Insolvency Jurisdiction" to prefer an appeal. The right of appeal is substantive and when by the Act it is allowed with respect to "any" decision or order, the right cannot be taken away or curtailed by the restrictive provisions of the Code of Civil Procedure. Hence, an order rejecting an application filed under O. 22, R. 3, Civil P. C., for the respondents 1 and 2 being brought on record in place of a deceased petitioner in an insolvency case is appealable. 1955 Mys 97 (Prs 1, 3) [AIR V 42 C 31] : ILR (1954) Mys 330.

[12] Section 5 cannot override the provisions of S. 75 in so far as the latter section confers a right of appeal in any instance. It is not permissible to read the provisions of S. 75 with a further modification that the provisions are subject to the provisions of the Civil Procedure Code in regard to appeals. 1948 Mad 520 (Pr 3) [AIR V 35 C 258] : ILR (1949) Mad 106 (DB).

[13] There is no provision in the Provincial Insolvency Act for a cross-objection to be filed within 30 days after service of notice as under O. 41, R. 22 and there is nothing in the Provincial Insolvency Act making the provisions of Order 41, Rule 22 applicable to an appeal under S. 75. 1954 All 419 (Pr 5) [AIR V 41 C 172] (DB).

[14] An order appointing an interim receiver affects the rights of the parties inasmuch as the receiver would be under the order entitled to take over possession of certain properties and to realise rent therefrom. Such an order can hardly be said to relate to the procedure of the Court and therefore is appealable. 1955 Ajmer 26 (Pr 2) [AIR V 42 C 28].

Retrospective Operation

[15] Where a receiver took action which gave rise to a question of title wherein certain property was still the property of the insolvent or had been a subject of a valid alienation before the coming into force of the present Act and the decision was pronounced by the District Court after the coming into force of the Act—*Held* that the appeal lay under the present Act at the instance of the creditor who was affected by the decision as a matter of right. 1922 All 196 (197) [AIR V 9] : 44 All 71 (DB).

[16] Rule laid down in S. 46 of the Act of 1907 disallowing appeal against an order refusing a set-off except with the permission of the District Court or the High Court, had no application where the insolvency proceedings commenced before that Act came into force and the right of appeal in such cases was regulated by S. 353, Civil P. C. of 1882. ('11) 21 Mad L Jour 764 (765) (DB).

2. Who may appeal.—*Person aggrieved*—[1] Section provides that a debtor, a creditor or a receiver or any person feeling aggrieved by the order of insolvency Court can prefer an appeal against such orders. The words of the section are very wide. 1952 Hyd 80 (Pr 8) [A I R V 39] : ILR (1952) Hyd 196 (FB) ✣ 1951 Mad 935 (Pr 2) [AIR V 38 C 330] : ILR (1952) Mad 82 (FB). (Thus, under S. 75 (1) the only person entitled to appeal is "a person aggrieved" by the decision or order of the Court.)

[2] The words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, or against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to

Section 75 — Note 2 *(contd.)*

something. 1946 Nag 24 (26) [AIR V 33 C 7] : ILR (1945) Nag 826 (DB) ✣ 1951 Mad 935 (Pr 3) [AIR V 38 C 330] : ILR (1952) Mad 82 (FB) ✣ 1942 Bom 27 (28) [A I R V 29] : I L R (1942) Bom 67 : 43 Cri L Jour 360 (DB)✣1942 Cal 241 (242) [AIR V 29] : ILR (1942) 1 Cal 427 (DB)✣1937 Rang 472 (472, 473) [A I R V 24] : 1937 Rang L R 264✣1935 Lah 818 (820) [AIR V 22] ✣ 1931 Lah 586 (1) (586) [A I R V 18] ✣ 1919 All 284 (285) [A I R V 6] : 41 All 243 (DB)✣1960 Punj 202 (Pr 9) [AIR V 47 C 68] : I L R (1959) Punj 647 : 1960 Cri L Jour 509 (DB). (AIR 1951 Mad 935 (FB), *Rel. on.*) ✣1951 Mad 935 (Pr 2) [A I R V 38 C 330] : ILR (1952) Mad 82 (FB).

[3] Not every person who has suffered some disappointment or whose expectations have not been realised as a result of the decision or order of an insolvency Court can claim to be an aggrieved person. 1951 Mad 935 (Pr 3) [AIR V 38 C 330] : ILR (1952) Mad 82 (FB).

[4] "Any such person aggrieved" mean any person aggrieved having regard to wording of S. 75, sub-section (1). 1941 Rang 24 (25) [AIR V 28] : 1940 Rang L R 643 (DB).

[5] "Any such person" include those persons in first sub-section of the section. 1938 Pat 471 (472) [AIR V 25] : 17 Pat 201 (DB).

[6] "Aggrieved by a decision" must be read as qualifying all persons who are entitled to appeal. They cannot be read as qualifying only the words "any other person" preceding them. 1942 Bom 27 (28) [AIR V 29] : I L R (1942) Bom 67 : 43 Cri L Jour 360 (DB)✣1937 Oudh 450 (451) [AIR V 24] (DB).

[7] The wording of S. 75 (1), first paragraph admits of but one construction, namely that the clause "aggrieved," etc., qualifies all the four categories of persons mentioned there. 1951 Nag 281 (Pr 7) [A I R V 38 C 79] : I L R (1950) Nag 347 (DB). (A I R 1942 Bom 27, AIR 1937 Rang 472, AIR 1942 Cal 241, A I R 1940 Cal 244, AIR 1941 Lah 243, A I R 1935 Mad 107, AIR 1933 Nag 9, A I R 1946 Nag 24 and AIR 1926 Mad 556 (FB), *Foll.*)

[8] When S. 75 (1) speaks of "aggrieved by a decision" and so forth, it contemplates an immediate injury and not a contingent injury which may never materialise. 1951 Nag 281 (Pr 10) [AIR V 38 C 79] : ILR (1950) Nag 347 (DB). (A I R 1924 Mad 163, *Not Foll.*; A I R 1942 Cal 241, *Foll.*)

Person aggrieved—Debtor

[9-10] Debtor can appeal only if he is aggrieved. 1942 Cal 241 (242) [AIR V 29] : ILR (1942) 1 Cal 427 (DB).

[11] Insolvent has right of appeal under Act V of 1920. 1929 Lah 622 (622) [A I R V 16].

[12] Where the receiver has done an act, that is to say, has decided that a certain debt is due by the insolvent, such a decision would undoubtedly aggrieve the insolvent and under S. 22 (old Act) the insolvent has a right of appeal. 1921 Sind 36 (37) [AIR V 8] : 15 Sind L R 28.

[13] Under S. 75 the insolvent has no right of appeal against an order including a creditor in the list of scheduled creditors. On the passing of the vesting order in insolvency, the insolvent loses all right, title or interest in his property. He is, therefore, represented for all purposes (except for purposes of compositions and schemes of arrangement) by the receiver. 1951 Nag 281 (Prs 1, 5, 10, 12) [AIR V 38 C 79] : ILR (1950) Nag 347 (DB).

[*See also* 1924 Mad 163 (164) [A I R V 11] : 47 Mad 120 (DB). (When claim of creditor is wrongly admitted the insolvent is the person aggrieved and can appeal.)]

[14] Certain debt declared proved by District Court—Debtor may appeal to High Court. 1938 Pat 471 (472) [A I R V 25] : 17 Pat 201 (DB).

[15] Insolvent whose estate has vested in the official receiver is not entitled to appeal as an "aggrieved person". 1935 Mad 107 (107) [AIR V 22] (DB)✣1919 All 284 (285) [A I R V 6] : 41 All 243 (DB). (Sale of property confirmed by District Judge — Insolvent is not person aggrieved.)

[16] Application by receiver for stay of sale rejected by executing Court — Appeal against order by judgment-debtor, and not by receiver, is incompetent. 1930 Lah 970 (970, 971) [AIR V 17].

[17] Under S. 75 read with S. 28, an insolvent cannot be said to be a person aggrieved by an order directing sale of property alleging it to belong to him and hence he has no right of appeal. 1955 Pat 503 (Pr 3) [A I R V 42 C 137] (DB). (AIR 1926 Mad 556 (FB) and AIR 1919 All 284, *Rel. on.*)

[18] If there is a flagrant case of a sale by the receiver for a gross undervalue, if a sale or lease is granted secretly and without public notice for wholly inadequate price or rental or if the sale or lease is granted in favour of a benamidar or a person in whom the receiver is personally interested without disclosing that fact to the Court, if property on which there is no subsisting encumbrance is sold for an undervalue as if it were subject to an encumbrance, if the property is so incorrectly described as to mislead purchasers into thinking that its value is negligible when in fact it is valuable—in cases like these the insolvent is an 'aggrieved person' and would have a remedy by way of an application under S. 68 and an appeal under S. 75. 1950 Mad 492 (Pr 25) [AIR V 37 C 212] : I L R (1951) Mad 77 (FB). (AIR 1926 Mad 556 (FB), *Overruled.*)

[19] Where an insolvent is impleaded in his individual capacity as a party to proceedings initiated by the opposite party — the insolvent's estate being represented by the Official Receiver—and an order is passed against the insolvent personally and not against his estate, he will be deemed to be a person aggrieved within the meaning of S. 75. 1952 All 356 (Pr 10) [AIR V 39] (DB).

[20] Adjudication annulled — Insolvent's properties vested in Official Receiver under S. 37—Execution against insolvent—Insolvent made party along with Official Receiver—Order in execution—Insolvent has right of appeal. 1949 Mad 91 (Pr 10) [AIR V 36 C 38] (DB).

Section 75 — Note 2 *(contd.)*

[21] An insolvent has a right of appeal similar to that provided by S. 476-B, Criminal P. C., against order of Court directing prosecution. 1941 Mad 285 (285) [A I R V 28].

Person aggrieved—Creditor

[22] Unless creditor is aggrieved by order of Insolvency Judge, there is no appeal under S. 75. 1937 Rang 472 (473) [AIR V 24] : 1937 Rang L R 264 ✣ 1937 Lah 2 (3) [A I R V 24]. (Creditor aggrieved can appeal.)✣1933 Nag 9 (10) [AIR V 20] : 28 Nag L R 286 ✣ 1925 All 549 (550) [AIR V 12] : 47 All 849 (DB). (Creditor held person aggrieved.) ✣ 1920 Nag 25 (25) [AIR V 7]. (Creditor is not so aggrieved if the order merely holds that there is no *prima facie* case against the insolvent.)

[23] A creditor who is allowed to intervene in insolvency proceeding, even if his debts have not been proved before Court, is a person aggrieved and has a right of appeal. 1933 Cal 151 (152) [AIR V 20] (DB).

[24] Creditor is not an aggrieved person—Aggrieved person is one with grievance-in-law. Creditors have no legal interest in or right to represent the insolvent's estate. Creditor can interfere only through receiver and where he is not a proper party he has no right of appeal except for costs which ought not to be ordered against him. (Case under old law.) 1917 All 160 (161, 162) [AIR V 4] : 39 All 152 (DB).

[25] On refusal by the official receiver to file an appeal in a litigation to which the creditors are not parties, it is not open to them to file an appeal independently of him. In the absence of a provision similar to S. 75, Provincial Insolvency Act, it is not possible to confer a right of appeal in such a case by the analogy of S. 75. 1941 Mad 577 (578) [AIR V 28] ✣ 1934 Mad 360 (363) [AIR V 21]: 57 Mad 670 (DB). (Creditor who was not party to suit cannot appeal.)

[26] A creditor or receiver who is under the provisions of the Act empowered to make and who makes an application to the insolvency Court for a relief or who is brought before the Court to submit to its decision is, if the decision goes against him, thereby an 'aggrieved person'. 1951 Mad 935 (Pr 3) [AIR V 38 C 330]: ILR (1952) Mad 82 (FB).

[27] An appeal lies on dismissal of a petition in the lower Court filed by the creditor for invoking the insolvency jurisdiction of that Court. 1952 Hyd 80 (Pr 8) [AIR V 39] : ILR (1952) Hyd 196 (FB).

[28] Order in insolvency proceedings — Appeal against such order by a creditor who was a stranger to such proceeding but is aggrieved by the order is maintainable. 1932 Mad 162 (162) [AIR V 19] : 55 Mad 313 (DB).

[29] Individual creditor can always appeal whether official receiver appeals or not and whether appellant's interests are or are not homogeneous with those of other creditors. Where his interests are homogeneous with others his petition, however, should be a representative petition on behalf of all the creditors. The fact that the appellant was not a party in his individual capacity to the original petition does not preclude him from appealing as he should then be deemed as represented by official receiver. 1926 Mad 801 (802, 803) [AIR V 13] : 49 Mad 794 (DB) ✣1937 Lah 757 (757) [AIR V 24]. (One creditor is entitled to appeal against an order which affects him along with other creditors and under S. 75, it is not necessary that such a creditor alone should be affected by the order appealed against and not jointly with other creditors.)

[30] Adjudication annulled — Creditor tendering proof can appeal. 1927 Mad 175 (176) [AIR V 14] (DB).

[31] Creditor has a right to appeal from order under S. 53. 1938 Mad 370 (371) [A I R V 25]✣1920 Mad 917 (918) [A I R V 7] (DB) (But creditor will not be entitled to conduct proceedings in pursuance of order of remand by appellate Court.)

[32] The creditors have locus standi to maintain an appeal against an order refusing to annul mortgage by insolvent on an application by the receiver. In such a case the burden lies on the creditors to prove that the transaction in question was not made in good faith or for valuable consideration. 1934 Lah 968 (968) [AIR V 21].

[But see 1921 Lah 81 (82) [AIR V 8].]

[33] A creditor has a right of appeal from an order passed on an application by the official receiver under S. 54 (4). 1933 Lah 856 (856) [AIR V 20].

[34] Person adjudicated at creditor's instance —Creditors are persons aggrieved and have right of appeal. 1926 Lah 24 (24) [AIR V 13].

[35] Order under S. 25 dismissing creditor's application for adjudication of debtor as insolvent is appealable. ('38) 40 Pun L R 433 (434).

[36] Where to an adjudication petition filed by the creditors, basing the petition upon a mortgage as an act of insolvency, the mortgagee is made a party and the debtor is adjudged insolvent, the mortgagee is a "person aggrieved" and has a right of appeal. The fact that the mortgagee does not file an appeal against an order declaring the mortgage void, upon an application by the Official Receiver under Ss. 53 and 54 will not preclude him from exercising his right of appeal from the order of adjudication. 1949 Mad 131 (Prs 7, 14) [AIR V 36 C 55] : ILR (1949) Mad 323.

[37] Creditor has a right to appeal from order of discharge. 1937 Oudh 450 (451) [AIR V 24] (DB).

[38] Order discharging receiver on application under S. 37 — Creditor can appeal making other creditors respondents. 1922 Nag 260 (260) [AIR V 9].

[39] Creditor is entitled to have his petition under S. 43 enquired into, otherwise he would be "a person aggrieved" by order within S. 46 and entitled to appeal. He is not a person aggrieved by final order passed after enquiry under S. 43. 1924 Mad 185 (185) [AIR V 11] (DB).

[40] Creditor who has been refused leave to prosecute the insolvent for fraudulent sup-

Section 75 — Note 2 *(contd.)*

pression of assets by an order under S. 70 of the Act made by a subordinate Court is not aggrieved by the order within the meaning of S. 75 (1) of the Act, and hence not entitled to appeal to the District Court. 1942 Bom 27 (28) [AIR V 29] : ILR (1942) Bom 67 : 43 Cri L Jour 360 (DB).

[41] Refusal to sanction prosecution of insolvent under S. 69—Creditor is not person aggrieved. 1937 Lah 432 (432) [A I R V 24]✣ 1941 Lah 243 (246) [AIR V 28] : I L R (1941) Lah 779 (DB). (Neither creditor nor receiver is person aggrieved.)✣1937 Rang 472 (472, 473) [AIR V 24] : 1937 Rang L R 264 ✣ 1930 Sind 2 (2) [A I R V 17] (DB) ✣ 1920 Lah 323 (324) [A I R V 7] : I Lah 213 ✣ 1917 All 280 (280, 281) [AIR V 4] : 39 All 171 (DB). (Offences dealt with under S. 43 (2) are in nature of disciplinary offences and not offences against Criminal law.)✣1917 Lah 282 (282) [A I R V 4]✣1915 Mad 1066 (1066) [AIR V2]: 40 Mad 630 (DB).

[42] One of the acts of insolvency was that the insolvents had given fraudulent preference to the Banks who were also creditors. After the order of adjudication and the appointment of a receiver the Banks made an application that no notice under S. 19 (2) was issued by the Court and therefore the Banks could not appear and contest the petition and show to the Court that it was not a case of fraudulent preference to the Banks. That application was dismissed on the ground that no notice under S. 19 (2) was necessary when the application was by a creditor. On objection to the appeal preferred by the Banks against that order : *Held*, that as a result of the order of adjudication the creditors would be able to make an application under S. 53 or 54, and that would very prejudicially affect the rights of the Banks who were said to be creditors to whom fraudulent preference was given. They were therefore persons aggrieved by the order of adjudication and had right to appeal. 1958 Raj 223 (Pr 3) [AIR V 45 C 73]: ILR (1958) 8 Raj 221 (DB).

[43] Where in the winding up proceedings the District Judge allows 6 per cent. per annum interest to the share-holder who has overdrawn the company's money, it is only the Official Liquidator who is competent to file appeal. An appeal by another shareholder is not competent when no leave was obtained either of the District Court or of the High Court. 1958 Mad 260 (Prs 1, 2) [A I R V 45 C 79].

Person aggrieved — Receiver

[44] Under S. 75 official receiver is one of persons who has right of appeal if he is aggrieved by order of Court acting in insolvency jurisdiction. 1923 Mad 355 (356) [AIR V 10] : 46 Mad 405 (DB).

[45] Where an official receiver moves the Court under S. 70 for proceeding against the insolvent for any of the offences under S. 69 and the Court declines to make a complaint, the Receiver cannot be said to be a person who is aggrieved by the order and no appeal lies under S. 75 (1) at his instance. 1960 Punj 202 (Pr 9) [AIR V 47 C 68] : ILR (1959) Punj 647 : 1960 Cri L Jour 509 (DB). (A I R 1941 Lah 243, *approved.*)✣1951 Mad 935 (Prs 2, 5) [AIR V 38 C 330] : I L R (1952) Mad 82 (FB). (AIR 1950 Mad 492 (FB), *Foll.*; AIR 1942 Bom 27 & AIR 1941 Lah 243, *Appr.*; (1902) 1 K B 107, *Expl.*; AIR 1924 Mad 185, *Disting.*; AIR 1915 Mad 1066 & AIR 1920 Mad 400, *Ref.*)

[46] Creditor or receiver cannot appeal unless they are aggrieved by the order. They cannot be said to have been aggrieved by refusal to prosecute insolvent under S. 69 (c). They have no right of appeal against such refusal. 1941 Lah 243 (246) [AIR V 28] : ILR (1941) Lah 779 (DB).

Person aggrieved— "Any other person"

[47] The right of appeal under S. 75 is given not only to creditors but also to any person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction. 1958 Raj 223 (Pr 3) [A I R V 45 C 73] : ILR (1958) 8 Raj 221 (DB).

[48] Where sale of outstandings of insolvent fetched very low price and Court cancelled sale, auction-purchasers had a right of appeal from that order. 1916 Lah 360 (360) [AIR V 3].

[49] Where an insolvent's hotel is granted on lease in a public auction, the prior lessee of the hotel who is neither a creditor nor the highest bidder, is not an "aggrieved person", so as to be entitled to appeal from the order granting lease to the highest bidder nor has such prior lessee any equitable right. 1931 Lah 586 (586) [AIR V 18].

[50] Per *Sen J.*, *Bose J.*, contra.— Where transfer forms the basis of an order of adjudication, the title of the transferee not being affected by the order of adjudication, he cannot be regarded as a "person aggrieved" within the meaning of S. 75 and he has therefore no right of appeal against the order of adjudication. 1947 Nag 161 (174) [AIR V 34 C 49] : ILR (1947) Nag 85 (FB).

[*See also* 1948 Nag 385 (Pr 10) [A I R V 35 C 132] : ILR (1948) Nag 523. (Adjudication based on transfer as act of insolvency — No notice to transferee—Order of adjudication is not conclusive against him—He can apply to set it aside—He as transferee cannot be considered as "aggrieved" by the order within meaning of S. 75.)]

[But see 1961 Madh Pra 15 (Pr 5) [A I R V 48 C 11] (DB). (Where the Court passes an adjudication order and holds that the transfer by the insolvent amounts to a fraudulent preference, the order affects the rights of the transferee. The order operates in rem and as such binds the transferee also, not only as regards the fact of insolvency but also as regards the transfer on which it is based. Hence the transferee being a person aggrieved can appeal against such order. View of Bose, J in AIR 1947 Nag 161 (FB), *Foll.*; View of Sen J., *Diss. from.*)]

Section 75 — Note 2 *(contd.)*

[51] Application by creditor to set aside alienation — Expiry of time to apply for discharge — Annulment of adjudication and ordering vesting of alienated property in creditor — Appeal by alienee is competent he being party aggrieved. 1931 Mad 10 (11) [AIR V 18].

[But see 1928 Mad 981 (981) [A I R V 15] (DB).]

[52] Person claiming to be transferee of property for valuable consideration and setting up good faith is an aggrieved person if the transfer in his favour is set aside under the present S. 53 (old S. 36). ('10) 12 Cal L Jour 452 (455) (DB).

[53] By vesting of property in the hands of receiver sons or representatives of deceased debtor cannot be regarded as "persons aggrieved". 1935 Lah 818 (819, 820) [AIR V 22].

[54] Section 75 gives a right of appeal to any person aggrieved by the decision come to by the Insolvency Court but the person aggrieved must have an independent right to the relief sought for. It is entirely a matter of discretion with the insolvent to give such support as he thinks fit to the members of family. The members of family of insolvent have no right of appeal under S. 75. Persons aggrieved must have an independent right to the relief sought for. 1935 Lah 952 (952) [AIR V 22].

3. "Order of Court subordinate to District Court." — [1] No appeal lies to High Court against order made in insolvency jurisdiction by Court subordinate to District Court. Such appeal lies to District Court. ('21 63 Ind Cas 848 (849) (DB) (Cal) ✣ 1959 Bom 47 (Prs 2, 3, 4) [A I R V 46 C 16] : I L R (1958) Bom 1115 (DB) ✣ 1933 Lah 307 (307) [AIR V 20]. (Orders by senior Sub-Judge.)✣ 1923 Nag 80 (81) [A I R V 10]. (An appointment as an Additional District Judge under S. 26 (1) Central Provinces Courts Act cannot be implied from appointment as an Insolvency Judge under the Insolvency Act.

[2] No appeal lies to the High Court against an order of a Civil Judge (Subordinate Court invested with jurisdiction under S. 3 with powers of District Court) granting an application to set aside an abatement. 1952 All 423 (Pr 2) [AIR V 39].

[3] Subordinate Court though exercising concurrent jurisdiction with the District Court is yet subordinate to District Court for purposes of appeal under S. 75. 1939 Sind 221 (221) [AIR V 26] : ILR (1939) Kar 527 (DB) ✣ 1955 Mad 554 (Pr 3) [(S AIR V 42 C 158]. (Order of Court subordinate to District Court confirming decision of Official Receiver rejecting creditor's claim Order is appealable to District Court and not to High Court under sub s. (3).)

[4] The expression "concurrent jurisdiction" in S. 3 (1) of the Act only means that even though a Court subordinate to a District Court may be invested with jurisdiction under the Act, the District Court would still continue to possess jurisdiction under the Act. Therefore, notwithstanding the fact that the Assistant Judge may have been invested with jurisdiction under the Act by a notification issued under S. 3, sub-s. (1) of the Act, he would still be a Court subordinate to the District Court. 1959 Bom 47 (Prs 2, 3, 4) [AIR V 46 C 16] : ILR (1958) Bom 1115 (DB). (Nor can such Court be a "District Court" within the meaning of S. 5 of Saurashtra District and Subordinate Civil Court Ordinance, 1948 because there can be only one District Court in a District. He does not, therefore, cease to be subordinate to the District Court.)

[5] An Additional Judge is not subordinate to District Court—Appeal from order under S. 69 (old S. 43) lies to High Court. 1914 All 276 (277) [A I R V 1] : 36 All 576 : 15 Cri L Jour 658 (FB).

[6] When Small Cause Court is given powers of District Judge appeal against order passed under S. 46 lies to Chief Court. ('17) 1917 Pun L R No 94 p. 261 (262).

[7] Order by Deputy Commissioner exercising powers of subordinate Judge in insolvency — Appeal lies to District Court and not to High Court. 1925 Cal 335 (335) [A I R V 12] (DB) ✣ ('12) 15 Cal L Jour 239 (240) (DB). (Order of Deputy Commissioner setting aside transfer by insolvent.)

[8] Divisional Court in Punjab is District Court—Order of District Court is appealable to Divisional Judge. 1916 Lah 307 (308) [AIR V 3] ✣ ('11) 1911 Pun L R No. 29, p. 155 (156): 1911 Pun Re No. 3.

[9] Appeal from order of Assistant District Court, in its insolvency jurisdiction, lies to District Court and not to High Court. 1934 Rang 155 (155) [A I R V 21] : 12 Rang 362 (DB).

[10] An order was made by the Insolvency Judge in the course of an insolvency application. That order did not merely deal with the jurisdiction of the Insolvency Judge to entertain the application under S. 4. In making that order the Insolvency Judge had found against A on various other pleas touching the question of restitution of an amount to be made by him. *Held* that the order passed by the Insolvency Judge was not merely an order regulating procedure but decided questions arising on the merits of the application; that order must, therefore, be deemed to have been passed in the exercise of insolvency jurisdiction and thus came within S. 75 (1). 1952 Punj 49 (Prs 7, 9) [AIR V 39] ILR (1951) Punj 313.

[11] An order the result of which is definitely to conclude a particular dispute between the parties, as for instance, whether the alienees should or should not be made parties to the insolvency application, falls within the words "decision come to or an order made" in S. 75 (1). Appeals from such orders therefore can be filed in the District Court. 1948 Mad 520 (Prs 3, 4) [AIR V 35 C 258]: ILR (1949) Mad 106 (DB).

[12] *Per Sundaram J.* — Insolvency Act applies to proceedings under Travancore Debt Relief Act (2 of 1116) for limited purposes only. The general right of appeal conferred by S. 75 (S. 77 of the Tr. Ins. Act) cannot be invoked in respect of orders passed in proceedings under S. 16 of the Debt Relief Act

Section 75 — Note 3 *(contd.)*
1954 Trav Co. 259 (Pr 53) [AIR V 41 C 98] : ILR (1953) Trav-Co 633 (FB).

Orders of Receiver

[13] A creditor has a right of appeal from an order passed on an application by the official receiver under S. 54 (4). 1933 Lah 856 (856) [AIR V 20].

[14] Dismissal of insolvency petition by receiver — No appeal to High Court direct is maintainable. 1916 Mad 1014 (1015) [AIR V 3] : 38 Mad 15 (DB).

[15] Official receiver is not a Court subordinate to District Court and the order of District Court under S. 22 (old Act) is not one passed in appeal and therefore not final. 1918 Mad 964 (966) [AIR V 5] : 40 Mad 752 (DB).

4. "Order of District Court upon such appeal shall be final." — [1] Order of the District Judge in appeal is final subject to the two provisos to S. 75 (1). 1939 Lah 300 (300) [AIR V 26] ✣ 1943 Sind 190 (191) [AIR V 30]: ILR (1943) Kar 238 (DB) ✣ 1943 Sind 176 (176) [AIR V 30] : ILR (1943) Kar 203 (DB). (Section 75 (2) does not govern such a case.) ✣ 1932 Oudh 61 (62) [AIR V 19].

[2] "Shall be final" means no second appeal lies. 1917 Lah 75 (76) [AIR V 4] : 1917 Pun Re No. 22 (DB).

[3] Official receiver is not a Court subordinate to District Court and the order of the District Court under S. 22 (old Act of 1907) is not one passed in appeal and therefore not final. 1918 Mad 964 (966) [AIR V 5]: 40 Mad 752 (DB).

5. Section 75 (1)—Proviso 1—Powers of revision. — *Scope*—[1] From proviso 1 to S. 75 (1) it is clear that the jurisdiction of the High Court to call for a case and pass such order as it thinks fit is a revisional jurisdiction quite distinct from an appellate jurisdiction. An appeal contemplated by the further proviso to S. 75 (1) is an appeal from a decision of a District Court which decision itself must have been arrived at from a decision of a subordinate court and it must be a decision under S. 4. 1959 Bom 47 (Prs 3, 4) [AIR V 46 C 16]: ILR (1958) Bom 1115 (DB).

[2] Under S. 75, High Court is entitled to act *suo motu* on facts being brought to its notice. 1937 Nag 31 (32) [AIR V 24]: ILR (1937) Nag 512.

[3] High Court in revision cannot entertain appeal expressly prohibited by C. P. C. or barred by law of limitation. 1935 Pat 177 (178) [AIR V 22] (DB).

[4] Order of Judge on appeal for additional evidence though not revisable under proviso to S. 75 (1) being not final, is yet revisable by High Court under its powers and also under S. 5 (2) of Act. 1921 Nag 159 (160) [AIR V 8].

[5] Where the order was passed in the first instance by the receiver and not by the Court subordinate to the District Judge, revision under S. 75 does not lie. The revision however may be treated as having been made under S. 115, Civil P. C. read with S. 5, Provincial Insolvency Act. 1939 Lah 460 (461) [AIR V 26].

[6] It is not the correctness of the decision but the illegality or the material irregularity in procedure that can be pointed out in a revision application. The contention that the District Judge in an appeal under S. 75 adopted an incorrect procedure cannot therefore be accepted in revision. 1955 Ajmer 26 (Pr 3) [AIR V 42 C 28].

[7] Appeal against order of subordinate Court under S. 68 confirming decision of Receiver lies to District Court — Revision to High Court against decision of subordinate Court is not maintainable. 1955 Mad 554 (Pr 3) [(S) AIR V 42 C 158].

[8] The fact that the Courts below have passed concurrent orders of discharge is no bar to interference in revision in proper cases. 1959 Ker 376 (Pr 5) [AIR V 46 C 129] : ILR (1959) Ker 27.

[9] Revision under S. 115, Civil P. C. may be treated as one under S. 75 (1), Proviso 1. 1955 N U C (Ajmer) 4137 [AIR V 42].

Extent of powers

[10] The High Court has wider powers under S. 75 than under 115, Civil P. C. Under S. 75 the High Court can interfere if it is not satisfied that the order made in appeal was "according to law". 1933 Nag 39 (40) [AIR V 20] : 28 Nag L R 295 ✣ 1960 Punj 604 (Pr 2) [AIR V 47 C 212] ✣ 1938 All 59 (61) [AIR V 25] : I L R (1938) All 84 (DB) ✣ 1937 All 4 (5) [AIR V 24] (DB). (It is immaterial whether a second appeal from an order passed by an Insolvency Court is treated as an appeal or a revision. The High Court is to satisfy itself in any event whether the order passed by the lower Court was according to law or not.) ✣ 1936 All 489 (489) [AIR V 23] (DB) ✣ 1932 Oudh 61 (62) [AIR V 19].

[*See also* 1943 Nag 117 (128) [AIR V 30] : I L R (1943) Nag 176 (FB). (Case under S. 25, Provincial Small Cause Courts Act — "According to law"—There should be no interference on question of law or fact even though decision may appear to be erroneous unless conclusion of the Small Cause Court is one which no Judge acting judicially could reasonably reach. AIR 1923 Nag 292, *Overruled*; AIR 1931 Nag 17, AIR 1936 Nag 157 & AIR 1933 Nag 39, *Considered*.)]

[11] Interference is proper when order of lower Court is not according to law. 1932 Lah 416 (416) [AIR V 19] : 13 Lah 798 ✣ 1946 Nag 24 (28) [AIR V 33 C 7]: I L R (1945) Nag 826 (DB). (The considerations which are relevant for not interfering in revision with a decision of a Small Cause Court are not applicable to an order passed by the District Court in an appeal under Insolvency Act.) ✣ 1933 Mad 653 (653) [AIR V 20] ✣ 1929 Nag 338 (339) [AIR V 16] : 26 Nag L R 46.

[12] Part consideration of mortgage was held in deposit for discharge of previous mortgage by mortgagee — Discharge of previous mortgage admitted by first mortgagee—Lower appellate Court upheld annulment of mortgage on ground of collusion overlooking evidence of mortgagee — *Held* finding was

Section 75 — Note 5 *(contd.)*

vitiated by error of law. 1930 Lah 122 (123, 124) [AIR V 17].

[13] Receiver's sale set aside in appeal on agreement between Advocates of parties—Revision competent on ground that the District Judge acted illegally. 1943 Mad 672 (673) [AIR V 30].

[14] Though scope of revision under S. 75 is wider than that under S. 115, Civil P. C., High Court will not interfere under S. 75 simply because there is error of law. It will not interfere on ground that the lower Court has preferred one judicial authority to the other, when there is conflict in authorities. High Court will, however, interfere if the lower Court has treated an award which is really one under Civil P. C., as one under Arbitration Act and on misunderstanding of rulings on which it relied, refused to hear award as decree for payment. 1944 Sind 217 (218) [AIR V 31] (DB).

[15] Mistaken notion of law regarding onus of proof under S. 53 can be revised. ('32) 1932 Mad W N 59 (60).

Question of fact

[16] Questions of fact cannot be reconsidered in revision. 1945 Mad 253 (255) [AIR V 32] ✣ ('59) 61 Pun L R 753 (754). (Conclusion of fact arrived at by District Judge based on evidence will not be interfered with even though as a Court of first instance, it may be inclined to take a different view.) ✣ 1942 Oudh 80 (81) [AIR V 29]. (A finding of fact arrived at on a consideration of evidence and circumstances of case, and involving no question of law will not be interfered with when Judge committed no error of law in coming to this finding.) ✣ 1937 Mad 930 (932) [AIR V 24] (DB). (Unless there has been a patent miscarriage of justice.) ✣ 1935 Oudh 406 (408) [AIR V 22] : 11 Luck 61. (Unless order is perverse or palpably wrong.) ✣ 1934 Pat 144 (144) [AIR V 21] (DB). (Unless there is substantial reason for interference.)

[17] A concurrent finding of fact will not be interfered with in revision. ('38) 40 Pun L R 433 (434).

[18] Finding as to absence of fraudulent intention is a finding of fact which cannot be disturbed. ('39) 41 Pun L R 655 (656).

[19] The question whether a particular transaction is a bona fide or genuine one or it is a transaction which is not made in good faith and is fictitious is a mere question of fact. Hence a decision under S. 53 on such point is not open to revision. 1935 Lah 708 (709) [AIR V 22].

[20] Where issues in judgment of District Judge are issues dealing substantially with issues of facts, High Court should not interfere in revision in absence of sufficient reasons for same, particularly as no second appeal lies from such judgment. 1942 Bom 159 (161) [AIR V 29] : I L R (1942) Bom 175 (DB).

Discretion of lower Court

[21] Where law leaves a matter within discretion of a Court and Court, after proper enquiry and due consideration, has exercised discretion in a sound and reasonable manner, High Court will not interfere with conclusion arrived at. When pending the insolvency proceedings the lower Court appointed interim receiver in the exercise of its discretion and the order was confirmed in appeal by the District Judge, the High Court refused to interfere. 1932 Bom 228 (230) [AIR V 19] (DB).

[22] Lower Court using discretion in granting absolute discharge under S. 42 (1)—No interference in revision. 1946 Sind 156 (157) [AIR V 33 C 48] : I L R (1946) Kar 265.

[23] Where the District Judge has given reasons for the order interfering with the exercise of the discretion by the first Court the order being within his jurisdiction cannot be challenged in revision. 1955 Ajmer 26 (Pr 4) [AIR V 42 C 28].

Appealable orders

[24] High Court would not interfere by way of revision when remedy by way of appeal is available. 1933 Mad 609 (610) [AIR V 20].

[25] No application in revision lies against order of a Small Cause Court Judge exercising insolvency jurisdiction refusing to take proceedings against insolvent under S. 69, as an appeal lies to District Court under S. 75 (1). ('37) 1937 Oudh W N 762 (764) (DB) ✣ 1937 Oudh 247 (248) [AIR V 24].

[26] Where debtor accepts in insolvency proceedings the contention that he was personally liable and had committed acts of insolvency and is adjudicated insolvent and has acquiesced in adjudication and in administration of estate by official receiver, order of adjudication cannot be challenged in revision if there was no appeal from that order or from order of vesting property in official receiver. 1940 Mad 30 (31) [AIR V 27] : I L R (1940) Mad 191 (DB).

[27] Receiver reporting that some alienations by insolvent were fictitious — Court refusing to consider question under S. 4—Saleable interest of insolvent sold—Purchasers applying to consider question of title—Issues on merits framed—Revision is incompetent as appeal with leave was competent under S. 75. 1933 Lah 611 (612) [AIR V 20].

[28] The High Court will not interfere in revision at the instance of a creditor with an order of conditional discharge where the official receiver had not appealed against that order and the creditor had opportunity to do so. 1931 Lah 647 (648) [AIR V 18].

New point

[29] A legal objection which goes to the root of case may be allowed to be raised for first time in revision even though it has not been mentioned in grounds. ('38) 40 Pun L R 433 (434).

[30] Where plea of want of jurisdiction to hear appeal is not taken before Appellate Court, it cannot be taken up in revision. 1944 Mad 49 (50) [AIR V 31].

[*See* 1942 Pesh 90 (91) [AIR V 29]. (Point that leave under S. 54A was not given being one of jurisdiction can be taken even on revision provided no evidence is required to support it.)]

Section 75 — Note 5 *(contd.)*

[31] When the gronnd of the petition being defective, has not been raised by the debtor in the lower Court or in revision, the High Court in revision will not exercise the discretionary powers in regard to a matter. 1937 Rang 189 (190) [AIR V 24].

[32] Particulars as to time and place of commission of act of insolvency must be specified in petition for insolvency—No exact date of commission of act of insolvency given — No objection raised in trial Court or lower appellate Court—Objection held could not be raised in revision. 1949 East Punj 359 (Pr 9) [AIR V 36 C 90].

[33] In a proper case, the High Court may allow a point of law not taken below to be raised under S. 75, but where the petition in a revision before the High Court has raised a certain point in the trial Court and in the memorandum of appeal but has dropped it in the Appellate Court, and such point affects his minor son who is not a party to the petition, the High Court will not allow such point to be raised, more especially where the petitioner has been a party to a conspiracy to defraud his son. 1942 Mad 294 (295) [AIR V 29] (DB).

Appeal treated as revision

[34] Jurisdiction conferred by Section 75 is one and indivisible. Tribunal in both cases is "High Court": not a revisional Court nor yet an appellate Court, but "High Court"—Once its jurisdiction is invoked, manner in which it is invoked is mere irregularity and is curable. The fact that the application is labelled appeal instead of revision is immaterial if no prejudice is thereby caused. 1935 Nag 33 (34) [AIR V 22] : 31 Nag L R 212.

[35] Appeal cannot be treated as revision, where the decision of the Courts below was based on facts. 1933 Lah 634 (635) [AIR V 20].

[36] High Court may treat a second appeal as a petition for revision. ('37) 1937 Oudh W N 807 (808) (DB).

[37] Where order is based on points not taken in grounds of appeal nor supported by evidence, High Court may interfere treating appeal as a petition for revision. 1934 Lah 198 (198) [AIR V 21].

[38] Where point involved is of some importance, High Court may treat a second appeal as revision. 1943 Sind 176 (176) [AIR V 30] : ILR (1943) Kar 203 (DB).

[39] Where no leave is obtained from District Court the appellate Court may treat the appeal as revision. 1915 Low Bur 60 (60) [AIR V 2] (DB).

[40] District Judge allowing share-holder who has overdrawn company's amount 6 p.c., interest—Another share-holder is not competent to appeal—Only Official Liquidator can appeal—Appeal by another share-holder cannot be treated as revision, when Official Receiver has not appealed and it would not be proper to interfere in revision at the request of a share-holder. 1958 Mad 260 (Pr 2) [AIR V 45 C 79].

[41] Order setting aside adjudication — No second appeal lies—It may be treated as revision. 1948 Nag 385(Pr 5) [AIR V 35 C 132]: ILR (1948) Nag 523.

[42] No second appeal against order under S. 25 — Second appeal may, however, be treated as revision. 1954 Mys 133 (Pr 3) [AIR V 41 C 54] : ILR (1953) Mys 566.

6. Section 75 (1) — Proviso 2 — Second appeal.—[1] Appeal contemplated by Proviso 2 to S. 75 (1) is an appeal from a decision of District Court arrived at from a decision of a subordinate Court and it must be a decision under S. 4—Decision of Court subordinate to District Court and not under S. 4—Proviso 2 to S. 75 (1) cannot be invoked. 1959 Bom 47 (Prs 3, 4) [AIR V 46 C 16] : ILR (1958) Bom 1115 (DB)✣1935 Mad 432 (433) [AIR V 22].

[2] When the District Judge relies on S. 4 and purports to decide a case under it, a second appeal lies under S. 75 (1). 1935 Nag 246 (249) [AIR V 22] : 31 Nag L R (Sup) 36✣1939 Lah 346 (346) [AIR V 26] : ILR (1940) Lah 40 (Quaere.)✣1939 Lah 87 (88) [AIR V 26]✣1934 Lah 807 (807) [AIR V 21]. (But where no question of title is involved no second appeal lies.)✣1927 Cal 474 (476) [AIR V 14] (DB).

[3] Under S. 75 a second appeal is maintainable only if the decision of the insolvency Court is one under S. 4. If the order is not one under S. 4 but is either under S. 51 of the Act or under S. 151, Civil P.C., then a second appeal is incompetent. 1949 Nag 39 (Pr 5) [AIR V 36 C 19] : ILR (1948) Nag 284.

[4] Where the questions disposed of by an order of the Insolvency Judge are questions "arising in insolvency" the order is one under S. 4, and a second appeal lies from that order. 1949 All 464 (Pr 6) [AIR V 36 C 174] (DB).

[5] Where the Insolvency Judge professed to dispose of number of proceedings before him by a single order, and every one of the questions in those proceedings expressly arose in insolvency within the meaning of those words in S. 4, second appeal from that order is maintainable. 1949 All 464(Pr 6) [AIR V 36 C 174] (DB).

[6] Where an insolvent files an application for restoration of his property by challenging the sale of his property made by the Collector under S. 68, Civil P. C., the Insolvency Judge has ample power to decide the question under S. 4 of the Provincial Insolvency Act. Any order passed on appeal from the decision of the Insolvency Judge would fall within the second proviso to S. 75 (1) of the Act and therefore a second appeal to the High Court would be competent. 1952 Punj 222 (Pr 14) [AIR V 39] (DB). (A further appeal under Cl. 10 of the Lettets Patent would also be competent if the case is certified to be a fit one for appeal.)

[7] Transfers by insolvent annulled as fraudulent—Order under S. 4 though relief sought under S. 53 — Matter for purposes of appeal is under S. 4 — Whatever the view of the lower appellate court second appeal is competent. 1951 Nag 268 (Pr 3) [A I R V 38 C 72] : ILR (1950) Nag 331.

[8] Application by official receiver under Ss. 58 and 4 — Dismissal of appeal to District

Section 75 — Note 6 *(contd.)*

Judge—Reversal on point under S. 53 only — Second appeal is not competent. 1943 Mad 369 (370) [AIR V 30].

[9] An appeal under S. 75 can lie only on grounds similar to those under S. 100(1), Civil P. C. The decision of the lower Courts based on findings of fact cannot be assailed under S. 75. 1932 Cal 642 (648) [AIR V 19] : 59 Cal 1135 (DB). (Per *Guha J.*)

[10] "May appeal" in proviso 2 sub-section (1) of S. 75 means party aggrieved may appeal to the High Court but is not bound to do so. 1917 Lah 75 (76) [AIR V 4] : 1917 Pun Re No. 22 (DB).

[11] Adjudication of father as insolvent — Ex parte orders for delivery of property of insolvent and minor sons—Order dismissing minor's application to set aside ex parte order is appealable under S. 75. 1933 Mad 345 (346) [AIR V 20].

[12] Order adjudicating karta of family as insolvent and appointing receiver falls under S. 4 and is open to second appeal. 1937 Cal 517 (520) [AIR V 24] : ILR (1937) 2 Cal 675 (DB).

[13] Order under S. 70 filing complaint — Appeal lies. 1936 Lah 871 (871) [AIR V 23].

[14] The decision of the question whether a sale by an insolvent is benami falls under S. 4 and hence a second appeal would lie. 1937 Lah 441 (441) [AIR V 24].

[15] Suit to declare property of insolvent liable for attachment and sale is matter under S. 4—Second appeal lies. 1924 Nag 361 (362) [AIR V 11].

[16] Receiver taking possession of property —Objection by third person — Third person succeeding and property released — Appeal lies under second proviso to sub-section 1 of S. 75 since investigation of objection must be deemed to be under S. 4. 1937 Lah 757 (757) [AIR V 24].

[17] Attachment before judgment—Compromise decree — Purchase of house by decree-holder—Judgment-debtor adjudicated insolvent—Sale by receiver of house—Objection by decree-holder — No sanction for appeal was necessary and appeal is competent since investigation of objection must be deemed to be under S. 4. 1937 Lah 297 (298) [AIR V 24].

[18] A decision under S. 51 falls under S. 4 and a second appeal would therefore be competent. 1940 Lah 166 (166) [AIR V 27].

[19] The question whether the earnings of an insolvent would or would not vest in the receiver under S. 28, Cl. (5), has to be decided by the Insolvency Court under the provisions of S. 4 of the Act which expressly provides for a second appeal. 1942 Bom 191 (192) [AIR V 29] : ILR (1942) Bom 287.

[20] The "decision" in S. 75 (1) has no technical or artificial meaning. It is to be interpreted in its ordinary and natural meaning. It means decision whether it is final or otherwise. A decision that the Court has jurisdiction to entertain application under S. 4 or that there is no legal obstacle to the application is a decision within the meaning of S. 75 (1), proviso (2). 1946 Nag 42 (44, 45) [AIR V 33 C 11] : ILR (1945) Nag 719 (DB).

[See however 1932 Bom 228 (230) [AIR V 19] (DB).]

[21] No second appeal from order made by Subordinate Judge under Ss. 53 and 54. 1940 Bom 51 (53) [AIR V 27] : ILR (1940) Bom 1 (DB) ✠ 1940 Lah 6 (6) [A I R V 27]. (Order under S. 54 —No second appeal lies —Appeal can be treated as revision.) ✠ 1933 Lah 634 (635) [AIR V 20]. (The official receiver filed an application for setting aside a mortgage effected by the insolvent on the ground that the transaction was fictitious and intended to defraud creditors. The application was dismissed and appeal therefrom to the District Judge was also dismissed. *Held*, that S. 53 was clearly applicable to the case and not S. 4 and that no second appeal lay under S. 75 — *Held further*, that the memorandum of appeal could not be treated as a petition for revision as the decision of the Courts below was based on erroneous facts.) ✠ 1933 Lah 745 (747) [AIR V 20] ✠ 1932 Lah 321 (321) [AIR V 19]. (A revision only lies under proviso 1, S. 75) ✠ 1931 Nag 153 (153, 154) [AIR V 18] : 27 Nag L R 179 (FB) ✠ 1930 Lah 122 (123) [A I R V 17].

[22] Where *interim* receiver makes application in execution for enforcing right conferred on him by S. 52 and order is made on such application, no appeal lies. 1933 Mad 152 (153) [AIR V 20] : 56 Mad 453 (DB).

[23] Decision whether debtor has right to present petition — No second appeal. 1942 Oudh 80 (81) [AIR V 29].

[24] No second appeal lies from an order under S. 25 or 27. 1936 Rang 26 (27) [A I R V 23] : 13 Rang 717 ✠ 1954 Mys 133 (Pr 3) [AIR V 41 C 54] : ILR (1953) Mys 566. (High Court may, in certain circumstances treat second appeal as revision and examine the order of the District Judge and determine about its legality and correctness.)

[25] Order under S. 27 extending time for discharge not one under S. 4. Proviso of S. 75 (2) will not apply—Second appeal will not lie. 1929 Mad 43 (44) [A I R V 16] : 52 Mad 337 (DB).

[26] No second appeal lies from an order made on an application by a creditor claiming priority for certain debts due to him on account of rent for the premises in which the insolvent's goods are stored by the official receiver. 1937 Lah 96 (96) [AIR 24].

[27] Receiver in insolvency mortgaging to creditor occupancy rights belonging to insolvent after his discharge—Insolvency Judge setting aside mortgage holding that receiver had become *functus officio* — District Judge on appeal, although holding that the act of the receiver was *ultra vires*, setting aside order of Insolvency Judge, holding insolvent's appeal to be barred by time—Second appeal, held, was incompetent as the application by the insolvent fell under S. 68 and as such S. 4 was inapplicable. High Court, however, was entitled to interfere in revision under S. 75 — Act of receiver being *ultra vires* and mortgage being without sanction of Court, mortgage held, was liable to set aside. 1936 Lah 502 (503) [AIR V 23].

Section 75 — Note 6 *(contd.)*

[28] Order refusing discharge — No second appeal is competent. 1934 Lah 198 (198) [AIR V 21].

[29] An order by the trial Court granting conditional discharge to the insolvent does not come within S. 4 and consequently no appeal lies from the appellate order of the District Judge passed thereon. The appellate order can be challenged only by way of revision to the High Court. 1942 All 219 (220) [AIR V 29] : ILR (1942) All 756 (FB).

[30] Insolvent's holding held saleable and sold — Revenue Court subsequently holding sale to be invalid at landlord's instance — Purchaser applying for refund of purchase-money — Question of title triable under S. 4 held, was not involved and no appeal lay. 1933 Lah 628 (629) [AIR V 20].

[31] Interest allowed at rate higher than permissible is not one in respect of which an appeal lies from District Court to High Court. 1938 All 28 (29) [AIR V 25] : ILR (1938) All 50 (DB).

[32] Order refusing to restore appeal dismissed for default is appealable under section 75 (1) or 75 (3) with leave. 1932 Lah 248(249) [AIR V 19].

[33] No second appeal is competent against an order made on an application under S. 68 of the Act, but the memorandum of appeal can be treated as revision application. ('37) 39 Pun L R 744 (745).

[34] Where a creditor files a petition under S. 9 and in order to prove his subsisting debt impeaches a discharge receipt executed by him to the debtor on the ground of fraud etc. the question does not fall under S. 4 and as such no second appeal lies from an appellate order. 1935 Bom 80 (81) [AIR V 22] : 59 Bom 161.

[35] Decision of first Court under S. 9 and not under S. 4—No second appeal. ('37) 1937 Oudh L R 424 (DB).

[36] Under S. 75, no second appeal lies against an order setting aside an adjudication. 1948 Nag 385 (Pr 5) [AIR V 35 C 132] : I L R (1948) Nag 523. (Under proviso to the section however, the appeal may be treated as revision.)

[37] Order under S. 33—No second appeal. 1960 Punj 604 (Pr 2) [A I R V 47 C 212]. (Appeal treated as revision.)

[38] Creditor's application under S. 24 — Insolvency Court finding questions to be complicated referring parties to Civil Court and keeping petition pending in the meanwhile — First appeal against order not successful—No second appeal lies to High Court — Decision in summary enquiry under S. 24 is not covered by S. 4. 1953 Nag 189 (Pr 4) [A I R V 40 C 69] : ILR (1953) Nag 608 (DB).

[39] Where in arriving at finding of fact lower appellate Court did not consider oral evidence, or did not apply its mind to the question or based the finding partly on admissible and partly on irrelevant and inadmissible evidence, the finding can be interfered with in second appeal, for this would raise a question of law. 1958 All 54 (Prs 21, 22, 25, 26) [AIR V 45 C 20] (DB).

[40] Finding of fact — Concurrent findings of fact, not challenged in the grounds of appeal, cannot be allowed to be raised. 1949 All 464 (Pr 16) [AIR V 36 C 174] (DB).

Interlocutory orders

[41] In insolvency cases, High Court has power to act under C. P. C. only subject to provisions of Provincial Insolvency Act. The word "decision" has element of finality so far as that particular Court is concerned. Hence an order in appeal impleading legal representative of deceased debtor is an interlocutory order and not appealable or revisable. 1936 All 80 (81, 82) [AIR V 23] : 58 All 639 (DB).

[42] A decision that the Court has jurisdiction to entertain an application under S. 4 or a decision that there is no legal obstacle to the application is a decision under S. 4 within meaning of S. 75 (1). 1946 Nag 42 (43, 44) [AIR V 33 C 11] : ILR (1945) Nag 719 (DB).

[43] In the case of a claim sought to be made under S. 4 a finding which does not dispose of the claim amounts to a decision come to or an order made within meaning of section 75 (1). 1946 Nag 42 (42) [A I R V 33 C 11] : ILR (1945) Nag 719.

[44] Order appointing *interim* receiver — No second appeal. 1932 Bom 228 (230) [AIR V 19] (DB).

[45] No appeal is maintainable from decision of Insolvency Court that it had jurisdiction to entertain application to scale down debt under Mad. Agri. Relief Act. 1942 Mad 305 (306) [AIR V 29] (DB).

[**See however** 1943 Nag 42 (43) [AIR V 33 C 11] : ILR (1945) Nag 719 (DB).]

[46] Order refusing to frame issues is interlocutory order and no appeal lies therefrom. 1934 Lah 194 (194) [AIR V 21].

7. Section 75 (2) — Orders of District Court specified in Schedule I made otherwise than in appeal. — [1] "Such decision" in S. 75 (2) clearly refer to such decision as is specified in Sch. I, and Sch. I, in its turn, names a decision under S. 4 as decision which is appealable within meaning of section. 1941 Rang 24 (25) [AIR V 28] : 1940 Rang L R 643 (DB).

[2] Order by District Judge in appeal is not governed by S. 75 (2). Hence no appeal lies from decision of District Judge on appeal. Appeal was treated as revision. 1943 Sind 176 (176) [A I R V 30] : 1 L R (1943) Kar 203 (DB).

[3] The dismissal of claim under S. 4 really tantamounts to a decision under S. 4 and entitles the appellant to an appeal under S. 75 read with Sch. I of the Act. 1934 Cal 122 (123) [AIR V 21] (DB).

[4] Order refusing permission to verify petition and striking off petition after notice has been issued amounts to an order dismissing the petition under S. 25 within the meaning of Sch. I and is appealable. 1932 Lah 28 (29) [AIR V 19].

[5] Sale by Receiver—District Judge accepting objection that property belonged to objector — Order passed by District Judge is appealable. 1937 Lah 2 (3, 4) [AIR V 24].

Section 75 — Note 7 *(contd.)*

[6] Seizure by receiver of property as insolvent's property — Third party's claim under S. 68 allowed—Appeal under S. 75 lies without Court's leave. 1928 Lah 556 (556) [AIR V 15].

[7] *Quaere* — Whether appeal lies against order to continue proceedings in presence of heirs of debtor who dies pending proceedings after leave has been obtained. 1930 Cal 590 (590, 591) [AIR V 17] (DB).

[8] Order requiring person already adjudicated to show cause why order under S. 69 (old S. 43 (2)) should not be made is not appealable—It is doubtful whether appeal lies with leave. 1916 Cal 174 (174) [AIR V 3] (DB).

[9] Order of District Judge under S. 68, dismissing application of aggrieved party on ground that it was made beyond 21 days after receiver had taken possession of property is appealable. 1928 Cal 263 (264) [AIR V 15].

[10] An appeal heard by the Judicial Commissioner under S. 75 against an order passed by a District Judge under S. 69 is a first civil appeal heard in the exercise of the civil jurisdiction of the Court. ('24) 73 Ind Cas 129 (130) (Pesh).

[11] *A* having *B* and *C* as partners in certain contract — Separate suits by *B* and *C* for settlement of accounts — Decree obtained — Meanwhile, *A* adjudicated insolvent — Application by unsecured creditor under S. 4 for determination, whether money recovered under contract should be paid to *C* solely—*B* made party — Decision in favour of *B* — In appeal, *B* not made party — *B* applying to be made party — Application rejected — Appeal by *B* under S. 75 (2) — Appeal, held premature and incompetent. 1939 Sind 45 (46) [AIR V 26] (DB).

[12] Where the application by the debtor to the District Court purported to be made with reference to a scheme or composition and for the expunging of the debt of the respondent from the schedule of creditors, it was held that under S. 75 (2) an appeal would lie to the High Court from the order of the District Court rejecting the debtor's application. 1950 Mad 492 (Pr 29) [AIR V 37 C 212]: ILR (1951) Mad 77 (FB). (AIR 1926 Mad 556 (FB), *Overruled.*)

8. Section 75 (3) — Orders appealable with leave of Court. — *Scope* — [1] Grant of leave to appeal against order under S. 10 (2) of District is discretionary. 1928 Pat 23 (23) [AIR V 15] (DB).

[2] No appeal lies against discretionary order of Court refusing leave to appeal. 1918 Mad 1070 (1070) [AIR V 5] (DB).

[3] No appeal lies against order refusing to grant leave to appeal from order which falls within S. 75 (3). 1939 Mad 800 (800) [AIR V 26] (DB).

[4] In respect of orders not falling within Sch. I the party aggrieved has not an unqualified right of appeal; he has to obtain the leave either of the District Court or of this Court. The leave referred to in S. 75 (3) of the Act is clearly leave granted by a Judge of the Court and not by any of its administrative officers. 1950 Mad 630 (Pr 2) [AIR V 37 C 267] (DB). (Admission of appeal as matter of routine in the office is not tantamount to grant of leave.)

[5] Section 77, Travancore Insolvency Act imposes no limitations whatever as to appeals against orders passed in the exercise of insolvency jurisdiction. Unlike the Provincial Insolvency Act no leave of the Insolvency Court or the High Court is required to entertain an appeal against any order in insolvency. 1955 Trav-Co 49 (Pr 10) [(S) AIR V 42 C 22]: ILR (1954) Trav-Co 1042 (DB).

Procedure

[6] Leave must be expressly sought. 1916 All 349 (350) [AIR V 3] (DB).

[7] Under S. 75 (3), it is not necessary that appellant must apply for leave prior to filing appeal in the High Court. 1927 Mad 869 (870) [AIR V 14] : 50 Mad 815 (DB).

[8] Memorandum of appeal should always be accompanied by petition for leave to appeal where the appeal is not presented as one which lies as a matter of right. 1927 Lah 914 (914) [AIR V 14].

[9] Where the appeal has been coming up in the list for considerable time and the error about the necessity of leave has not been rectified the Court will not allow an oral application for leave made at the time of hearing. 1950 Mad 630 (Pr 4) [AIR V 37 C 267] (DB).

[**See however** 1936 Rang 413 (415) [AIR V 23] (DB).]

[10] In deciding whether appeal is maintainable though leave is obtained, Civil P. C. may be referred to as a guide. 1930 Cal 590 (590, 591) [AIR V 17] (DB).

[11] Court may go into facts and hear arguments before granting leave — Circumstances held justified leave to appeal. 1929 Pat 184 (185) [AIR V 16] (DB).

Implied grant

[12] Where an appeal only lies under the provisions of S. 75 (3) the leave of either the District Judge or the High Court is necessary. But if such appeal has been admitted to hearing by the High Court it should be considered that the necessary leave has been granted. 1933 Lah 642 (643) [AIR V 20] ✣1933 Cal 151 (153) [A I R V 20] (DB) ✣ 1928 Pat 338 (339) [AIR V 15] : 7 Pat 375 (FB).

[**But see** ('31) 132 Ind Cas 223 (223, 224) (Lah). (But grant of leave is discretionary and leave may be granted even after admission at hearing of appeal.) ✣ 1927 Lah 424 (425) [AIR V 14].]

[13] Where no application for leave to appeal from an order under S. 61 has been made it cannot be inferred that leave was granted because appeal was admitted. Leave can be granted at hearing and time granted under S. 5, Limitation Act. 1934 Lah 33 (34) [AIR V 21].

[**But see** 1938 Oudh 101 (102) [AIR V 25] : 13 Luck 757. (Admission of appeal against rejection of application of creditor for substitution under S. 16 is tantamount to grant of leave contemplated by S. 75 (3). Absence of

Section 75 — Note 8 *(contd.)*

application for leave is no bar; only real question in such a case being whether there is a substantial point for consideration.)]

[14] Appeal containing prayer for leave — Appeal admitted without specific mention that leave was granted — Section 75 held sufficiently complied with and leave held granted. 1929 Lah 622 (622) [AIR V 16]✠1937 Lah 895 (896) [AIR V 24] ✠ 1937 Lah 87 (88) [AIR V 24]:17 Lah 775 ✠ 1929 Lah 636 (636) [AIR V 16].

[15] The 'leave' referred to in S. 75 (3) is leave granted by a Judge and not by any of its administrative officers. Hence admission of appeal as a matter of routine in the office cannot be treated as tantamount to grant of leave. 1950 Mad 630 (Pr 2) [AIR V 37 C 267] (DB).

Stage for granting

[16] Where the law allows an appeal to be taken only by leave to do so, the appeal cannot be regarded as having been duly instituted until such leave is obtained. Where leave is obtained long after the expiry of the period of limitation from the date of the order which is to be appealed against, sufficient cause within the meaning of S. 5, Limitation Act must be shown for not duly instituting the appeal within the period of limitation. 1937 Rang 283 (283) [AIR V 24] (DB) ✠ 1937 Pat 665 (667) [AIR V 24] : 16 Pat 724 (DB). (Where in spite of want of leave under S. 75 (2), appeal is admitted, irregularity can be cured in a case in which leave ought to be granted by granting such leave at time of hearing appeal.) ✠ 1934 Rang 117 (117) [AIR V 21] (DB)✠1932 Lah 248 (249) [AIR V 19]. (Leave to appeal may be granted even after expiry of limitation and even if there is no prayer for it in memorandum of appeal.) ✠ 1924 Mad 345 (346) [AIR V 11] : 47 Mad 673 (DB).

[17] Appeal against order of District Judge unaccompanied by any application for leave admitted by Registrar of High Court — The High Court if the circumstances justify it can grant leave to appeal at the hearing of the appeal itself. 1954 Pat 459 (Pr 2) [A I R V 41 C 159] : 33 Pat 185 (DB) ✠ ('31) 132 Ind Cas 223 (224) (Lah)✠1934 Lah 33 (34) [AIR V 21].

[**See however** 1937 Lah 249 (250) [A I R V 24]. (Leave cannot be granted at hearing in High Court if receiver on account of want of due diligence and without bona fides fails to obtain leave to appeal.)]

[18] Leave to appeal under S. 75 (3) can be granted even on oral application made in course of hearing of appeal before the High Court. 1936 Rang 413 (415) [AIR V 23] (DB).

[**See however** 1950 Mad 630 (Pr 4) [A I R V 37 C 267] (DB).]

[19] Leave applied for at very late stage was granted as the case was one involving principle and required careful consideration because of certain existing decisions. 1923 All 466 (467) [AIR V 10] : 45 All 364 (DB).

Jurisdiction of District and High Courts

[20] High Court and District Judge have concurrent jurisdiction to grant leave to appeal. Though District Judge has refused leave to appeal, High Court can grant that leave. 1915 Cal 477 (477) [AIR V 2] (DB).

[21] High Court is competent to grant leave to appeal notwithstanding District Court refused to grant it. 1919 Lah 121 (122) [A I R V 6] : 1919 Pun Re No. 63.

[22] Where appeal to High Court is competent with leave of Court, High Court may grant leave in a fit case at hearing. 1942 Cal 241 (243) [AIR V 29] : I L R (1942) 1 Cal 427 (DB).

Illustrations.

[23] Order refusing to set aside *ex parte* order of adjudication is appealable under S. 75 (3). 1936 Mad 660 (660, 661) [AIR V 23] : 59 Mad 1049.

[24] Order refusing to annul transfer would not be covered by S. 75 (2) but by S. 75 (3) and can be appealed only with the leave of the Court. 1933 Lah 242 (243) [AIR V 20].

[25] Leave to appeal from order refusing to annul transfer should not be given to creditor unless District Court or High Court is satisfied that receiver has been requested and has refused to appeal. 1931 Lah 651 (652) [A I R V 18].

[26] No appeal lies against an order of a District Judge, sitting in insolvency passed under S. 70 making a complaint after a preliminary enquiry to a Magistrate to be dealt with by him under S. 69. If there is any appeal against such an order, it can only be under S. 75 (3) and only by leave of either of the District Court or High Court. But a very strong case will be needed to justify the granting of such leave. Where such leave has not been obtained, the appeal is incompetent, nor does an appeal lie from the order under provisions of S. 476-B, Criminal P. C. 1939 Cal 264 (264, 265) [AIR V 26] : ILR (1938) 2 Cal 478 : 40 Cri L Jour 335 (DB).

[27] Order refusing to modify annulment is appealable with leave of the District Judge or the High Court. 1938 Mad 461 (462) [A I R V 25] (DB).

[28] Third person objected to seizure of certain movable property by receiver as property of insolvent and objection was dismissed — *Held* that appeal would lie against such order by special leave of District Court or High Court. 1914 All 212 (213) [AIR V 1] : 36 All 8 (DB).

[29] Dismissal of creditor's petition to include certain persons as debtors dismissed — Appeal lies under S. 75 (3), though not under S. 75 (2). 1933 Cal 151 (152, 153) [AIR V 20].

[30] Proceedings under S. 38 or 39 — No appeal as of right—Leave of District or High Court necessary for appeal. 1926 All 361 (368) [AIR V 13] (DB).

[31] No appeal lies from order of dismissal of insolvency petition made on ground of fraud, etc., except with leave of District Court or High Court. 1914 Low Bur 257 (257) [AIR V 1] : 7 Low Bur Rul 257 (DB).

[32] When order of District Court deals partly with question of discharge of insolvent under S. 41 and partly with annulment of adjudication under S. 43, leave for appeal is necessary. 1928 Pat 338 (339) [AIR V 15] : 7 Pat 375 (FB).

Section 75 — Note 8 *(contd.)*

[33] Order refusing to take action under S. 36 is appealable with leave. ('10) 6 Nag LR 146 (148).

9. Appeal to Privy Council and Supreme Court. — [1] When a right of appeal is given to one of the ordinary Courts of the country, the procedure, orders and decrees of that Court will be governed by the ordinary rules of the Civil P. C. An appeal to Privy Council is therefore maintainable from the decision of the High Court under S. 75 from the order of the District Judge, under S. 4 (2). 1934 PC 81 (82) [AIR V 21] : 12 Rang 194 : 61 Ind App 158.

[2] When S. 75 confers a right of appeal to High Court, a right of appeal to His Majesty in Council is not excluded. An order in revision whether it is under S. 75 or S. 115, Civil P. C. is not an order in appeal falling under S. 109 (a), Civil P. C. and must fall if if it falls at all under S. 109 (c), Civil P. C. 1944 Sind 220 (221, 222) [AIR V 31] : I L R (1944) Kar 216 (DB).

[3] No appeal lies to High Court from order of District Judge granting leave to appeal to Privy Council — Right of the party to appeal to Privy Council is something beyond the scope of Provincial Insolvency Act. 1937 Mad 930 (935, 936) [AIR V 24] (DB).

[4] A District Court sitting in appeal under S. 75 is not a Court of final appellate jurisdiction, as the High Court has revisional powers over it. Section 75 is comprehensive and self-contained. The provision for revision is deliberate. There is further right of second appeal in matters coming within S. 4. No appeal lies to Privy Council from order of District Judge, whatever be value of subject-matter. 1937 Mad 930 (934) [A I R V 24) (DB).

[5] Order of High Court passed in revisional jurisdiction and not on appeal — No appeal to Supreme Court lies from it. 1953 Nag 145 (Pr 2, 5) [AIR V 40 C 48]: ILR (1953) Nag 243 (DB).

10. Parties. — [1] Appeal against adjudication — Receiver is not a necessary party— This is the uniform practice of Lahore High Court. 1928 Lah 202 (203) [AIR V 15].

[2] Official receiver is a necessary party in appeal by creditors against order granting conditional discharge to insolvent. 1931 Lah 647 (648) [AIR V 18].

[3] Where a receiver was a party in the trial Court and had acquiesced in the order but was not made a party in appeal — *Held*, the defect was not fatal where the order in appeal was in favour of the receiver. 1922 Mad 439 (440) [AIR V 9] (DB).

[4] Appeal from order annulling mortgage — Necessary parties are official receiver and creditors. 1934 Lah 36 (36) [AIR V 21].

[5] Adjudication of debtor is not matter purely personal to him but affects his property and heirs — Debtor adjudicated insolvent on creditor's petition — Appeal by insolvent — Insolvent dying pending appeal — Right survives in favour of heirs — Heirs are entitled to be brought on record and to continue appeal — Same principle applies where debtor is adjudicated on his petition and creditor's appeal. 1942 Lah 211 (213) [AIR V 29]: ILR (1942) Lah 746 (FB). (AIR 1928 Lah 119 and 1888 Pun Re No. 69, *Overruled.*)

[6] Where in an appeal against order of District Judge a creditor died and no legal representatives are brought on the record within the time fixed by law, the appeal does not abate as the real person who is interested in the appeal is the official receiver. 1927 Lah 424 (425) [AIR V 14].

[7] Where a creditor only proved his debt but did not take part in the insolvency proceedings nor did he put in an appearance in course of proceedings in connection with the application for insolvent's discharge, and the order of discharge having been refused the insolvent filed an appeal during the pendency of which the creditor died and his heirs were not brought on record. *Held*, that the non-substitution of heirs did not adversely affect their interest and hence failure to substitute them in appeal did not render the appeal incompetent. 1939 Cal 490 (492) [AIR V 26].

[8] Where in an appeal by creditors under S. 75 some of the debtors (respondents) die, but their heirs are not brought on record, the appeal does not abate. The receiver represents the estate and a decision binding the receiver will bind the estate of the debtors. No question of conflicting decisions can arise in the case. 1949 Pat 63 (Prs 6, 7, 8) [A I R V 36 C 14]: 26 Pat 648 (DB).

[9] In appeal from order under S. 4, petitioning creditor is not a necessary party as he is sufficiently represented by receiver. 1937 Cal 517 (520) [AIR V 24]: ILR (1937) 2 Cal 675 (DB).

[10] Appeal by creditor against order overruling his contention that he was secured creditor —Receiver joined as party respondent —Other creditors held were not necessary parties and that the appeal was competent. 1920 Cal 525 (526) [AIR V 7] (DB).

[11] Where property is sold in insolvency proceedings and sale is confirmed auction-purchasers are not necessary parties to appeal against order confirming sale. 1919 Lah 121 (122) [AIR V 6]: 1919 Pun Re No. 63.

[*See* 1919 Lah 3 (3) [AIR V 6]: 1 Lah 21 (DB). (Appeal by insolvent against order confirming auction sale —Auction-purchasers are necessary parties and if they are joined after expiry of limitation for appeal, appeal is incompetent).]

[12] Where an insolvent appeals against the order of adjudication and dies during the pendency of the appeal his heirs have a right to continue the appeal on his death.1937 All 435 (437) [AIR V 24] : ILR (1937) All 616 (DB).

11. Procedure. — [1] In appeal against order passed in insolvency, only parties affected by order are entitled to notice. 1915 Mad 1053 (1053) [AIR V 2]: 39 Mad 74 (DB).

[2] Absence of notice to heir of deceased scheduled creditor would not render appellate proceedings incompetent. 1926 Cal 1210 (1211) [AIR V 13] (DB).

PART VII

MISCELLANEOUS

76. Costs.

The costs of any proceeding under this Act, including the costs of maintaining a debtor in the civil prison, shall subject to any rules made under this Act, be in the discretion of the Court in which the proceeding is had.

[P. I., 1907—S. 49; P.T.I., 1909—S. 90 (2).]

Section 75 — Note 11 *(contd.)*

[3] Debtor filing appeal — Notice should be served on substantial number of creditors. 1917 All 243 (244) [AIR V 4] (DB).

[4] Appeal for an adjudication – Service of notice to creditors—One of creditors who was stated to have been dead, not served —Irregularity does not affect case between insolvent and applicant creditor. 1937 Pat 671 (671) [AIR V 24] (DB).

[5] Where appeal in District Court is miscellaneous appeal against order under S. 25, judgement of District Judge should not be followed by decree but should be followed by a formal order adjudicating appellants. 1936 Rang 26 (26) [AIR V 23]: 13 Rang 717.

[6] Although there is no specific provision either in Provincial Insolvency Act or the Civil P. C., which provides for an order of security for costs in regard to a revision application made under S. 115, Civil P. C. or under S. 75, Provincial Insolvency Act, on the ground that the applicant is not residing in British India and has not any immovable property in British India, it is competent to the High Court, on an application by the opposite party for security for costs, to make an order for security of costs of the nature provided in O. 25, R. 1 in exercise of its inherent jurisdiction under S. 151, Civil P. C. 1938 Bom 510 (512) [AIR V 25]: ILR (1938) Bom 743.

[7] District court in appeal remanding case to subordinate court with specific direction that the court should first consider whether petition comes under S. 53 or S. 54 and then to consider the question whether sanction under S. 54 A should be given. The lower court deferred the consideration of the first question to a later stage and meanwhile gave sanction applied for: *Held* that there was no justification for the lower Court to ignore or act contrary to the clear and specific direction contained in order of remand. 1955 NUC (Trav-Co) 5106 [AIR V 42] (DB).

[8] Rule 2, Ch. XII, Oudh Civil Rules having been framed under the powers conferred upon the Court by S. 122, Civil P. C. must govern the procedure in presenting appeals. This rule leaves no discretion to the Court. An appeal against an order dismissing an objection of the insolvent to the sale of his house on the ground of his being an agriculturist must, therefore, be accompanied by a copy of the formal order dismissing the objection and where no such copy is filed with the memorandum within the time allowed by law the appeal is not properly constituted. 1948 Oudh 262 (Pr 7) [AIR V 35 C 95]: 23 Luck 291 (DB).

12. Limitation. — [1] The only specific provisions regarding limitation in the Act are contained in S. 68 and S. 75. 1932 Mad 352 (356) [AIR V 19]: 55 Mad 766 (DB).

[2] General provisions of Limitation Act apply to the proceedings under the Act. 1918 Lah 372 (373) [A I R V 5]: 1918 Pun Re No. 89. (Case under old Act of 1907.)

[3] In counting the 30 days, the time taken for obtaining a copy of the order of adjudication must be excluded under S. 12, of the Limitation Act. 1953 Mad 465 (Pr 12) [AIR V 40 C 177].

[See however ('11) 33 All 738 (742, 743) (DB). (Case under 1907 Act — S. 12, Limitation Act does not apply.)]

[4] Day on which the act appealed against is done is to be excluded under S. 9, General Clauses Act. 1919 Mad 947 (947) [A I R V 6]: 42 Mad 13 (DB).

[5] In the case of an appeal against an order of adjudication the starting point for counting the 30 days under S. 75 (4) is in the case of parties to the proceeding the date of the order of adjudication and in the case of third parties the date of its notification in the Gazette. 1953 Mad 465 (Pr 11) [AIR V 40 C 177].

[6] The Appellate Court should consider whether a case has been made out for the applicability of S. 5 of the Limitation Act to the case of an appeal by a third party and not summarily dismiss it when it is filed beyond the 30 days. 1953 Mad 465 (Pr 13) [AIR V 40 C 177].

[7] An order passed under S. 4 by a District Court constitutes a miscellaneous case and a formal order should be prepared under O. 43, R. 3, Civil P. C. Consequently where an order passed under S. 4 by the District Court is appealed against, but no copy of the formal order is filed along with the memorandum of appeal within the period of limitation, the memorandum of appeal must be rejected. 1946 Oudh 242 (243, 244) [AIR V 33 C 76].

[8] *See also* S. 78.

Section 76 — Note 1

[1] The discretion in the matter of costs and the exercise of that discretion, applying the provisions of S. 35-A, Civil P. C., exists in Court disposing of proceeding. 1935 Nag 207 (208) [AIR V 22] : 31 Nag L R 365.

[2] Where the receiver of an insolvent's estate brings an action against a third person and he is ordered to pay the costs of the latter, in the absence of an express direction in the decree to the contrary, the receiver is, in the first instance, personally liable for the costs, though he may have a right to be reimbursed out of the insolvent's estate. If he wants to safeguard his personal interest he should obtain an indemnity from the creditor

77. Courts to be auxiliary to each other.

All Courts having jurisdiction in insolvency and the officers of such Courts, respectively, shall severally act in aid of and be auxiliary to each other in all matters of insolvency, and an order of a Court seeking aid with a request to another of the said Courts shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by the order, such jurisdiction as either of such Courts could exercise in regard to similar matters within their respective jurisdictions.

[P. I., 1907—S. 50; P.T.I., 1909—S. 128.]

78. Limitation.

(1) The provisions of sections 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals and applications under this Act, and for the purpose

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Section 76 — Note 1 *(contd.)*

or other person in whose interest he is conducting the litigation. 1932 All 288 (289) [AIR V 19] : 54 All 444 (DB).

[3] When the official assignee or the official receiver files a suit in a Court other than the Insolvency Court of which he is the insolvency officer, the Court trying the suit or the application may dismiss the suit or the application with costs. In such a case, the plaintiff or the applicant, that is, the official assignee or official receiver is always personally liable for costs. But where the official assignee or the official receiver is a defendant or a respondent, the position is different. In such a case, he has to defend the action or at least to put the plaintiff or the applicant to proof of his claim and to watch the proceedings to see that the claim is properly proved. In such a case, there is no justification whatever for the Court to make the official assignee or the official receiver personally liable to the plaintiff. 1941 Mad 632 (633) [AIR V 28].

Section 77 — Note 1

[1] District Court of Amherst, Burma, requesting under S. 77, District Court of Ramnad to sell insolvent's property alleged to be situated in Ramnad District—Person claiming title in property sold making application under S. 4 in Amherst Court—Amherst Court returning it for presentation to Ramnad Court —Applicant filing fresh application in Ramnad Court—Ramnad Court, held proper Court to decide question of title to property. 1941 Mad 580 (581) [AIR V 28] (DB). (A I R 1941 Mad 75, *Reversed.*)

[2] Adjudication by Rangoon High Court —That Court sending a letter to the District Court at Ramnad in Madras Presidency requesting it to direct the official receiver of that place to render help to official assignee of Rangoon—District Court, Ramnad, acting in aid of administration of insolvent's estate from 1937 i. e., before separation of Burma — Application made to District Court, Ramnad, for possession by purchaser of insolvent's property after separation of Burma—*Held*, that District Court at Ramnad had power to deal with application although made after separation of Burma. 1944 Mad 481 (483) [A I R V 31].

[3] After 26th January, 1950, when India became a Republic and Pakistan became a foreign territory so far as India is concerned, the Insolvency Court in Delhi is not competent to grant an application made to it by the Official Assignee, Karachi, to take possession of a property situate in India belonging to a firm adjudicated insolvent at Karachi. Now the Courts in India are no longer British Courts and S. 122 of the British Bankruptcy Act 1914 cannot be said to apply to any Courts in India. 1951 Punj 356 (Pr 4) [AIR V 38 C 94].

[4] After integration of Hyderabad State with Indian Union question whether Court in Akola is foreign Court, in relation to Hyderabad State, does not arise—Insolvency Court at Akola adjudicating debtor insolvent—Receiver taking possession of property in Berar and applying to Aurangabad Court for its aid to enable him to take seisin of property in Hyderabad — Aurangabad Court must give aid — The argument that Provincial Insolvency Act is not made applicable to Hyderabad State and that Akola Court has no jurisdiction to hear insolvency matter under Hyderabad Insolvency Act and that Aurangabad Court is not an auxiliary Court is not tenable in view of Art. 261 of the Constitution. 1952 Hyd 80 (Prs 9, 11, 27, 29) [A I R V 39] : ILR (1952) Hyd 196 (FB).

[5] Successive adjudications by two Courts *A* and *B*—All property of insolvent vests in Official Assignee appointed by Court *A* where prior adjudication was made—It will not be divested from him by subsequent adjudication by Court *B* — It is not just and equitable to all proceedings to go on in both Courts concurrently leading to conflict of jurisdiction — One of the Courts should either annul the adjudication or stay all proceedings — Assets in hands of *A* Court can only be transferred to *B* Court in pursuance of a letter of request under S. 77 made by *B* Court to *A* Court— Application for transfer of assets by Official Assignee of *B* Court made directly to *A* Court is not sustainable under S. 36. 1957 Andh Pra 649 (Pr 3) [AIR V 44 C 208] (DB).

SECTION 78 — SYNOPSIS

1. **Retrospective effect.**
2. **'Applications' — Meaning of.**
3. **Appeal and application for leave to appeal.**
4. **"Where an order of adjudication has been annulled under this Act."**

of the said section 12, a decision under section 4 shall be deemed to be a decree.

(2) Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-section *(2)* of section 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded :

Provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act.

Section 78 — Synopsis *(contd.)*

5. "The date of the order of adjudication."
6. Leave under section 28 (2).
7. Sub-section (2) not applicable where decree-holder is insolvent.
8. Sub-section (2) not applicable where insolvent obtains absolute discharge.
9. Insolvency of Hindu father—Limitation against sons.
10. Section 48, Civil P. C., whether controlled by this section.
11. "Provable."
12. "Not proved under this Act."
13. Limitation against judgment-debtors under joint decree.

1. Retrospective effect. — [1] Retrospective effect may be given to S. 78 as it relates merely to procedure. 1924 Mad 400 (400) [AIR V 11] (DB).

[**But see** 1932 Sind 71 (72, 73) [AIR V 19] : 26 Sind L R 204 (DB).]

[2] An application by a creditor to adjudicate the debtor an insolvent made statedly under the Act of 1907 which could be made only under that Act on its date, cannot be considered to be an application under the new Act of 1920, merely because it was pending disposal when the new Act came into force. Nor can the discretion given to the Court by the Legislature statedly in respect of applications under the New Act be extended to applications made under the old Act. 1921 Mad 272 (272) [AIR V 8] (DB).

2. 'Applications'—Meaning of. — [1] Although it is true that S. 78, Provincial Insolvency Act, makes S. 5, Limitation Act, applicable to appeals and applications under the Provincial Insolvency Act, yet it does not extend the application of S. 5, Limitation Act, to petitions to adjudicate a person insolvent. Such petitions are not included in the word "applications" as used in S. 78, Provincial Insolvency Act. 1928 Sind 177 (178) [A I R V 15] (DB) ✠ 1948 Nag 385 (Pr 9) [AIR V 35 C 132] : ILR (1948) Nag 523 (DB). (Section 78 (1) has no application to petitions under S. 9 (1) (c) — Act maintains distinction between petitions and applications.) ✠ 1932 Mad 352 (360) [AIR V 19] : 55 Mad 766 (DB) ✠ 1932 Mad 112 (114) [AIR V 19].

[**See however** 1925 Lah 436 (437) [A I R V 12] (DB). (Section 5, Limitation Act did not apply to petition under Act 3 of 1907. But under new Insolvency Act S. 5 has been specifically declared to be applicable.)]

[2] Three months' period prescribed under S. 9 (1) (c) is not period of limitation but a condition precedent — Delay in filing petition cannot be condoned under Ss. 5 and 14, Limitation Act. 1948 Nag 385 (Pr 9) [A I R V 35 C 132] : ILR (1948) Nag 523 (DB).

3. Appeal and application for leave to appeal. — [1] Court can excuse delay under S. 78 in the presentation of an appeal or application and in a proper case High Court will excuse the delay in asking for leave to appeal under S. 75 (3). 1924 Mad 345 (346) [AIR V 11] : 47 Mad 673 (DB) ✠ 1953 Mad 465 (Pr 12) [AIR V 40 C 177]. (Section 12, Limitation Act applies to appeal under S. 75, Provincial Insolvency Act.)

[2] Delay in application for leave to appeal may be excused under S. 78 and the fact that no appeal was necessary under the old Act is sufficient reason for doing so. 1924 Mad 400 (400) [AIR V 11] (DB).

[3] Where an appeal is filed without obtaining leave to appeal, but subsequently leave is obtained after the period of limitation, limitation may be reckoned up to date on which memorandum of appeal is presented or in any case, the delay in filing the appeal can be excused under S. 78. 1934 Rang 117 (117) [AIR V 21] (DB).

[4] Where no application for leave to appeal has been made it cannot be inferred that leave was granted because the appeal was admitted—Leave granted at hearing in appeal and time was extended under S. 5, Limitation Act read with S. 78 of Provincial Insolvency Act. 1934 Lah 33 (34) [AIR V 21].

4. "Where an order of adjudication has been annulled under this Act."—[1] *X* applying for insolvency of *Y* — *Ex parte* adjudication order passed against *Y* — Court annulling *ex parte* order on application of *Y* but on original application passing fresh adjudication order—Appellate Court setting aside the insolvency under S. 25 (1)—*Held* S. 78 (2) did not apply as order of adjudication was a prerequisite for its applicability and there was no valid order of adjudication in this case. 1931 Nag 109 (110) [AIR V 18].

[2] Section has no application to a case where before the order of adjudication the petition for adjudication is withdrawn and no order of adjudication is actually made. 1931 Mad 784 (785) [AIR V 18].

Section 78 — Note 4 *(contd.)*

[3] Section 78 (2) excludes time only in case of annulment of order of adjudication. 1941 Nag 60 (60) [AIR V 28] : I L R (1942) Nag 306.

[4] The benefit of S. 78 can only be invoked by a party who wants to proceed against an insolvent after the adjudication has been annulled. So long as the insolvency proceedings are pending the period of limitation is suspended, provided the claim was not barred on the day of adjudication, and if the order of adjudication is annulled, the right to proceed against the insolvent would revive and the period during which the insolvency proceedings were pending would be excluded if the person wishes to proceed against the insolvent or his property. 1928 Mad 977 (978) [AIR V 15] : 51 Mad 862 (DB).

[5] A person, who brings a suit against insolvent before adjudication is annulled is not entitled to exclude time under S. 78. 1929 Mad 715 (718) [AIR V 16].

[6] Where a creditor of an insolvent instituted a suit after the period of limitation but before annulment of the adjudication order, the Court should not dismiss the suit but permit the creditor to withdraw the suit with liberty to sue again if so advised. 1933 Rang 75 (75, 76) [AIR V 20].

[7] "Annulled under this Act" in S. 78 (2) would include annulment resulting from setting aside of adjudication by appellate Court. 1943 P C 98 (101) [AIR V 30] : I L R (1943) Nag 669 : 70 Ind App 83 : ILR (1943) Kar (PC) 109.

[8] There is no difference in principle between the setting aside the order of adjudication in appeal against an order of adjudication and the annulment of the order of adjudication under Ss. 35, 36, 39 and 43 so far as limitation is concerned. The disability of the creditor during the period from the date of the order of adjudication to the date, when the order is rendered void in law, is the same in both cases. 1937 Cal 158 (159) [AIR V 24]: I L R (1937) 1 Cal 628 (DB) ✠ 1933 Lah 953 (954) [AIR V 20] : 14 Lah 426 (DB).

[9] Judgment-debtor on 4th July, 1933, adjudged insolvent — Insolvent failed to apply for discharge within time allowed—On a creditor's application Court, on 21st November, 1934, annulled order of adjudication—On 12th February, 1943, order closing proceedings passed—*Held*, 21st November, 1934, was date of order which was material:— Fact that order had been passed under S. 37 had no bearing. 1947 Mad 238 (239) [AIR V 34 C 117] : ILR (1947) Mad 661 (DB).

[10] Under S. 78 (2), where an order of adjudication has been annulled under the Act for computing the period of limitation prescribed for any suit which might have been brought but for the order of adjudication, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded. Where, therefore, there is an acknowledgment of a debt during the insolvency proceedings, the plaintiff creditor is entitled to exclude the period from the date of acknowledgment to the date of the order of annulment in computing the period for limitation for a suit based upon the acknowledgment. 1945 Mad 215 (216) [AIR V 32].

[11] A widow of the deceased insolvent sued for the sale proceeds of the property acquired under the decree which she asserted formed part of her husband's estate. She impleaded in her suit the official receiver and alleged that the official receiver had taken no action to get possession of this money for the estate. At the time when she filed this suit, she was taking steps, for the annulment of the adjudication of her husband but she did not in the plaint specifically pray that the money claimed in the suit should be made payable to the official receiver. She claimed it for herself, possibly anticipating that the annulment of the adjudication would intervene before the suit was decreed. The adjudication was eventually annulled. At the time of the annulment the suit was barred as regards one item but was still within time as regard the other item — *Held* that she had no legal basis for her suit at the time when it was filed. As however the suit was within time so far as the second item was concerned when the adjudication was annulled the suit with reference to this item was maintainable. With reference to the first item the suit would be dismissed on the ground that the plaintiff had no cause of action when the suit was filed, the property being vested in the official receiver and the suit for this item being time-barred before the adjudication was annulled. 1941 Mad 84 (87) [AIR V 28].

[12] A debtor was adjudicated insolvent on 2nd October 1931 on a petition filed by him on 23rd January 1931. A suit was instituted by the creditor on 24th February 1931 to recover a debt incurred prior to date of insolvency petition, which was proved in insolvency, and was decreed on 12th December 1931. The adjudication was annulled on 15th July 1940 and an execution petition was filed by creditor on 9th December 1943 : *Held*, that the petition was not time-barred. The decree-holder was entitled to the benefit of S. 78 (2) and the period between date of adjudication and date of annulment could be excluded in computing limitation. ('47) 1947-2 Mad L Jour 572 (573).

[13] Decree obtained by Official Receiver for debt due to insolvent — Adjudication annulled — Later on annulment of adiudication set aside and Official Receiver reappointed—Application by Official Receiver for execution of decree obtained — *Held* application was barred under Art. 182 (5) — Failure by the insolvent to apply for execution during period of annulment would disentitle the Official Receiver from seeking to execute the decree after the annulment order was set aside after three years from the date of the order on the previous application for execution. 1951 Mad 879 (2) (Pr 3) [AIR V 38 C 307] (DB).

[14] Unconditional annulment of adjudication—Properties automatically revert to insolvent — Court, however, is not functus

Section 78 — Note 4 (*contd.*)
officio — It can subsequently pass order to make properties formerly vested in Court, available for distribution amongst creditors upon their application — Section 78 (2) does not apply to exercise of such powers by the Court. 1950 Orissa 233 (Pr 2) [AIR V 37 C 43] : ILR (1950) Cut 117 (DB).

5. "The date of the order of adjudication."—[1] In computing the period of limitation for a claim against a person who has been adjudged insolvent but whose adjudication has been annulled, the period to be excluded under S. 78 is only the period of time between the date of the adjudication and the date of the annulment. The plaintiff is not entitled to exclude the whole of the period between the presentation of the petition and the annulment of the adjudication on the legal fiction that the adjudication relates back to the date of the presentation of the petition. 1936 Mad 290 (290, 291) [AIR V 23]✣ 1954 Bom 436 (Pr 8) [AIR V 41 C 119] : ILR (1954) Bom 840 (DB). (Effect cannot be given to legal fiction introduced by S. 28 (7).)✣ 1938 Mad 19 (20, 21, 22) [AIR V 25] : ILR (1938) Mad 439 (DB)✣ 1943 Nag 156 (156, 157) [AIR V 30] : ILR (1943) Nag 326. (Section 78 (2) is not governed by S. 28 (7).)

[But see ('31) 131 Ind Cas 252 (253) (All).]

6. Leave under S. 28 (2).— [1] Where the permission to execute under S. 28 (2) was one that was not only not acted upon but on which it was in the circumstances impossible to act — *Held*, that such permission was ineffectual to exclude the unfettered operation of S. 78 and that the period between the adjudication and annulment should be deducted from the period allowed for limitation. 1925 All 735 (735) [AIR V 12] (DB).

7. Sub-section (2) not applicable where decree-holder is insolvent.—[1] Time cannot be excluded under S. 78 (2) in cases in which it is creditors or decree-holders who were insolvents and who after orders of annulment institute suit or file application for execution. 1929 Mad 715 (716) [AIR V 16]✣ 1931 Mad 784 (785) [AIR V 18]✣ 1936 Nag 117 (118) [AIR V 23] : ILR (1936) Nag 41.

8. Sub-section (2) not applicable where insolvent obtains absolute discharge.— [1] Section 78 (2) cannot apply where the order of adjudication is not annulled but the insolvent obtains an order of absolute discharge. 1949 Mad 363 (Pr 14) [AIR V 36 C 154].

9. Insolvency of Hindu father —Limitation against sons.—[1] Section 78 which provides for the exclusion of the period between the date of adjudication and the date of the annulment necessarily involves the conclusion that the cause of action cannot be said to have been barred during the interval. The provision is not that on the happening of the latter event, a new right is created but the provision is one providing for the exclusion of the period between the two events. Hence it follows that in case of a joint Hindu family a claim against the sons can be enforced even during the insolvency of the father. 1945 Mad 73 (75, 77) [AIR V 32].

[2] Decree against Hindu father and sons— Period between adjudication of father and annulment cannot be excluded for executing decree against sons. 1947 Mad 271 (273) [AIR V 34 C 133] (DB).

[3] Suit against father and son — Father declared insolvent — Decree against father against property in hands of receiver and also against son's share — Sale of father's undivided share by official receiver in insolvency— Annulment of adjudication — Execution against father and son 9 years after decree — There being no bar under the law to prevent the decree-holder from executing the decree against the son's share, notwithstanding father's insolvency, an application filed nearly 9 years after decree is barred against the son. 1951 Mad 1010 (Prs 2, 3) [AIR V 38 C 350].

[4] In a joint Hindu family, when the debt is alive against the father, it is alive against the son in the absence of special circumstances, such as when created by a renewal after a partition between the father and son, or perhaps the position when the father and son were both defendants and the father alone was an insolvent against whom limitation is saved under S. 78. 1943 Mad 94 (96) [AIR V 30] (DB)✣ 1943 Mad 552 (553) [AIR V 30] (DB).

10. Section 48, Civil P. C. whether controlled by this section.—[1] "The period of limitation prescribed for any suit or application for the execution of a decree" in S. 78 (2) includes period of time prescribed in S. 48, Civil P. C. 1932 Oudh 69 (71) [AIR V 19] : 7 Luck 397✣ 1939 Mad 270 (271, 272, 273) [AIR V 26] : ILR (1939) Mad 611 (DB).

11. "Provable." — [1] When a debt, though provable under insolvency, is not admittedly proved, S. 78 (2) can have no application. A debt is provable unless it falls under S. 34 (1). 1944 Nag 313 (314) [AIR V 31] : ILR (1945) Nag 427.

[2] The plaintiff brought a suit in 1942 upon a promissory note executed by the defendant in 1935 in renewal of an earlier promissory note of 1932. When the pronote of 1935 was executed, the defendant had been adjudicated an insolvent. This adjudication was in July 1934, and the insolvency continued until it was annulled in September 1941 — *Held*. that in essence, a pronote was not itself a debt but only evidence of a debt. As the debt evidenced by the pronote of 1935 had been in existence since 1932, it was provable in insolvency and hence, Section 78 (2) applied to the suit on the pronote of 1935. 1943 Mad 658 (659) [AIR V 30].

[3] The expression 'debts provable' in the Act means the debts whose proof is offered

Section 78 — Note 11 *(contd.)*
with a view to entitle the creditors to be included in the Schedule with a view of their participating in the assets of the insolvent and not the proof for any other purpose. The use of the same expression in S. 28 (2) and the proviso to section 78 (2) should not carry a different meaning. 1960 Andh Pra 257 (Pr 3) [AIR V 47 C 79] (DB).

[4] Secured creditors are not affected by proceedings in insolvency and unless they realise the security or surrender or value it under S. 47 of the Provincial Insolvency Act, it cannot be said that their debts are provable in insolvency. Thus, if the mortgagee has no debt provable in insolvency, then the ban on the institution of suits or proceedings for the realisation of debts imposed by S. 28 (2) does not operate and the mortgagee cannot avail himself of the provisions of Section 78 (2). The application by the mortgagee under O. 34, R. 6, C. P. Code, is an application in the mortgage suit itself and the personal remedy would be available only if the suit had been filed within six years of the date due for the payment of the mortgage money, subject to any acknowledgment or part payment extending the period of limitation Hence he is not ever entitled to invoke the aid of that provision in respect of his claiming a personal decree against the mortgagor. 1957 Andh Pra 437 (Prs 7, 8, 10) [(S) AIR V 44 C 136].

12. "Not proved under this Act." — [1] Section 78 (2) was intended to incorporate the principle of S. 14, Limitation Act, so as to meet the situation which is likely to arise frequently in insolvencies. That principle operates to enable a person who was prosecuting with due diligence another proceeding founded upon the same cause of action in another Court, to exclude the time during which he was so prosecuting that proceeding. Want of diligence, and failure to do what could be done to recover the debt in spite of the insolvency, that is to say, a failure to prove for the debt, would deprive a party of the benefit of the section. 1940 Mad 716 (719) [AIR V 27] : ILR (1941) Mad 136.

[2] The operation of section 78 (2) is not confined to the narrow limits of section 49, but can be applied where there is sufficient evidence on the record to establish the debt. 1947 Mad 331 (332) [AIR V 34 C 166] : ILR (1947) Mad 665 (DF).

[3] It is not correct to say that a debt can be said to be proved under the Act, only, if it is accepted or admitted by the Court. 'Provable' and 'proof' are words of technical import in the language of the law of insolvency. A creditor proves his debt when he lodges a proof in the mode prescribed by a Statute, i. e. by fulfilling the requirements laid down in S. 49 of the Act and when he has done that he has proved his debt within the meaning of the proviso to S. 78 (2). 1943 P C 98 (101, 102) [AIR V 30]: ILR (1943) Nag 669: ILR (1943) Kar (PC) 109:70 Ind App 83 ✣ 1940 All 494 (496) [AIR V 27]. (Debt is "proved" when those steps in respect of it which are prescribed by S. 49 (1) have been taken.) ✣ 1934 Mad 465 (466) [AIR V 21] : 57 Mad 767.

[But see 1932 Lah 173 (174) [AIR V 19] (DB). (It is necessary that the debt must have been proved, that is to say, there must have been either a formal order proving the debt or any proceedings which, by necessary implication, are tantamount to such order.)]

[4] The word 'proved' in the proviso, to S. 78 (2) is used in the technical sense of proof of debt for the purposes of claiming distribution in the assets of the insolvent, and would include admission in the Court and also affidavit of debt under S. 49. Section 78 (2) can only be taken advantage of where creditor's purpose for furnishing proof of his debts is that of claiming a share in the dividend. An affidavit for purposes of permission under S. 28 (2) would not amount to a debt being proved within the meaning of S. 78 (2). 1960 Andh Pra 257 (Prs. 4, 5) [AIR V 47 C 79] (DB). (AIR 1947 Mad 331 & AIR 1940 Mad 716, *Rel. on*; AIR 1934 Mad 465 & AIR 1933 Mad 168, *Considered*.)

[5] The words "not proved" in proviso to S. 78, should be limited to cases of debts failing to be proved either (a) because the decree-holder has not availed himself of the directions given in Ss. 49 and 33 of the Act, or has in some other way not done what he ought to do by way of proving his debt, or (b) because the Court has passed orders rejecting a debt put forward by a creditor or has definitely held such debt not to be proved. Any other interpretation must give rise to what is irrational or unjust. 1948 Bom 112 (Pr 2) [AIR V 35 C 26] (DB).

[6] A mere admission of the debt by the debtor in his petition for adjudication would not amount to proof. 1938 Oudh 8 (9) [AIR V 25] (DB) ✣ 1954 Trav-Co 1 (Prs. 14, 15) [AIR V 41 C 1]:ILR (1953) Trav-Co 858 (FB). (Where the decree-holder did not give the proof of his claim, he could not claim exclusion of time under this section in order to take out the case out of the bar under S. 48, C. P. Code.)

[7] The debtor's statement in the application for being adjudged insolvent that the amount is due to the creditor under a decree by itself does not constitute proof of the debt and the creditor is not entitled to claim the benefit of the section on the basis of such statement. ('50) 55 Mys H C R 152 (155) (DB).

[8] The proof of debts referred to in the proviso to S. 78 refers to proof under S. 33 and a mere statement of a debt under S. 13 (d) in an insolvency petition, even though not denied by creditor, will not amount to proof under the Act and hence, will not save limitation under S. 78 (2). 1934 Nag 282 (282) [AIR V 21] : 31 Nag L R 101.

[9] Debt is not proved by its mere inclusion in schedule of debts. Such a debt as this is at most debt "provable". 1938 Mad 142 (143) [AIR V 25].

Section 78 — Note 12 *(contd.)*

[10] Where the debt to the decree-holder was proved in the insolvency proceedings, according to the statement of the insolvent that a decree had been obtained against him, the debt must be taken to have been proved within the proviso to S. 78. 1929 Cal 159 (160) [AIR V 16] (DB).

[11] Proof of debt in insolvency means that kind of proof only which entitles a creditor to have his name entered in schedule and none other. 1940 Mad 716 (717, 718) [AIR V 27] : ILR (1941) Mad 136.

[12] The proviso to S. 78 of the Provincial Insolvency Act refers only to the debts proved during the pendency of the insolvency proceedings, i. e., from the date of the order of adjudication to the date of the order of annulment and the Act contemplates proof of debts only during such period. Proof of debt before Official Receiver in whom the properties vested under S. 37 would not give the creditor the benefit of S. 78 (2). 1949 Mad 683 (Prs. 4, 7) [AIR V 36 C 303].

[13] Where a decree that the creditor seeks to execute is obtained subsequent to the insolvent's adjudication and it is obtained not only against the insolvent but also against the official receiver who was impleaded as a party, although the Act provides a formal mode of proving a debt which has not been adopted by the creditor, yet the debt is proved and the proviso to S. 78 does not apply. 1930 Mad 356 (356) [AIR V 17] : 53 Mad 243 (DB).

[14] A decree for money was granted against the appellant on January 29, 1925, and an application to execute the same was made in June, 1925, but it was not prosecuted because the judgment-debtor had been adjudicated an insolvent. The application for execution, however, remained pending and was dismissed on May 28, 1930. In the meantime, the order of adjudication was annulled on May 13, 1927, and another application for execution of the decree was made on October 16, 1928. It was found that all that was necessary, therefore, for the respondent to prove his debt was done by him but it appeared that the official receiver did not formally include the debt in the schedule of debts prepared by him—*Held*, that it must be held that the respondent had proved his debt as that term is used in S. 78 (2) by having done all that was necessary to prove it and in the absence of a decision refusing to admit his debt, it must be assumed that the debt was proved and, therefore, the respondent was entitled to the exclusion of the period between the date of adjudication and its annulment and the last application was not time-barred. 1933 Lah 101 (101, 102) [AIR V 20].

[15] Annulment under S. 43—Affidavit filed in the Insolvency Court, after annulment, to prove debt—Debt is not 'proved under the Act'. 1947 Pat 199 (201) [AIR V 34 C 73] (DB).

[16] Judgment-debtor adjudicated insolvent — Receiver appointed — Decree-holder forwarding to him certified copy of decree accepted as proof of debt by receiver — Decree-holder accepted as scheduled creditor —Certified copy of decree, held was proof. 1947 Pat 161 (162) [AIR V 34 C 59] : 25 Pat 447 (DB).

[17] During pendency of plaintiff's suit for money, defendant applied to be adjudicated insolvent. After passing of decree, defendant was adjudicated insolvent. Decree in suit contained direction that plaintiff might prove his debt in insolvency. Decree was assigned to third party who applied in Insolvency Court to be recognized as insolvent's creditor and referred to direction as to proving debt, in decree — *Held*, that debt should be deemed to have been proved although formal mode prescribed by S. 49 was not followed and that S. 78 applied to case. 1933 Mad 168 (169) [AIR V 20].

[18] A judgment in insolvency, declaring that the creditor's debt, (i. e., a judgment debt) is a provable debt does not declare that an alleged debt which merged in that judgment debt is proved. 1931 Mad 441 (452) [AIR V 18] : 54 Mad 601 (SB).

[19] No doubt the period from the date of the adjudication to the date of annulment cannot be excluded under S. 78 in case of an execution of a decree unless the debt to which the decree related was proved in insolvency. Where, however, the application for execution is directed against the person of the judgment-debtor and not against his property movable or immovable the decree-holder, will, if he applies promptly after the cessation of the protection order, be entitled to the exclusion of the period during which the protection order was in force. 1930 All 580 (581, 582) [AIR V 17].

[20] A mortgagee who has given up his security, in filing suit for a money decree against his mortgagor whose adjudication has been annulled can exclude the period between the adjudication and annulment in computing the period of limitation for the suit, even though he has not proved his debt in insolvency. The mortgage debt is not provable in insolvency except under three contingencies contemplated by sub-ss. (1), (2) and (3) of S. 47. The fact that the prior mortgagee had sold the mortgaged property in execution of his mortgage decree even before the annulment order would not affect the question if the subsequent mortgagee claiming the benefit of S. 78 (2) had not been a party to the mortgage suit by the prior mortgagee. 1949 Mad 273 (Prs. 2, 4) [AIR V 36 C 127]. (AIR 1942 Mad 273, *Applied.*)

[21] In summary proceedings creditors do not prove their debts and it is the Court which has to go into the claims of the creditors and frame a schedule of creditors and distribute whatever assets are available. But where the Court in summary proceedings did not frame a schedule of creditors because the adjudication itself was annulled and the proceedings dropped without distributing the assets, S. 78 (2) would not be a bar to an execution petition because the decree-holder

79. Power to make rules.

[a][*(1)* The High Court may, with the previous sanction of the State Government, make rules for carrying into effect the provisions of this Act.]

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide—

(a) for the appointment and remuneration of receivers (other than Official Receivers), the audit of the accounts of all receivers and the costs of such audit,

(b) for meetings of creditors,

(c) for the procedure to be followed where the debtor is a firm, [b][*]

(d) for the procedure to be followed in the case of estates to be administered in a summary manner, [c][and

(e) for any matter which is to be or may be prescribed.]

(3) All rules made under this section shall be published [d][* * *] in the Official Gazette, [e][* * *] and shall, on such publication, have effect as if enacted in this Act.

[P. I., 1907—S. 51; P.T.I., 1909—Ss. 112; 113.]

[a] *Substituted* for the original sub-section by A.O., 1937 [1-4-1937]. [b] The word "and" was *omitted* by the Provincial Insolvency (Amendment) Act, 1926 (XXXIX of 1926), S. 6. [c] *Inserted*, *ibid.* [d] The words "in the Gazette of India or" were *omitted* by A. O., 1937 [1-4-1937]. [e] The words "as the case may be" were *omitted*, *ibid.*

STATE AMENDMENT

MAHARASHTRA

In its application to the State of Bombay, in sub-section *(2)* of section 79, after clause *(a)* the following clause shall be *inserted*, namely :—

"*(aa)* the form of insolvency notice and the manner in which it may be served;".

— Bom. Act XV of 1939, S. 3 (c) [19-6-1939].

Section 78 — Note 12 *(contd.)*

had not proved his debt in insolvency. 1956 Mad 580 (Pr 5) [AIR V 43 C 179].

[22] Where the debt was incurred prior to the filing of the petition in insolvency, the mere fact that the decree was passed after the adjudication, which later on was annulled, would not make it a debt incurred after the adjudication. As it was a provable debt and was in fact proved there is no reason for not giving the decree-holder the benefit of S. 78 (2). ('47) 1947-2 Mad L Jour 572 (573).

13. Limitation against judgment-debtors under joint decree.—[1] The fact that limitation is saved for execution against one judgment-debtor because of his application in insolvency, will not save limitation against other judgment-debtors when the decree was joint; and a payment by the receiver will be of no avail as against such debtors. 1938 Pat 395 (396) [AIR V 25].

Section 79 — Note 1

[1] Where no rules have been framed under the new Act old rules under the Act of 1907 hold good if they are not inconsistent with the new Act. 1926 Lah 360 (361) [AIR V 13].

[2] Failure to frame rules cannot override provision of law which exempts insolvent from liability for his debts prior to date of his insolvency on his obtaining a discharge. In absence of such rules, provisions of Civil Procedure Code apply to insolvency proceedings. 1932 Sind 39 (40) [AIR V 19] : 25 Sind L R 422 (DB).

[3] Order under S. 56 appointing receiver only fixing rate of remuneration and not source or time for payment must be construed in light of S. 56 (1) (b) read with rules framed under S. 79 (2). 1938 Nag 230 (232) [AIR V 25] : ILR (1940) Nag 161.

[4] Rules under S. 79—(Nag.), R. 14 — Remuneration of receiver fixed at certain percentage on realization and distribution — No realization — Receiver is not entitled to remuneration for labour and trouble — He cannot even claim compensation on principle of Quantum meruit — Receiver appointed as appointee under S. 37 after annulment — No agreement as to remuneration for such period after annulment — Appointee unable to sell due to obstructive tactics of debtor — Appointee is entitled to compensation on basis of quantum meruit. 1948 Nag 92 (Prs 4, 5, 6) [AIR V 35 C 35] : ILR (1947) Nag 397.

[5] It is clear from S. 79 (2) (c) that the legislature contemplated orders of adjudication being passed against firms. Moreover a firm is not a separate legal entity; nor is it a distinct person. It is merely a shorthand form for collectively designating all the partners in a firm and an order of adjudication passed against the firm is an order against individual partners who constitute it. 1929 Lah 447 (448) [AIR V 16].

[6] Rules framed by the High Court under S. 79 provide that adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in the firm. By analogy, all the members of a firm carried on by a joint Hindu

80. Delegation of powers to Official Receivers.

(1) The High Court, with the like sanction, may from time to time direct that, in any matters in respect of which jurisdiction is given to the Court by this Act, the Official Receiver shall, subject to the directions of the Court, have all or any of the following powers, namely :—

[a][* * * * *]

(b) to frame schedules and to admit or reject proofs of creditors;

[a][* * * * *]

Section 79 — Note 1 *(contd.)*

family would be insolvents on the adjudication of the firm as an insolvent. 1935 All 643 (644) [AIR V 22] (DB).

[7] Rule 3 of the rules framed by the Lahore High Court under S. 79, Provincial Insolvency Act merely prescribes the procedure which is to be followed in proceedings under the Provincial Insolvency Act. It does not lay down any rule of substantive law. The question whether a joint Hindu family or the business carried on by it can or cannot be adjudicated insolvent is not a question of mere procedure but is one of substantive law. It is, therefore, not covered by R. 3, and that rule cannot have the effect of impliedly providing for the adjudication of a joint Hindu family as such or of its trading business as insolvent. 1940 Lah 462 (465) [AIR V 27] : ILR (1941) Lah 55 (DB).

[8] Sub-section (2) (c) — Acts of insolvency are acts which when committed create personal liability. Therefore any act of insolvency committed by the Manager of a joint Hindu family is to be considered as an act of insolvency committed by him alone and not by other members of the family. Nor can a joint Hindu family firm be adjudged insolvent. 1958 Madh-Pra 233 (Prs 2, 4) [AIR V 45 C 84] (DB).

[9] An application under S. 9 not accompanied by deposit required under R. 27 (4) framed by the Bombay High Court, cannot be dismissed but the deposit should be ordered to be made in a certain time. 1924 Bom 472 (472) [AIR V 11] (DB).

[10] Rule 5 framed under S. 79 nowhere provides that mere publication of the notice of order fixing date of hearing of petition under S. 19 (2) in the Official Gazette will be enough. It distinctly provides that a copy of the notice should also be forwarded by registered letter to each creditor. Where the creditor has received no notice of either the application or the date of the hearing, the Court must allow his petition for setting aside the insolvency order passed ex parte and re-hear the matter. Mere publication in the Government Gazette of the notice is not enough. In such a case, the question of prejudice is irrelevant. 1940 Pat 623 (625) [AIR V 27] (DB).

[11] Madras Provincial Insolvency Rules (1922), R. 21 (3) — Adjudication application by creditor — Notice to debtor and creditors issued — Actual hearing of application postponed — Meantime R. 21 (3) amended, requiring notice to transferee also, transfer to whom was alleged to be act of insolvency — Order of adjudication in absence of transferee — When petitioner had done all that was required of him by the rule as it existed at the time, subsequent amendment did not render additional notice necessary — Amendment was not retrospective. 1946 Mad 262 (263, 264) [AIR V 33 C 142].

[12] Rule 21 (3) framed by Madras High Court is mandatory. But failure of Court to send notice to transferee of insolvency petition by the creditor does not vitiate the proceedings and render it void — Effect is that order of insolvency is irregular and can only be set aside by persons aggrieved by want of notice. Debtor on whom the notice was served cannot urge the failure to serve the transferee as a ground in revision for invalidating the order of adjudication, specially when this point was not taken before the Insolvency Court or in appeal. 1957 Mad 299 (Prs 3, 4) [AIR V 44 C 94]. (AIR 1950 Mad 386, *Ref.*) ✣ 1950 Mad 386 (Pr 2) [AIR V 37 C 170]. (Madras Civil Rules of Practice, R. 21 (3)—Order of adjudication on petition under S. 19 (1) without notice to transferee — Application by transferee to set aside adjudication — Order set aside.)

[13] Rule III-A, cls. 9 (c) and 10 of Bombay High Court Rules — Rules do not extend time prescribed by S. 9 (1) (c). Rules are enacted by the Court under its rule-making power and contain a provision for ascertaining the point of time from which the period for the fulfilment of the condition prescribed in the section is to be calculated and in this view no provision of the Act is violated by framing cls. 9 (c) and 10 of R. III-A. Both the clauses are intra vires the High Court. 1958 Bom 164 (Pr 6) [AIR V 45 C 48] : ILR (1957) Bom 295 (DB).

[14] The words 'debts provable' in the Act mean debts where proof is offered with a view to entitle the creditors to be included in the schedule with a view of their participating in the assets of the insolvent and not the proof for any other purpose. The use of the same expression in S. 28 (2) and the proviso to S. 78 (2) should not carry a different meaning. The definition of proved debts under R. 3 of the Rules framed by Madras High Court under S. 79 (1) is not ultra vires the Act. 1960 Andh-Pra 257 (Pr 3) [AIR V 47 C 79] (DB).

Section 80 — Note 1

[1] In order to prepare the schedule under the powers delegated to him under S. 80 (b), the receiver has to decide whether the alleged debt was actually due and, if so, whether the whole or a part of it was unsecured. When after an inquiry into these matters he has come to the conclusion that the debt was

(e) to make interim orders in any case of urgency; and

(f) to hear and determine any unopposed or *ex parte* application.

(2) Subject to the appeal to the Court provided for by section 68, any order made or act done by the Official Receiver in the exercise of the said powers shall be deemed the order or act of the Court.

[P. I., 1907—S. 52; P. T. I., 1909—S. 6.]

[a] Clauses *(a)*, *(c)* and *(d)* were *omitted* by the Provincial Insolvency (Amendment) Act, 1926 (XXXIX of 1926), S. 7.

81. Power of State Government to bar application of certain provisions to certain Courts.

Any State Government [a][* * *] may, by notification in the Official Gazette, declare that any of the provisions of this Act specified in Schedule II shall not apply to insolvency proceedings in any Court or Courts having jurisdiction under this Act in any part of the territories administered by such State Government.

[P. I., 1907—S. 54.]

[a] The words "with the previous sanction of the Governor-General in Council" were *omitted* by the Devolution Act, 1920 (XXXVIII of 1920), S. 2 and Sch. I.

82. Savings.

Nothing in this Act shall—

(a) affect the Presidency-towns Insolvency Act, 1909, [a][* * *] or

(b) apply to cases to which Chapter IV of the Dekkhan Agriculturists Relief Act, 1879, is applicable.

[P. I., 1907—S. 55.]

[a] The words and figures "or S. 8 of the Lower Burma Courts Act, 1900" were *omitted* by the Repealing and Amending Act, 1930 (VIII of 1930), S. 3 and Sch. II.

Section 80 — Note 1 *(contd.)*

genuine, but that no part of it was secured, the proceedings before the receiver cannot be said to have been misconceived, or the order passed by him ultra vires. An appeal lies under S. 68 against such order to the District Judge. 1939 Lah 460 (462) [AIR V 26].

[2] Official receiver exercising powers under S. 80 is not a Court subordinate to District Court under S. 46. 1918 Mad 964 (966) [AIR V 5] : 40 Mad 752 (DB).

[3] The power delegated to the official receiver under S. 80 is to frame the schedule after an ex parte examination of the evidence tendered by the alleged creditors of the insolvent and he does not decide judicially or finally upon the contested claims. His entering a creditor's name in the schedule does not prevent the Court from entertaining applications under Ss. 50 and 53. 1918 Mad 206 (206, 207) [AIR V 5] : 41 Mad 30.

Section 82 — Note 1

[1] The assignee of a decree, during pendency of his darkhast, also filed an application in insolvency against the judgment-debtor who was an agriculturist. On judgment-debtor's contentions that the application was barred under S. 82 (b) of the Provincial Insolvency Act, the Subordinate Judge dismissed the application for want of jurisdiction. On appeal to the District Court, the Assistant Judge held that the Subordinate Judge had jurisdiction and remanded the case. In a revision application the judgment-debtor contended that no appeal to the District Court lay under S. 33 — *Held*, that although under S. 33 no appeal was competent, under S. 53 a revision was competent on a question of legality or propriety of any order passed by Subordinate Judge in any matter falling under Chap. IV of Dekkan Agriculturists' Relief Act. The question before Assistant Judge was a question of jurisdiction of the trial Court and could, therefore, form the subject-matter of a revision. The order of the Assistant Judge could, therefore, be regarded as an order in revision and dealt with by the High Court. 1945 Bom 374 (375) [AIR V 32] : ILR (1945) Bom 518 (DB).

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83. Repeals.

[a][* * * * *]

(2) Where in any enactment or instrument in force at the date of the commencement of this Act, reference is made to Chapter XX (Of Insolvent Judgment-debtors) of the Code of Civil Procedure, 1877, or of the Code of Civil Procedure, 1882, or to any section of either of those Chapters, such reference shall, so far as may be practicable, be construed as applying to this Act or to the corresponding section thereof.

[P. I., 1907—S. 56.]

[a] Sub-section *(1)* was *omitted* by the Repealing Act, 1927 (XII of 1927), S. 2 and Sch.

SCHEDULE I

[*See* section 75 (2)]

DECISIONS AND ORDERS FROM WHICH AN APPEAL LIES TO THE HIGH COURT UNDER SECTION 75 (2)

Section	Nature of decision or order
4	Decision of questions of title, priority, etc., arising in insolvency.
25	Order dismissing a petition.
26	Order awarding compensation.
27	Order of adjudication.
33	Orders regarding entries in the schedule.
35	Order annulling adjudication.
37	Order declaring the conditions on which the debtor's property shall revert to him on annulment of adjudication.
41	Order on application for discharge.
50	Order disallowing or reducing entries in the schedule.
53	Order annulling a voluntary transfer.
54	Decision that a transfer of property is a preference in favour of a creditor.
[a][*	* * * * *]

[a] The entry relating to S. 69 was *omitted* by the Repealing Act, 1927 (XII of 1927), S. 2 and Sch.

Section 83 — Note 1

[1] By S. 193 of the Agra Tenancy Act, Chap. 20 of Civil P. C. of 1882 is made inapplicable to proceedings under the Tenancy Act. By S. 56 of the Provincial Insolvency Act, 1907, Chap. 20 of Civil P. C. 1882, was repealed and it was enacted that references to Chap. 20 should be construed as applying to Provincial Insolvency Act of 1907. Hence Provincial Insolvency Act of 1907 does not apply to proceedings under Agra Tenancy Act of 1901. 1921 All 13 (14) [AIR V 8]: 43 All 510 (FB).

[2] Sections 344 to 359, Civil P. C., of 1877 being repealed by operation of S. 8, General Clauses Act and S. 83 (2), Provincial Insolvency Act, 1920, references to old Code must be construed as applying to the corresponding provisions of the Provincial Insolvency Act 1920. The references in Chap. 4, Dekkhan Agriculturists' Relief Act, to Ss. 344 to 359, Civil P. C. of 1877 are references to the whole law of insolvency as contained in those sections. Therefore the power of the creditor to make applications in insolvency must be regarded as saved by the present provisions of the Provincial Insolvency Act, 1920, notwithstanding that in no part of Chap. 4, Dekkan Agriculturists' Relief Act, is the power of a decree-holder to file an insolvency petition against an agriculturist debtor expressly mentioned, the reason being that at the date of the enactment of the above Act such a creditor had the power under the general provisions of the Civil Procedure Code to file such a petition. Therefore the decree-holder is entitled under S. 9, Provincial Insolvency Act 1920, to present an insolvency petition against the agriculturist judgment-debtor notwithstanding the provisions of S. 82 (b), Provincial Insolvency Act 1920. 1945 Bom 374 (377) [AIR V 32] : I L R (1945) Bom 518 (DB).

SCHEDULE II

(*See* section 81)

PROVISIONS OF THE ACT APPLICATION OF WHICH MAY BE BARRED BY STATE GOVERNMENTS.

Provisions of the Act	Subject
Section 26	Award of compensation.
28, sub-section *(3)*.	Reputed property of an insolvent.
34	Debts provable under the Act.
38, 39, 40	Compositions and schemes of arrangement.
42, sub-sections *(1)* and *(2)*.	Obligation to refuse absolute discharge.
45, 46, 47, 48, 49, 50	Method of proof of debts.
51, 52, 53, 54, 55	Effect of insolvency on antecedent transactions.
61 [except clause *(a)* of sub-section *(1)* and sub-section *(4)*].	Priority of debts.
62, 63, 64, 65	Dividends.
66	Management by and allowance to insolvent.
72	Penalty for obtaining of credit by undischarged insolvent.

SCHEDULE III.—Enactments repealed. *[Repealed by the Repealing Act, 1927 (XII of 1927), S. 2 and Sch.]*

[THE] PROVINCIAL SMALL CAUSE COURTS ACT, 1887

(Act IX of 1887)

[The Act printed here is as on 1-3-1961.]

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THE SECOND SCHEDULE. — SUITS EXCEPTED FROM THE COGNIZANCE OF A COURT OF SMALL CAUSES.

STATEMENT OF OBJECTS AND REASONS

"The suits cognisable in Courts of Small Causes are subject to certain provisos, described in section 6, Act XI of 1865, as "claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage or demand does not exceed in amount or value the sum of five hundred rupees whether on balance of account or otherwise" and section 586 of the Code of Civil Procedure provides that "no second appeal shall lie in any suit of the nature cognisable in Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees". Since section 6 of the Act of 1865 was enacted, a vast quantity of case-law has grown up around it, and, as the rulings of the Courts have not been uniform, doubts constantly arise on the question whether a suit is or is not a suit of the nature cognisable by a Court of Small Causes, and, consequently, whether or not, where the suit is of value not exceeding five hundred rupees and the original decree made in it was not final but was open to appeal, an appeal will also lie from the appellate decree in the suit. It appears to the Government of India that the conflicting constructions placed on section 6, of which some are due to the progress of legislation during the last twenty years (ILR 3 All 66), render a more accurate definition necessary of the suits of which Courts of Small Causes may take cognizance, and that legislation to this end should follow sections 18 and 19 of the Presidency Small Cause Courts Act, 1882, in declaring the jurisdiction of those Courts to extend to all suits of a civil nature, subject to specified exceptions. This Bill has accordingly been prepared, its primary object being to remove the doubts now felt as to the effect of section 6, Act XI of 1865; and, as several sections and parts of sections of that Act have, from time to time, been repealed and other sections are obsolete as regards both expression and utility, it has been considered desirable to repeal the Act and re-enact the substance of the extant portions of it. * * *"

—Gazette of India, 1886, Part V, p. 8.

PREVIOUS LEGISLATION

Provincial Small Cause Courts Act, XLII of 1860—Repealed by Act XI of 1865.

Mufassal Small Cause Courts Act, XI of 1865—Repealed by Act VIII of 1887.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937; A. L. O., 1950; 2 A. L. O., 1956;
—Adapted by An. A. L. O., 1954 and 1957; Mad. (Ad. Ter.) A. L. O., 1961.
—Amended by Acts VI of 1914; XI of 1915; IX of 1922; I of 1926; IX of 1935.
—Amended in its application to—
Madhya Pradesh by M. P. Act XIX of 1958.
Maharashtra by Bom. Acts VI of 1930; IX of 1932; LVII of 1950; LXXXVII of 1958.
Uttar Pradesh by U. P. Acts XXIV of 1954; XVII of 1957.
—Extended by Acts LIX of 1949; XXX of 1950.
—Extended in—
Assam by Assam Act VIII of 1947.
Bombay by Bom. Acts IV of 1950; LXXXVII of 1958.
Madras by Mad. Acts XXXV of 1949; XXII of 1957.
Punjab by Punj. Act V of 1950.
—Repealed in part and amended by Act X of 1914.
—Repealed in part by Acts X of 1888; XII of 1891; IX of 1908; IV of 1914; I of 1938.
—Repealed in its application to areas mentioned in Sch. A to Bom. Act XVII of 1945 —*See* S. 4 (1) of that Act.
—Repealed in its application to Malabar district by Ker. Act VIII of 1957.

[THE] PROVINCIAL SMALL CAUSE COURTS ACT, 1887
(ACT IX OF 1887)[a]

[24th February, 1887.]

An Act to consolidate and amend the law relating to Courts of Small Causes established beyond the Presidency-towns.

WHEREAS it is expedient to consolidate and amend the law relating to Courts of Small Causes established beyond the local limits for the time being of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William in Bengal and at Madras and Bombay ;

It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1886, Pt. V, page 8 ; for Report of the Select Committee, *see ibid*, 1887, Pt. IV, page 33.

This Act has been *declared* to be in force in Panth Piploda by the Panth Piploda Laws Regulation, 1929 (I of 1929), S. 2 ; in the Khondmals District by the Khondmals Laws Regulation, 1936 (IV of 1936), S. 3 and Schedule ; and in the Angul District by the Angul Laws Regulation, 1936 (V of 1936), S. 3 and Schedule.

It has been *declared*, under the Scheduled Districts Act, 1874 (XIV of 1874), S. 3 *(a)* to be in force in the Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum, *see* Gazette of India, 1887, Pt. I, page 582. The District of Lohardaga (now called the Ranchi District, *see* Calcutta Gazette, 1889, Pt. I, page 44) included at this time the District of Palamau which was separated in 1894.

This Act has been *extended* to and shall be in force in—

(a) the new Provinces and merged States—*see* the Merged States (Laws) Act, 1949 (LIX of 1949), S. 3 [1-1-1950] ;

(b) the States of Manipur, Tripura and Vindhya Pradesh — *see* the Union Territories (Laws) Act, 1950 (XXX of 1950), S. 3 [16-4-1950] ;

(c) Shillong in the State of Assam—*see* Assam Act VIII of 1947, S. 3 and Sch. I ;

(d) the States merged in the State of Bombay—*see* Bom. Act IV of 1950 ;

(e) the Hyderabad and Saurashtra areas of the State of Bombay — *see* Bom. Act LXXXVII of 1958, S. 2 (1) [15-10-1958] ;

(f) the States merged in the State of Madras — *see* Mad. Act XXXV of 1949, S. 3 [w. e. f. 1-1-1950] ;

(g) the transferred territory in the State of Madras — *see* Mad. Act XXII of 1957, S. 3 [18-12-1957] ;

(h) the States merged in the State of Punjab—*see* Punj. Act V of 1950.

The amending Acts enacted in the State of Bombay, namely, Bom. Acts VI of 1930, IX of 1932 and LVII of 1950, and which amend the Provincial Small Cause Courts Act, 1887, in its application to the area of the pre-Reoganisation State of Bombay excluding the transferred territories are extended to and shall be in force in the Vidarbha region and Kutch area of the State of Bombay to which they did not extend before 15-10-1958 ; the said Act shall from that date be deemed to be amended accordingly also in that part of the State—*see* Bom. Act LXXXVII of 1958, S. 2 (2) [15-10-1958].

This Act has ceased to apply to or to be in force in the areas specified in Parts II, III and IV of Sch. A to Bom. Act XVII of 1945—*see* S. 4 (1) and Sch. D of that Act.

The Provincial Small Cause Courts Act, 1887, as in force in the Malabar district is *repealed* by the Kerala Small Cause Courts Act, 1957, S. 33 [1-8-1957].

For power to confer upon a Subordinate Judge or Munsif in Bengal, the Province of Agra and Assam, the jurisdiction of a Court of Small Causes under this Act, *see* the Bengal, Agra and Assam Civil Courts Act, 1887 (XII of 1887), S. 25.

Sections 15, 32, 37, 38, 39 and 40 of the Bengal, Agra and Assam Civil Courts Act, 1887 (XII of 1887), apply to Courts of Small Causes constituted under this Act, *see* Act XII of 1887, S. 40.

The powers of a Court of Small Causes under this Act have been conferred upon the Courts of Sub-Divisional Officers of the Khondmals and Angul Districts by S. 13 of Regulations 4 and 5 of 1936, respectively.

CHAPTER I

PRELIMINARY

1. Title, extent and commencement.

(1) This Act may be called THE PROVINCIAL SMALL CAUSE COURTS ACT, 1887.

(2) It extends to [A][the whole of India except [a][the territories which, immediately before the 1st November, 1956, were comprised in Part B States]] ; and

(3) It shall come into force on the first day of July, 1887.

[a] *Substituted* for the words "Part B States" by 2 A. L. O., 1956 [1-11-1956]. Immediately before 1st November 1956, the following were Part B States, namely, Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin.

STATE AMENDMENTS

GUJARAT

Same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in section 1—

(a) to sub-section *(2)*, *add* the following Proviso, namely,—

"Provided that on the commencement of the Provincial Small Cause Courts (Bombay Unification and Amendment) Act, 1958, it shall also extend to the Saurashtra and Hyderabad areas of the State of Bombay."

(b) to sub-section *(3)*, *add* the following Proviso, namely,—

"Provided that, in the Saurashtra and Hyderabad areas of the State of Bombay, it shall come into force on the commencement of the Provincial Small Cause Courts (Bombay Unification and Amendment) Act, 1958."

Bom. Act LXXXVII of 1958, S. 4 [came into force on 15-10-1958].

2. Repeal. *[Repealed partly by the Amending Act, 1891 (XII of 1891), S. 2 and Schedule I, and partly by the Repealing Act, 1938 (I of 1938), S. 2 and Schedule.]*

3. Savings.

Nothing in this Act shall be construed to affect—

(a) any proceedings before or after decree in any suit instituted before the commencement of this Act ; or

(b) the jurisdiction of a Magistrate under any law for the time being in force with respect to debts or other claims of a civil nature, or of village-munsifs or village-panchayats, under the provisions of the

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Section 3 — Note 1

[1] Small Cause Court has concurrent jurisdiction with the Village Munsif to hear suits under S. 13, Madras Act 1 of 1889. ('90) 13 Mad 145 (146) (DB).

[2] In view of the rule of construction contained in S. 3 (c), what is contained in the Act does not affect the power that is given to the local Government under the Madras Act to raise the jurisdiction. 1957 Mad 673 (674) [AIR V 44 C 207].

[3] Section 25 of the Act affords ground for interference within an ambit wider than that provided by para. 35 of the Himachal Pradesh (Courts) Order. Hence, S. 25 of the Act cannot be said to affect the special law contained in Para 35 of the Order within the intendment of S. 3 (c) of the Act. 1953 Him Pra 68 (69) [AIR V 40 C 30].

Madras Code, or of village-munsifs under the Dekkhan Agriculturists' Relief Act, 1879[a] ; or

(c) any local law or any special law other than the Code of Civil Procedure.[b]

[a] Now *see* Bombay Agricultural Debtors Relief Act, 1947 (Bom. XXVIII of 1947), S. 56.
[b] *See* now the Code of Civil Procedure, 1908 (Act V of 1908).

STATE AMENDMENTS

ANDHRA PRADESH

In its application to the State of Andhra Pradesh, in clause *(b)* of section 3 after the words "Madras Code" *insert* the words and figures "or of the laws in force in the State of Andhra as it existed immediately before the 1st November, 1956".

—Andh. Pra. A. L. O., 1953 and 1957.

MADRAS

In its application to the *added* territories in the State of Madras, in clause *(b)* of section 3, for the words and figures "State of Andhra as it existed immediately before the 1st November, 1956" *substitute* the words and figures "territories specified in the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959".

—Mad. (Ad. Ter.) A. L. O., 1961.

4. Definition.

In this Act, unless there is something repugnant in the subject or context, "Court of Small Causes" means a Court of Small Causes constituted under this Act, and includes any person exercising jurisdiction under this Act in any such Court.

CHAPTER II

CONSTITUTION OF COURTS OF SMALL CAUSES

5. Establishment of Courts of Small Causes.

(1) The State Government [a][* * *] may, by order in writing, establish a Court of Small Causes at any place within the territories under its administration beyond the local limits for the time being of the ordinary original civil jurisdiction of a High Court of Judicature established in a Presidency-town.

(2) The local limits of the jurisdiction of the Court of Small Causes shall be such as the State Government may define, and the Court may be held at such place or places within those limits as the State Government may appoint.[b]

[a] The words "with the previous sanction of the Governor-General in Council" were *repealed* by the Decentralization Act, 1914 (IV of 1914), S. 2 and Sch., Pt. I. [b] For notifications issued under clause *(2)* of section 5, *see* different local Rules and Orders.

[a][**6. Judge.**

When a Court of Small Causes has been established there shall be appointed, by order in writing, a Judge of the Court :

Provided that if the State Government so direct, the same person shall be the Judge of more than one such Court.]

[a] *Substituted* for the original section by A.O., 1937.

7. Appointment of times of sitting in certain circumstances.

(1) A Judge who is the Judge of two or more such Courts may, with the sanction of the District Court, fix the times at which he will sit in each of the Courts of which he is Judge.

(2) Notice of the times shall be published in such manner as the High Court from time to time directs.

Section 4 — Note 1

[1] No distinction exists between a Small Cause Court Judge and a Court which has Small Cause Court powers. 1935 All 690 (691) [AIR V 22].

Section 5 — Note 1

[1] Section 28 of the Civil Courts Act does not owe its origin to S. 5 of this Act. The former section only envisages ordinary Civil Courts invested with small cause jurisdiction by virtue of the powers given by other enactments. The Small Cause Courts contemplated by S. 5 are distinct and different from those envisaged in S. 28 of the Civil Courts Act. 1959 Andh Pra 3 (5) [A I R V 46 C 2] : I L R (1958) Andh Pra 740 (DB).

8. Additional Judges.

[a][*(1)* If the State Government so direct, there may be appointed, by order in writing, Additional Judges of a Court of Small Causes or of two or more such Courts.]

(2) [b][An Additional] Judge shall discharge such of the functions of the Judge of the Court or Courts as the Judge may assign to him, and in the discharge of those functions shall exercise the same powers as the Judge.

(3) The Judge may withdraw from [b][an Additional] Judge any business pending before him.

(4) When the Judge is absent, the [c][senior] Additional Judge may discharge all or any of the functions of the Judge.

[a] *Substituted* for the original sub-section by A. O., 1937. [b] *Substituted* for "the Additional" by the Repealing and Amending Act, 1915 (XI of 1915), S. 2 and Sch. I. [c] *Inserted*, *ibid*.

9. Suspension and removal of Judges. *[Repealed by A. O. 1937.]*

10. Power to require two Judges to sit as a bench.

The State Government, after consultation with the High Court, may, by order in writing, direct that two Judges of Courts of Small Causes or a Judge and an Additional Judge of a Court of Small Causes shall sit together for the trial of such class or classes of suits or applications cognizable by a Court of Small Causes as may be described in the order.

11. Decision in case heard by a bench.

(1) If two Judges, or a Judge and an Additional Judge, sitting together under the last foregoing section, differ as to a question of law or usage having the force of law, or in construing a document the construction of which may affect the merits, they shall draw up and refer, for the decision of the High Court, a statement of the facts of the case and of the point on which they differ in opinion, and the provisions of Chapter XLVI of the Code of Civil Procedure[a] shall apply to the reference.

(2) If they differ on any matter other than a matter specified in sub-section *(1)*, the opinion of the Judge who is senior in respect of date of appointment as Judge of a Court of Small Causes, or, if one of them is an Additional Judge, then the opinion of the Judge sitting with him, shall prevail.

(3) For the purposes of sub-section *(2)*, a Judge permanently appointed shall be deemed to be senior to an officiating Judge.

[a] Of Act XIV of 1882. *See* now Ss. 113 and 115 and the First Schedule, Order XLVI, of the Code of Civil Procedure, 1908 (Act V of 1908).

12. Registrar.

[a][*(1)* There may be appointed to a Court of Small Causes an officer to be called the Registrar of the Court.]

(2) Where a Registrar is appointed, he shall be the chief ministerial officer of the Court.

Section 8 — Note 1

[1] In matters assigned to him Additional Judge has got the same powers as those of Judge and therefore a complaint by him under S. 195, Criminal P. C. is good. 1931 Lah 530 (532) [A I R V 18] : 13 Lah 16 : 32 Cri L Jour 964 (DB).

Section 11 — Note 1

[1] A single Judge of Small Cause Court can make a reference to the High Court. Section 11 extends rather than restricts the power of the Court to make a reference under S. 113 and O. 46 R. 1, Civil P. C. 1937 Sind 318 (319) [AIR V 24] (DB).

Section 12 — Note 1

[1] The Registrar has no jurisdiction under R. 33, Madras Rules, to enquire into the liability of the garnishee when the identical claim is already the subject-matter of another suit in the Court. His jurisdiction extends to those cases only where suit is not actually instituted. 1929 Mad 274 (275) [AIR V 16].

(3) The State Government may, by order in writing, confer upon a Registrar, within the local limits of the jurisdiction of the Court, the jurisdiction of a Judge of a Court of Small Causes for the trial of suits of which the value does not exceed twenty rupees.

(4) The Registrar shall try such suits cognizable by him as the Judge may, by general or special order, direct.

[b][* * * * *]

[a] *Substituted* by A.O., 1937 for the original sub-section which read : "*(1)* The Local Government may appoint to a Court of Small Causes an officer to be called the Registrar of the Court." [b] Sub-section *(5)*, which read: "A Registrar may be suspended or removed from office by the Local Government", was *repealed* by A.O., 1937.

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in sub-section *(3)* of section 12, for the word "twenty" *substitute* the words "one hundred".

— Bom. Act LXXXVII of 1958, S. 5 [15-10-1958].

13. Other ministerial officers. *[Repealed by A. O., 1937.]*

14. Duties of ministerial officers.

(1) The ministerial officers of a Court of Small Causes shall, in addition to any duties mentioned in this Act, or in any other enactment for the time being in force, as duties which are or may be imposed on any of them, discharge such duties of a ministerial nature as the Judge directs.

(2) The High Court may make rules consistent with this Act, and with any other enactment for the time being in force, conferring and imposing on the ministerial officers of a Court of Small Causes such powers and duties as it thinks fit, and regulating the mode in which powers and duties so conferred and imposed are to be exercised and performed.

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in section 14 in sub-section *(1)*, for the words "The ministerial officers" *substitute* the words "The clerks, bailiffs, appraisers and other ministerial officers".

—Bom. Act LXXXVII of 1958, S. 6 [15-10-1958].

CHAPTER III

JURISDICTION OF COURTS OF SMALL CAUSES

15. Cognizance of suits by Courts of Small Causes.

(1) A Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes.

SECTION 15 — SYNOPSIS

1. **Applicability.**
2. **Nature of Suit.**
3. **Jurisdiction.**
4. **Suits of Small Cause nature.**
5. **Suits excepted from Small Cause jurisdiction.**

1. Applicability.—[1] While the old Act gave to the Small Cause Court jurisdiction only in certain specified matters, the present Act proceeds upon another basis, excluding from the jurisdiction of the Courts of Small Causes certain matters and leaving to these Courts a residuary jurisdiction. 1939 Sind 35 (35) [AIR V 26] : ILR (1939) Kar 134 (DB).

[2] Section 15 does not apply to the Karachi Small Cause Court constituted under the Karachi Small Cause Courts Act of 1929. 1941 Sind 138 (141) [A I R V 28] : I L R (1941) Kar 238.

[3] The power given to local Government under S. 3 (c) of the Madras Civil Court Act (III of 1873) to raise the jurisdiction is not affected by sub-s. (3) of S. 15 of the Act. 1957 Mad 673 (673) [AIR V 44 C 207].

[4] Pecuniary jurisdiction provided for in the section being subject to provisions of any

(2) Subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.

(3) Subject as aforesaid, the State Government may, by order in writing, direct that all suits of a civil nature of which the value does not exceed one thousand rupees shall be cognizable by a Court of Small Causes mentioned in the order.[a]

[a] For notifications issued under this section, *see* different local Rules and Orders.

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MADHYA PRADESH

In its application to the whole of the State of Madhya Pradesh, in sub-section *(3)* of section 15, for the words "State Government" *substitute* the words "High Court".

—M. P. Act XIX of 1958, S. 28 and Sch. [w. e. f. 1-1-1959].

MAHARASHTRA

In its application to the State of Bombay, in sub-section *(3)* of section 15, for the words "one thousand rupees" *substitute* the words "two thousand rupees".

—Bom. Act LVII of 1950, S. 2 [w. e. f. 8-1-1951] read with LXXXVII of 1958, S. 2 [15-10-1958].

NOTE.—For validation of certain suits, proceedings, etc., the cognizance of which was taken from 8-1-1951 to 25-2-1955 by Courts having no jurisdiction, *see* section 3 of the Provincial Small Cause Courts (Suits Validation) Act, 1955 (Bom. XVI of 1955).

Section 15 — Note 1 *(contd.)*

enactment for the time being in force, the section does not obstruct the local enactments taking effect. 1959 Andh Pra 3 (5) [A I R V 46 C 2] : ILR (1958) Andh Pra 740 (DB).

2. Nature of suit.—[1] In deciding the question whether a suit is of a Small Cause nature or not attention has to be paid to the nature of the suit, as it was presented to the first Court and not to the subsequent shape that it may have taken as a result of the finding of the lower Courts. 1924 Mad 844 (844) [AIR V 11]✣('08) 32 Bom 356 (360) (DB)✣('96) 20 Bom 675 (676, 677) (DB).

[2] Where the suit is of a Small Cause nature, the mere addition of an idle prayer for declaration without which the suit can proceed does not make it the less a suit of a Small Cause nature. ('31) 1931 Mad W N 1107 (1108).

[3] The nature of a suit is to be determined according to the claim made by the plaintiff and not by the contest of the defendant. 1933 Nag 82 (83) [AIR V 20] : 29 Nag L R 115.

[4] In case of unclassed suit, fact that it arises out of suit of Small Cause nature does not make it Small Cause Suit. 1937 Lah 454 (455) [AIR V 24].

[5] Suit as originally brought and not in the character which it ultimately assumes determines the jurisdiction of the Court. The written statement is irrelevant to the determination of this question. Madhya Bharat Notification No. 1567 (3-3-1948) does not bar the jurisdiction of the Court of Small Causes in cases which are within its pecuniary jurisdiction. 1950 Madh B 14 (14) [AIR V 37 C 6]. (Hence a simple suit for damages for less than Rs. 500 against a Railway company for storage of goods, so far as the City of Indore was concerned, was held to be cognizable by the Small Cause Court, Indore.)

[6] Nature of suit is determined by relief claimed—Suit for recovery of Rs. 20 — Suit is small cause suit—No second appeal lies. 1955 N U C (Punj) 5722 [AIR V 42].

3. Jurisdiction.—[1] The question in order to exclude the jurisdiction of the Court must be a direct question for determination and not merely incidental for the purpose of deciding. 1930 Pat 335 (336) [AIR V 17].

[2] The jurisdiction of a Court of Small Causes cannot be ousted by adopting a dodge which is capable of being discovered. 1933 Sind 296 (297) [AIR V 20].

[3] A plaintiff is entitled to abandon a part of his claim so as to bring his case within the jurisdiction of the Small Cause Court. ('99) 23 Bom 266 (271) (DB).

[4] A plaintiff who alters the valuation of his suit for the purpose of evading jurisdiction may be punished by having no costs allowed to him, but the Appellate Court should not reverse a decision correct on merits and direct the return of the plaint simply because the value of the suit has been designedly increased or diminished to evade jurisdiction. ('97) 24 Cal 661 (664) (DB).

[5] A suit of a civil nature of value not exceeding Rupees five hundred being cognizable by a Court of Small Causes and no other, and the jurisdiction to try it as a regular civil suit being barred by S. 15 of the Act, it is not within the competence either of the High Court or of the parties to confer such jurisdiction upon a tribunal on which jurisdiction has not been conferred by the legislature. 1956 Punj 233 (234) [AIR V 43 C 93]. (Judicial Officer invested with Small Cause jurisdiction trying a suit as regular civil suit —Decision should be deemed to be one given by Small Cause Court — Decree passed not appealable.)

Section 15 — Note 3 *(contd.)*

[6] A suit filed as an original suit retains the character from the date of the institution of the suit. Any increase in the jurisdiction cannot have any retrospective effect. ('58) 1958 Andh L T 557 (558). (Money suit instituted as original suit—Small cause jurisdiction increased—Suit retains the character as original suit.)

[7] Jurisdiction of Small Cause Court to try a suit for recovery of rent will not be ousted by the defendant raising the question of fixation of standard rent. 1960 Punj 11 (13, 14) [AIR V 47 C 5] (DB). (Delhi and Ajmer Rent Control Act does not divest the Court of Small Causes of its exclusive jurisdiction to hear and decide a suit for recovery of House rent.)

[8] A Court of Small Causes is entitled to decide even questions of title relating to immovable property provided the suit in form does not ask for a relief relating to title to immovable property, but for payment of a sum of money. Hence in a suit for rent, the Court in deciding whether there was contractual relationship of landlord and tenant between the parties, can embark upon an enquiry as to title. 1956 Bom 236 (237) [AIR V 43 C 91].

[9] Suit by Commissioners for recovery of remuneration ordered to be paid to them in partition suit—Small Cause Court is bound by the decision given in the partition and has no jurisdiction to go into the question of the quantum of remuneration and hold that the amount of remuneration was exorbitant in relation to the nature of work done by the Commissioners. 1954 Sau 49 (49, 50) [AIR V 41 C 25].

4. Suits of Small Cause nature. — [1] A suit for the recovery of a sum of money representing the price of the plaintiff's share in certain ornaments is cognizable by a Court of Small Causes. 1933 Pat 31 (31) [AIR V 20] : 11 Pat 690 (DB).

[2] Suit for recovery of money alleged to be unlawfully collected by Taluk Board as profession tax is suit of Small Cause nature. 1932 Mad 226 (226) [AIR V 19]. (Though the judgment is prefaced by same sort of declaration.)

[3] Where a suit is in form one for the payment of a sum of money it is a suit of Small Cause nature though the principal purpose of the suit is to determine a right to immovable property. ('13) 37 Bom 675 (681) (FB).

[4] Suit to recover specific sum of money does not become suit for account though accounts have to be examined for determining question in controversy:— Suit cognizable by Court of Small Causes. 1918 Cal 1037 (1038) [AIR V 5] (DB) ✠ 1948 Oudh 80 (81) [AIR V 35 C 27]. (Suit by agent against principal for ascertained amount.)

[5] A suit for money had and received is cognizable by a Court of Small Causes. ('10) 34 Bom 171 (173) (DB).

[6] A suit for compensation for a part of land lost by purchase from the vendor is cognizable by a Small Cause Court. 1927 Rang 90 (91) [AIR V 14].

[7] Suit for interest due on mortgage money is cognizable by Small Cause Court. ('22) 66 Ind Cas 285 (286) (Lah).

[8] A suit by a company which is not under liquidation for recovery of arrears of allotment money and call money due on shares allotted to defendant is cognizable by a Court of Small Causes. 1933 Lah 657 (658) [AIR V 20] (DB).

[9] A suit by a claimant to recover the goods attached is in substance a suit for the goods though as a matter of form the decree may contain a declaration, and is cognizable by Court of Small Causes. ('99) 23 Bom 266 (270) (DB).

[10] The Small Cause Court has jurisdiction to entertain the suit for recovery of money under S. 65, Contract Act. 1955 Hyd 69 (77) [(S) AIR V 42 C 20] : ILR (1955) Hyd 101 (FB).

[11] Nature of suit is primarily determined by relief claimed in suit as originally instituted — Suit for recovery of arrears of rent of shop with costs and interest — Suit is not covered by Art. 7 and is not excepted from the jurisdiction of the Small Cause Court. ('53) 1953 Raj L W 295 (296).

[12] Land forming tenancy under deity landlords — Shebaits of deity collecting share of their rents separately — Defendant shebaits purchasing tenancy under the deity in execution of decree for share of their rent —Suit by plaintiffs shebaits for proportionate share of the produce of land — *Held*, that the suit was in essence a suit for mesne profits and was maintainable in the Small Cause Court. ('51) 55 Cal W N 51 (52).

[13] Where the plaintiff has a prima facie right of recovering the value of half the fruit of trees, a suit for half the fruit or for damages in lieu thereof, is not a suit which is barred from the cognizance of a Small Cause Court, even though the defendant raises the question of title by denying the plaintiff's title. In such a case the question of title is only incidental. 1954 Nag 128 (128) [AIR V 41 C 50].

[14] Compromise decree declaring rights of parties — Plaintiff getting right to recover amount of money from defendant — Suit to recover such amount lies in Small Cause Court and is not one for specific performance. 1961 Bom 221 (223) [AIR V 48 C 52]. (Suit tried as regular suit does not change its nature—No appeal.)

Suit for damages

[15] The Small Cause Court can take cognizance of a suit for damages for breach of a covenant. 1922 Mad 300 (301) [AIR V 9].

[16] Defendant taking lease of pasture lands from Government — Cultivation in breach of imposed conditions — Collector imposing penalty according to terms of engagement — Suit for recovery of penalty — *Held* that the suit was one for damages for breach of contract pure and simple and was cognizable by the Small Cause Court. Neither Art. 7 nor 31 of Sch. II was applicable. 1951 Mad 710 (710) [AIR V 38 C 225].

16. Exclusive jurisdiction of Courts of Small Causes.

Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable.

Section 15 — Note 4 *(contd.)*

[17] Where in a suit for damages for use and occupation for certain period, the plaint proceeds upon the footing that during these years, the defendants had no rights whatever in the land and were trespassers pure and simple, the claim is not one in respect of rent within the meaning of Art. 8 and is therefore a claim which can be tried by a Court of Small Causes. 1947 Cal 407 (408) [AIR V 34 C 125] (DB).

[18] A suit for damages on account of felling of trees by a tenant is not excepted by Art. 35 (ii) and is cognizable by a Small Cause Court. ('60) 64 Cal W N 172 (176) ✠ 1959 Mys 162 (164) [AIR V 46 C 65] : I L R (1958) Mys 826.

[19] Suit for damages for the injury caused to the plaintiff's wall on account of percolation of water—Sum payable agreed by defendant — Suit not excluded under Art. 35 (i) from the jurisdiction of Small Causes Court as it is not a suit for specific performance of a contract or for compensation for diversion of water course. ('54) I L R (1954) Madh B 52 (54).

[20] Where in a suit for damages, the question of title to immovable property arises incidentally, the suit is cognizable by the Small Cause Court. 1922 Pat 368 (369) [AIR V 9].

Suit to recover tax

[21] A suit for the recovery of Municipal taxes is cognizable by the Court of Small Causes. 1932 Pat 220 (221) [AIR V 19] ✠ 1950 Cal 415 (416) [AIR V 37 C 155] (DB). (Money decree and not any charge under S. 167, Bengal Municipal Act, claimed by a municipality in a suit for recovery of arrears of taxes—Small Cause Court has jurisdiction.)

[22] Suit to recover Katihari regarding tax for homestead paid by followers of certain trades is small causes suit. 1917 Pat 672 (673) [AIR V 4] (DB).

[23] Suit to recover grazing fee is cognizable by Small Cause Court. 1951 Nag 50 (51) [AIR V 38 C 17] : I L R (1952) Nag 115.

5. Suits excepted from Small Cause jurisdiction. — [1] Suit by one co-owner against other co-owner for recovery of rent realised from tenant in excess of his share — Suit is one for accounts within Art. 31 and is excepted from cognizance of the Court of Small Causes. 1952 Cal 736 (737) [AIR V 39] (DB).

[2] Suit for recovery of possession of immovable property—Small Causes Court has no jurisdiction. ('49) 53 Cal W N 692 (694).

[3] A suit for specific performance and for rescission of the contract is outside the jurisdiction of the Court of Small Causes. 1956 Bom 254 (256) [AIR V 43 C 107] ✠ 1953 Mad 559 (560) [AIR V 40 C 214].

[4] A suit by an agent against the principal for recovery of money on the basis of a khata entry made by the principal which only amounts to an admission of the correctness of the accounts as entered in the khata of the agent, is not a suit for recovery of money within S. 15 (1) and hence is not cognizable by a Small Cause Court. ('47) 1947 Marwar L R (Civ) 14 (15).

[5] A suit for recovery of interest due on a a mortgage of a house brought in the guise of a suit for arrears of rent as owner of the house, is not maintainable in a Small Cause Court in view of Sch. II, Art. 11 of the Provincial Small Cause Courts Act. 1961 Madh-Pra 152 (153) [AIR V 48 C 53].

SECTION 16 — SYNOPSIS

1. **Scope of the section.**
2. **Suit.**
3. **Ordinary Court, if can try Small Cause suit.**
4. **Small Cause suit tried as ordinary suit.**
5. **Transfer of Small Cause suit under S. 24, Civil P. C.**

1. Scope of the section. — [1] By S. 9 Civil P. C. and this section the jurisdiction of the District Court has been expressly barred in all cases of a nature cognizable by a Small Cause Court. Therefore as regards such cases the Small Cause Court and not the District Court is the principal Court of original jurisdiction. 1916 Pat 53 (54) [AIR V 3] : 2 Pat L Jour 1 : 18 Cri L Jour 370. (District Court has no power to give sanction under S. 195, Criminal P. C. in respect of cases before Small Cause Court.)

[2] The effect of the provisions of S. 16 is not to deprive the regular Court altogether of jurisdiction in suits cognizable by a Court of Small Causes, but merely to prevent the exercise of that jurisdiction by the regular Court so long as there is a Court of Small Causes having jurisdiction within the same local limits. 1938 Rang 35 (36, 37) [AIR V 25] : 1937 Rang L R 234 ✠ 1943 Oudh 449 (450) [AIR V 30] (DB).

[3] The provisions of S. 16 cannot be allowed to be evaded by the plaintiff adding to his plaint a claim based on another cause of action which cannot be entertained by the Court of Small Causes. 1947 Cal 407 (408) [AIR V 34 C 125] (DB).

[4] Failure to comply with the provision of S. 16 is merely a defect in procedure. 1930 Bom 80 (81) [AIR V 17] (DB).

[5] 'Any other enactment' includes Provincial Acts also. Therefore the provisions of the Provincial Acts override the provisions of S. 16 of the Act. 1947 Lah 308 (309) [AIR V 34 C 78]. (Case triable by tribunal under

Section 16 — Note 1 *(contd.)*

Punjab Panchayat Act — Small Cause Court has no jurisdiction.) ✣ 1953 All 346 (347) [AIR V 40 C 153]. (Suit for rent triable by Munsif under U. P. (Temporary) Control of Rent and Eviction Act — Not cognizable by Small Cause Court.)

[6] Section 16 prohibits the institution of a suit in any other Court, if the entire suit as it stood was triable by a Court of Small Causes. Where a suit as a whole is not cognizable by any Court of Small Causes and the suit as it stands is not of a Small Cause Court nature, the fact that the claim for arrears of rent is triable by Small Cause Court is immaterial. 1953 All 158 (160) [AIR V 40 C 69].

[7] Though the income derived by the sale of the produce of Phulwari and Kondar is sayar income, where a pronote is executed for their purchase and a suit is brought to recover the amount on the basis of the pronote, it could be filed in the Court of Small Causes and not in the Revenue Court. ('51) 1951 All L Jour 632 (633).

2. Suit.—[1] The expression "suit" in S. 16 is wide enough to include within its ambit an application under para 20, Schedule II, Civil P. C. (now repealed) which is not a suit but is required to be registered as a suit. Consequently, an application to file an award under para 20, Schedule II is suit within the meaning of S. 16. 1935 Sind 208 (209) [AIR V 22] : 30 Sind L R 12 (DB).

[*See also* ('73) 10 Bom H C R 54 (56) ✣ ('68) 1 Beng L R (A. C.) 43 (45).]

3. Ordinary Court, if can try Small Cause suit. — [1] Where a suit is within the pecuniary jurisdiction of the Small Cause Judge and is not excluded by the articles whether the Judge announced that he was trying it as a Munsif or not makes no difference, for neither the agreement of the parties nor will of Judge can make it any thing other than Small Cause Court suit, and there will be no right of appeal. 1936 Pat 406 (407) [AIR V 23].

[2] A Chief Court has no jurisdiction to entertain a suit cognizable by a Court of Small Causes. 1918 Low Bur 135 (135) [AIR V 5] : 9 Low Bur Rul 69 (DB) ✣ ('11) 5 Sind L R 155 (163, 165) (DB).

[3] Where a suit as originally instituted was triable by the Munsif but after the amendment of the plaint the suit became cognizable by the Small Cause Court, held that the Munsif had no jurisdiction to try the suit after the amendment and the plaint ought to be returned to the plaintiff for presentation to the proper Court. 1928 All 38 (38) [AIR V 15] : 49 All 686 (DB).

[4] Where a suit of Small Cause nature is filed as an original suit in the District Munsiff's Court, as at that time the Court of the Subordinate Judge did not have Small Cause jurisdiction, but, subsequently, the Subordinate Judge is invested with Small Cause jurisdiction over the local limits of the District Munsiff, the District Munsiff continues to have jurisdiction to dispose of the suit as an original suit and it should not be transferred to the Subordinate Judge's Court to be decided by it in exercise of its Small Cause jurisdiction. O. 7, R. 10, Civil P. C. saves the jurisdiction of the District Munsiff's Court and preserves it notwithstanding the subsequent conferment of Small Cause powers on the Subordinate Judge. 1957 Andh-Pra 133 (135) [(S) AIR V 44 C 51] : ILR (1957) Andh-Pra 270 (DB). (1956 Andh W R 280, *Overruled.*) ✣ 1934 Pat 504 (504) [AIR V 21].

[5] If a suit of a Small Cause nature is brought before and tried by an ordinary Court, or vice versa, the trial is without jurisdiction, even though no objection is raised by the defendant as to the competency of the Court to entertain the suit. 1956 Mad 610 (612) [AIR V 43 C 193].

4. Small Cause suit tried as ordinary suit. — [1] A Court which has Small Cause jurisdiction cannot try a suit of a Small Cause nature which it has jurisdiction to try as a Small Cause, otherwise than as a Small Cause suit. 1937 Mad 227 (228) [AIR V 24] ✣ 1954 Vind Pra 49 (49) [AIR V 41 C 19].

[2] Where a Subordinate Judge as a Judge of a Court of Small Causes has under S. 16 exclusive jurisdiction to try a suit the fact that he tries it as an ordinary suit does not make it so or make the provisions of the Act inapplicable to it. 1927 Mad 1093 (1094) [AIR V 14].

[3] Where a Munsif having jurisdiction to try a suit as a small cause suit tried it as a regular suit by mistake—*Held*, that the decree was a decree in a small cause suit and was not appealable. 1937 Mad 227 (228) [AIR V 24] ✣ 1947 Mad 382 (383) [AIR V 34 C 202] ✣ ('10) 33 Mad 323 (326) (FB) ✣ 1928 Pat 451 (451) [AIR V 15] ✣ 1930 Rang 139 (139) [AIR V 17] : 7 Rang 809.

[4] If a Court by error tries a suit which is of a Small Cause nature and is cognizable by a Small Cause Court exercising jurisdiction within the same local limits, the proceedings of such Court are not entirely without jurisdiction and therefore, are not a nullity. 1938 Rang 35 (36) [AIR V 25] : 1937 Rang L R 234 ✣ ('57) 1957-1 Andh W R 261 (263).

[5] Where a Small Cause suit was tried as an ordinary suit by a Sub-Judge who had no small cause jurisdiction, held that the suit should be retried in the proper Court as the trial of the suit as an ordinary suit had prejudiced the parties. 1930 Bom 80 (81) [AIR V 17] (DB).

[6] A suit cognizable by a Court of Small Causes was tried by a Munsif under his ordinary jurisdiction without objection to his jurisdiction though he had none and a decree was passed for plaintiff. The defendant appealed to the District Judge without any reference to the question of jurisdiction. The District Judge reversed the decree of the Munsif and the plaintiff applied to the High Court under S. 115, Civil P. C. for revision of the order of the District Judge — *Held* that the High Court should not interfere. 1924 Nag 17 (18) [AIR V 11] : 19 Nag L R 179.

CHAPTER IV

PRACTICE AND PROCEDURE

17. Application of the Code of Civil Procedure.

(1) [a][The procedure prescribed in the Code of Civil Procedure, 1908, shall, save in so far as is otherwise provided by that Code or by this Act,] be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits :

Provided that an applicant for an order to set aside a decree passed *ex parte* or for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give [b][such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed].

(2) Where a person has become liable as surety under the Proviso to sub-section *(1)*, the security may be realized in manner provided by section [c][145] of the Code of Civil Procedure, [d][1908].

[a] *Substituted* by the Small Cause Courts (Attachment of Immovable Property) Act, 1926 (I of 1926), S. 2. [b] *Substituted* for the words "security to the satisfaction of the Court for the performance of the decree or compliance with the judgment, as the Court may direct" by the Provincial Small Cause Courts (Amendment) Act, 1935 (IX of 1935), S. 2. [c] *Substituted* for "253" by Act I of 1926, S. 2. [d] *Inserted, ibid.*

Section 16 — Note 4 *(contd.)*

[7] A suit filed on the original side of a Court which has no jurisdiction to try it as a small cause suit cannot be considered to be a small cause suit. All that can be said is that the suit is of a small cause nature. There is nothing in the Provincial Small Cause Courts Act or in the Civil P. C. which prohibits a first appeal in such cases. 1941 Mad 665 (665) [AIR V 28]✣1934 Nag 121 (122) [AIR V 21] : 30 Nag L R 252.

[8] Small Cause Court exercising discretionary power under S. 23 and returning plaint for being presented to Court having original jurisdiction—Such latter Court has power to decide the Small Cause suit as an original suit irrespective of S. 16. ('06) 29 Mad 329 (330) (DB).

5. Transfer of Small Cause suit under S. 24, Civil P. C.—[1] Section 16 is no bar to the exercise of powers of transfer of the District Judge under S. 24 Civil P. C. 1934 All 530 (531) [A I R V 21] ✣ 1934 Lah 901 (901) [AIR V 21]✣1932 Mad 683 (684) [AIR V 19] : 55 Mad 960 (DB)✣1943 Oudh 449 (450) [AIR V 30] (DB).

[2] The High Court has power under S. 24 (4), Civil P. C. to transfer a suit from a Small Cause Court to a regular Court, and provided the suit to be transferred is within the limits of the pecuniary jurisdiction of the Court to which the transfer is to be made, the extent of its Small Cause powers does not matter as jurisdiction to try the case as a Small Cause is conferred by sub-section (4) of S. 24, Civil P. C. 1932 Bom 486 (488) [A I R V 19] : 56 Bom 387 (DB).

[3] Where a suit is filed in a Small Cause Court and the District Judge transfers it under S. 24, Civil P. C., to a Sub-Judge, it is not necessary that the transfer must be made to a Court having Small Cause Court powers. 1935 All 690 (691) [AIR V 22].

[4] Suit of value below Rs. 500 rightly instituted in Honorary Munsif's Court— Munsif informing District Judge that he was related to one of parties—District Judge transferring case to Munsif's Court not being Small Cause Court—No second appeal lies from the decision of Munsif. 1935 All 574 (575) [A I R V 22].

SECTION 17 — SYNOPSIS

1. Scope and applicability.
2. Proviso—General.
3. Application to be made with deposit of or security for decree amount.
4. Directions of Court.
5. Liability of surety.

1. Scope and applicability.—[1] Any proceeding arising out of a suit which has been decided by a Small Cause Court must be governed by the provisions of the Small Cause Courts Act. Hence where a Small Cause Court which passed a decree *ex parte* was abolished an application to set aside the decree to the Munsif is governed by S. 17 only and not by the Civil Procedure Code. 1934 All 943 (944) [AIR V 21] : 57 All 348.

[2] Section 17 is not applicable to a case when decree is passed by a Union Court. ('35) 62 Cal L Jour 295.

[3] Amendment of consent decree by Small Cause Court acting under Ss. 152 and 151 C. P. C. without notice to party affected by amendment—Party aggrieved petitioning for recalling the amendment under S. 151 C. P. C. and O. 9, R. 13 — *Held* that S. 17 of the Provincial Small Cause Courts Act did not apply to the case even though the petitioner had inadvertently included O. 9, R. 13 of C. P. C. 1943 Pat 72 (73) [AIR V 30].

[4] Section does not apply to an application to set aside dismissal for default. 1917 Cal 548 (549) [AIR V 4] : 44 Cal 950 (DB) ✣ 1935 All 502 (502, 503) [AIR V 22]. (Objection by

Section 17 — Note 1 *(contd.)*

judgment-debtor to execution by applicant in execution on the ground that he was not competent to apply — Objection struck off for the default of judgment-debtor—*Held* S. 17 of the Act did not apply to the application for restoration.)✻1923 All 605 (606) [AIR V 10] : 45 All 569✻1916 Cal 66 (66) [AIR V 3] (DB).

[5] Small cause suit — Counter claim by defendant — Suit dismissed for default but counter claim decreed ex parte— Application by plaintiff for setting aside ex parte decree and restoring his suit — Plaintiff making out good case for restoration — Restoration of plaintiff's suit cannot be refused on the ground that provisions of S. 17 (1) proviso had not been complied with — Restoration will result in reopening of plaintiff's claim only and will leave untouched ex parte decree. 1960 Madhpra 393 (394) [AIR V 47 C 177].

[6] The provisions of S. 17 are mandatory and non-compliance with these provisions amounts to an illegality and cannot be ignored on the ground that it is a mere irregularity. 1931 All 103 (104) [AIR V 18]✻ 1916 Cal 464 (465) [AIR V 3] (DB). (Substantial compliance with section but no strict compliance not enough.)

[7] Section 17 of the Act deals with procedure. It is the only section which applies anything in the Civil Procedure Code to Small Cause Courts. Since 1908 the section must be taken by virtue of S. 158 Civil P. C. to refer to S. 7 and O. 50 of C. P. C. 1924 Cal 193 (196) [A I R V 11] (DB). (Provincial Small Cause Court has no power to attach immovable property before judgment.)

[8] A Small Cause Court Judge can record the evidence at full length and can also deliver a full and considered judgment as is ordinarily passed in a regular suit. 1938 Rang 35 (36) [AIR V 25] : 1937 Rang L R 234.

[9] It is nowhere laid down in the Civil Procedure Code that in Small Cause Court suits issues need not be framed nor the framing of issues is prohibited in the Provincial Small Cause Courts Act. Hence, the Judges of Small Cause Courts should frame issues before recording evidence of parties. Framing of issues is also necessary to narrow down the points in dispute. Similarly, in cases where the facts are somewhat complicated the Small Cause Court can direct the parties to adduce further and full particulars and can also examine them under O. 10, Civil P. C. 1956 Bhopal 9 (10) [AIR V 43 C 7].

[10] Order 7 Rule 10, Civil P. C. read with S. 17 of this Act is no doubt mandatory but it would be attracted where upon the plaint as presented the Court finds that it has no jurisdiction to try the suit. If upon the plaint as presented, the Court finds that it has jurisdiction but subsequently if upon the defence allegations it is discovered that the Court has no jurisdiction, the Court is not bound to return the plaint but has power to dismiss the suit. 1961 Madh Pra 152 (153) [AIR V 48 C 53].

2. Proviso—General. — [1] The only decree referred to in the commencement of the proviso is an ex parte decree and therefore when the later sentences of the proviso refer to the decree it can mean only the ex parte decree which has been referred to in the earlier part of the proviso. 1938 Nag 75 (76) [AIR V 25] : ILR (1939) Nag 371.

[2] "Amount due under the decree" mean the amount due under the decree at the date it was given and not the amount due under it at the date where the application under S. 17 was presented. 1933 All 13 (13) [AIR V 20] : 54 All 409 (DB) ✻ 1925 All 412 (412) [A I R V 12] : 47 All 623.

[3] The expression "the amount due under the decree" in S. 17 does not include costs of execution. 1920 Mad 141 (142) [AIR V 7].

[4] Security required by the proviso to S. 17 (1) must relate to the performance of the ex parte decree and not to performance of decree which might ensue upon retrial. 1944 Nag 103 (104) [AIR V 31] : I L R (1944) Nag 161 ✻ 1939 Cal 748 (749) [A I R V 26] ✻ 1936 Pesh 193 (194) [AIR V 23].

[5] The security contemplated by S. 17 is security for the performance of the decree or compliance with the judgment. The furnishing of security for appearance of the judgment-debtor is not sufficient. 1931 All 103 (104) [AIR V 18].

[6] A draft security is a mere piece of paper and cannot have the effect of a security bond duly executed and registered. 1943 Mad 520 (521) [AIR V 30] : I L R (1944) Mad 194 (DB).

[7] An unregistered security bond is sufficient compliance with the law, provided the delay in getting it registered is not due to any fault of the applicant himself. Where security is tendered within the time and proves, even though tested after the time, eventually to be sufficient, the applicant must be deemed to have complied with the requirements of the proviso. The words "give such security" may be construed to mean "tender such security". 1960 Andh Pra 230 (233) [A I R V 47 C 74] (FB) ✻ 1956 Mad 422 (424) [A I R V 43 C 136] (DB) ✻ 1933 Pat 279 (280, 281) [A I R V 20] : 12 Pat 745 (DB).

[**See however** 1956 Cal 375 (378) [(S) A I R V 43 C 114]:ILR (1956) 2 Cal 50 (DB). (Where a security bond, given under S. 17 on the face of it, purports to create right, title and interest in properties valued over one hundred rupees the bond requires registration and where it is not registered, it is not a valid and effective bond.) ✻ 1923 All 270 (270) [AIR V 10]. (Court cannot set aside ex parte decree accepting an unregistered bond as security.)✻ 1934 Pat 74 (74, 75) [AIR V 21].]

[8] In cases in which a personal liability to pay a certain amount has been created by a decree, Courts should not ordinarily accept a personal bond of the debtor himself because such a bond gives no security worth the name to the decree-holder. The bond merely creates a personal liability which has already been created by the decree. 1951 All 424 (425) [A I R V 38 C 82] (DB). (Where an ex parte judgment-debtor applicant was permitted by

Section 17 — Note 2 *(contd.)*

the Court to file a personal security bond, and he in fact files a proper personal security bond, the fact that it also contained a hypothecation clause and it was not registered would not affect the validity of the bond required to be filed. It satisfies the order of the Court.) ✣ 1923 Mad 594 (595) [AIR V 10].

[9] Security bond furnished under this section falls under Art. 6, Schedule II of Court-fees Act and requires Court-fee stamp of eight annas. 1935 Mad 380 (382) [A I R V 22] : 58 Mad 687 (FB).

[But see 1956 Cal 375 (376, 377) [(S) A I R V 43 C 114] : ILR (1956) 2 Cal 50 (DB). (The security bond is not required to be affixed with Court-fee stamps and hence where it has been written on stamped paper in accordance with Stamp Act, the bond is proper and sufficient in so far as the matter of stamps is concerned. The bond given in accordance with the provisions of S. 17 is not a bond given under the Civil P. C.)]

[10] The Secretary of State is not exempted from making a deposit or furnishing security on making an application for setting aside an ex parte decree in a Small Cause Suit. 1932 All 575 (576, 577) [A I R V 19] : 54 All 879 (DB).

[11] Application by plaintiff for setting aside ex parte decree and restoring his suit — Plaintiff making out good case for restoration — Restoration of plaintiff's suit cannot be refused on the ground that provisions of S. 17 (1), Proviso were not complied with—Restoration will result in reopening of plaintiff's claim only and will leave untouched ex parte decree. 1960 Madh Pra 393 (394) [AIR V 47 C 177].

[12] Ex parte decree — Setting aside of, for sufficient cause — Whether cause for non-appearance was sufficient is a factual matter—Court accepting cause as sufficient — Matter cannot be agitated in revision. 1961 Madh Pra 2 (3) [AIR V 48 C 2].

3. Application to be made with deposit of or security for decree amount.—[1] Where an ex parte decree is passed by a Small Cause Court, the applicant against whom the decree is passed must present his application for setting aside the decree together with the security demanded before the expiration of thirty days of limitation as provided by Art. 164, Limitation Act. 1947 All 125 (126) [AIR V 34 C 61].

[2] An applicant applying for a review of judgment or for an order to set aside an *ex parte* decree of a Small Cause Court must at the time of presenting his application do one of the two things, namely, either deposit in Court the amount due under the decree or give such security for performance of the decree as the Court may have directed on a previous application made by him in this behalf. When a valid security bond on which the Court could act was not filed within a period of thirty days from the date of the *ex parte* decree, the subsequent filing of the security bond with the permission of the Court or having it accepted by the Court would not enable the petitioner to comply with the provisions of S. 17. In such a case the provisions contained in the proviso to S. 17 cannot be said to have been complied with. 1961 Orissa 37 (38, 39) [AIR V 48 C 15]: ILR (1960) Cut 481.

[3] An application for obtaining the directions of the Court is not required to be in writing and so it may also be made orally. 1951 All 420 (421) [AIR V 38 C 81] (DB).

[4] The provisions of S. 17 (1) proviso are mandatory and not merely recommendatory. The Court, therefore, errs in law in admitting and proceeding with a petition for review without the necessary deposit or security as required by the Proviso. 1949 Mad 419 (420) [AIR V 36 C 185].

[5] An application for setting aside an *ex parte* decree passed by a Court of Small Causes besides being required to be filed within limitation shall not be treated as a competent application until the applicant has either deposited the decretal amount in Court or has furnished such security for the performance of the decree as the Court may direct. 1946 All 425 (430) [AIR V 33 C 109] : ILR (1946) All 615 (DB) ✣ 1943 All 288 (288) [AIR V 30] : ILR (1943) All 658 ✣ 1939 All 77 (78) [AIR V 26]. (Unless complied with there is no jurisdiction.) ✣ 1922 All 29 (30) [AIR V 9]. (No deposit made with application but only prayer for time—Court cannot entertain application.) ✣1941 Oudh 103 (105) [AIR V 28] ✣ 1936 Pesh 91 (91, 92) [A I R V 23] (DB)✣ 1935 Pesh 159 (160) [AIR V 22] ✣ 1940 Sind 105 (107) [AIR V 27] : ILR (1940) Kar 154 (DB).

[6] Where the application for setting aside an *ex parte* decree is accompanied by a cash deposit of the decretal amount or a security bond safeguarding the interest of the decree-holder, it amounts to effective compliance with the requirements of S. 17. 1945 All 282 (283) [AIR V 32] : ILR (1945) All 635.

[7] Defendant depositing amount shown in decree, though itself incorrect has complied with the section. 1921 All 144 (145) [AIR V 8] : 43 All 438 ✣ 1925 All 379 (379) [AIR V 12] : 47 All 728 ✣ ('12) 14 Ind Cas 242 (242) (All). (Debtor depositing amount mentioned in notice of execution only under S. 17 and depositing costs later.)

[8] The mere filing of a draft security bond along with an application to set aside an *ex parte* decree, though within the period of limitation prescribed by Art. 164 of the Limitation Act is not sufficient compliance with the provisions of the proviso to S. 17 (1). 1943 Mad 520 (521) [AIR V 30] : ILR (1944) Mad 194 (DB) ✣ 1943 Mad 51 (52, 53) [AIR V 30]✣ ('58) 1958-1 Mad L Jour 330 (332)✣ ('55) ILR (1955) 1 Cal 88 (92) (DB).

[But see ('58) 1958-2 Mad L Jour 594 (595, 596). (Draft security bond giving list of immovable properties offered as security—Court accepting the security after testing—Requirements of proviso held satisfied — Subsequent registration of bond—Not material.)]

[9] A subsequent payment of the decree amount cannot remedy the original non-compliance with the provisions of S. 17. 1931 All 103 (104) [AIR V 18].

Section 17 — Note 3 *(contd.)*

[10] There is nothing to prevent withdrawal of application which fails to comply with proviso and filing of fresh application accompanied by necessary deposit or security if it is filed in time. 1940 Sind 105 (107) [AIR V 27] : ILR (1940) Kar 154 (DB).

[11] It is not essential that the deposit should be made at the time of making the application to set aside the *ex parte* decree; it is sufficient if the deposit is made within the time allowed by law to set aside the decree. 1943 Bom 237 (237, 238) [AIR V 30]. (Deposit made along with application for stay of execution held sufficient.) ✠ 1956 Bhopal 10 (11) [AIR V 43 C 8] ✠ 1951 Punj (Simla) 230 (231) [AIR V 38 C 52].

[12] Even under the proviso to S. 17, Provincial Small Cause Courts Act, as it now stands, after the amendment by Act IX of 1935, it is competent to the Courts of Small Causes to accept security for the performance of the decree, if filed within 30 days from the date of knowledge of the decree, although it was not filed along with the original application for setting aside the *ex parte* decree under O. 9, R. 13, C. P. Code. The application is to be taken to have been presented when the security was deposited. 1951 Cal 455 (456) [AIR V 38 C 125] : ILR (1951) 1 Cal 213 (DB) ✠ 1954 Madh B 147 (149) [AIR V 41 C 71] ✠ 1953 All 758 (759) [AIR V 40 C 377]. (If the security bond is presented after the expiry of 30 days after the application it must be rejected for non-compliance with the proviso.) ✠ 1951 All 420 (423) [AIR V 38 C 81] (DB). (Where any of the two necessary conditions required by S. 17 are satisfied after the expiry of the period of limitation, the application for the setting aside of an *ex parte* decree cannot be considered to be a proper application.)✠ 1946 Lah 62 (64) [AIR V 33 C 17] ✠ 1939 All 503 (504) [AIR V 26] : ILR (1939) All 554 ✠ 1938 Pat 106 (107) [AIR V 25].

[13] Where an application under O. 9, R. 13, Civil P. C. is made within time and the deposit is made or security is furnished beyond the prescribed time the application is incompetent. 1956 Mad 422 (422) [AIR V 43 C 136] (DB). (In Madras under S. 5 of Limitation Act all that can be done is to condone the delay in filing the application under O. 9, R. 13, for sufficient reasons. But where application is filed in time and deposit is made beyond limitation period, S. 5 of Limitation Act is inapplicable.)✠ ('50) 54 Cal WN (2DR) 67 (68). (An order for restoration of such suit cannot be made.)

[14] The Court has no jurisdiction to grant any extension of time either for making the deposit or for the filing of the security. ('41) 1941 Oudh W N 195 (196, 197) ✠ 1948 Oudh 41 (42) [AIR V 35 C 18] : 22 Luck 291 ✠ 1935 All 379 (380) [AIR V 22] ✠ 1938 Lah 18 (19) [AIR V 25] : ILR (1937) Lah 728 (DB).

[But see 1957 J&K 20 (20) [AIR V 44 C 17]: (The provisions of S. 16, Jammu and Kashmir Small Cause Courts Act, corresponding to S. 17 (before amendment of 1935) of the Act are directory and not mandatory and it is open to the Court in appropriate cases to extend the time within which the deposit is to made or security furnished.)]

[15] Where the security bond was filed with the application but the security was found insufficient it can be allowed to be made good beyond limitation. 1937 Oudh 206 (207) [AIR V 24] ✠ 1936 Mad 524 (525) [AIR V 23] . (Delay caused by action of Court — Delay should be condoned.) ✠ 1936 Oudh 407 (409) [AIR V 23] : 12 Luck 287.

[See however 1936 All 371 (372) [A I R V 23]. (Conditional order for deposit of decretal amount and costs— Deposit not made in time but order setting aside *ex parte* decree obtained in revision — *Held* period could be extended.)]

[16] Where delay was caused not by any default of the judgment-debtor seeking to set aside the *ex parte* decree the delay should be excused. 1923 Mad 354 (354, 355) [AIR V 10]. (Delay in issue of chalan by officer of Court.) ✠ 1951 Mad 472 (472) [A I R V 38 C 141]. (Section 5 of the Limitation Act is applicable to proceedings under this section. Delay in payment of decretal amount can be excused.) ✠ 1933 All 933 (934) [AIR V 20]. (Security bond in accordance with S. 17—Verification delayed by Court till after limitation.) ✠ 1926 All 602 (603) [AIR V 13] : 48 All 342. (Deposit not made possible by rules of the local treasury — Deposit made the following day held good.) ✠ ('30) 123 Ind Cas 825 (827) (All). (Deposit amount tendered on a Saturday —Deposit not made in treasury because it closed earlier that day—Deposit on following Monday sufficient.) ✠ 1932 Mad 142 (143) [AIR V 19]. (Delay caused by vakil's clerk)✠ 1922 Mad 186 (187) [A I R V 9] : 45 Mad 628 (DB). (Full amount of decree amount not paid within time due to mistake of vakil's clerk.)

[17] *Ex parte* decree of one Court transferred to another Court for execution—Deposit in latter Court and application to former Court—*Held* there was compliance with S. 17. ('10) 1910 Pun L R No. 141 p. 387 (388).

[18] Application with insufficient security rejected — No further application within time — Application cannot be considered. 1927 Pat 90 (91) [AIR V 14].

[19] Security for setting aside *ex parte* decree — Surety bond need not be registered. 1961 Madh Pra 2 (3) [AIR V 48 C 2].

4. Directions of Court. — [1] Where an applicant is not prepared to deposit the decretal amount in cash, he must file an application prior to his application for setting aside the *ex parte* decree, to the effect that he would desire to give security for the performance of the decree and must obtain the direction of the Court beforehand. This provision of law is mandatory. 1944 Oudh 104 (105, 106) [AIR V 31] ✠ 1960 All 612 (613) [AIR V 47 C 178] (DB). (The actual direction of the Court to furnish security need not necessarily be previous to the application for setting aside an *ex parte* decree.) ✠ 1939 All 46 (47) [A I R V 26]. (An applicant is not entitled to file a security bond along with the application without having previously obtained the per-

18. Trial of suits by Registrar.

(1) Suits cognizable by the Registrar under section 12, sub-sections *(3)* and *(4)*, shall be tried by him and decrees passed therein shall be executed by him, in like manner in all respects as the Judge might try the suits, and execute the decrees, respectively.

(2) The Judge may transfer to his own file, or to that of the Additional Judge if an Additional Judge has been appointed, any suit or other proceeding pending on the file of the Registrar.

19. Admission, return and rejection of plaints by Registrar.

(1) When the Judge of a Court of Small Causes is absent, and an Additional Judge has not been appointed or, having been appointed, is also absent, the Registrar may admit a plaint, or return or reject a plaint for any reason for which the Judge might return or reject it.

(2) The Judge may, of his own motion or on the application of a party, return or reject a plaint which has been admitted by the Registrar, or admit a plaint which has been returned or rejected by him :

Provided that where a party applies for the return or rejection or the admission of a plaint under this sub-section, and his application is not made at the first sitting of the Judge after the day on which the Registrar admitted, or returned or rejected, the plaint, the Judge shall dismiss the application unless the applicant satisfies him that there was sufficient cause for not making the application at that sitting.

20. Passing of decrees by Registrar on confession.

(1) If, before the date appointed for the hearing of a suit, the defendant or his agent duly authorized in that behalf appears before the Registrar and admits the plaintiff's claim, the Registrar may, if the Judge is absent, and an Additional Judge has not been appointed or, having been appointed, is also absent, pass against the defendant, upon the admission, a decree which shall have the same effect as a decree passed by the Judge.

Section 17 — Note 4 *(contd.)*

mission of the Court.) ✠ 1946 All 425 (430) [AIR V 33 C 109] : ILR (1946) All 615 (DB).

[2] Where two applications are filed simultaneously, one for permission to give security and the other to set aside *ex parte* decree and the Court entertained the former first and allowed it and thereafter proceeded with the setting aside of application and directed notice it was held that there was sufficient compliance with S. 17. 1941 All 284 (284, 285) [AIR V 28] : I L R (1941) All 589 ✠ 1946 All 425 (430) [AIR V 33 C 109] : I L R (1946) All 615 (DB).

[3] The Court only has got the competence whether to accept security or insist upon deposit of decretal amount. The applicant can have no choice in the matter. ('32) 33 Pun L R 931 (933) ✠ 1930 Mad 658 (658) [AIR V 17].

[See however 1926 Mad 647 (648) [A I R V 13]. (Court not justified in insisting on deposit when security is furnished and has not been rejected.)]

[4] Court has discretion to accept security offered as sufficient. 1928 Oudh 488 (489) [AIR V 15] ✠ 1928 All 607 (608) [AIR V 15] : 51 All 402.

[5] If security bond is discovered to be invalid though accepted by Court at time of making application, application should be rejected. ('21) 62 Ind Cas 108 (109) (Pat).

[6] Where the Judge passed the following order : "The security bond produced is not satisfactory. I can allow the application on condition of the applicant depositing entire decree amount in Court within two weeks" it was held that the order meant that the security was not accepted by the Small Cause Court as sufficient. 1922 All 265 (265) [AIR V 9].

[7] If the security filed be in pursuance of a direction of the Court and the Court accepts the security without question and directs a notice to issue before limitation has expired, it, by necessary implication, gives a direction that the security furnished is sufficient to its mind. 1947 All 125 (126) [AIR V 34 C 61].

5. Liability of surety. — [1] Security bond given by surety extends to whole of decree amount. 1916 Pat 66 (67) [AIR V 3].

[2] Security is furnished on the assumption that the *ex parte* decree will not be set aside— Where the decree is consequently set aside surety is discharged and will not be liable under ultimate decree. 1938 Bom 448 (448) [AIR V 25] (DB) ✠ ('57) ILR (1957) Andh Pra 162 (163, 164, 165) ✠ 1954 Hyd 24 (25) [AIR V 41 C 8] : I L R (1953) Hyd 526 ✠ 1936 All 593 (593) [A I R V 23] ✠ 1938 Nag 75 (76) [AIR V 25] : ILR (1939) Nag 371.

(2) Where a decree has been passed by the Registrar under sub-section *(1)*, the Judge may grant an application for review of judgment, and re-hear the suit, on the same conditions, on the same grounds and in the same manner as if the decree had been passed by himself.

21. Execution of decrees by Registrar.

(1) If the Judge is absent, and an Additional Judge has not been appointed or, having been appointed, is also absent, the Registrar may, subject to any instructions which he may have received from the Judge or, with respect to decrees or orders made by an Additional Judge, from the Additional Judge, make any orders in respect of applications for the execution of decrees and orders made by the Court of which he is Registrar, or sent to that Court for execution, which the Judge might make under this Act.

(2) The Judge, in the case of any decree or order with respect to the execution of which the Registrar has made an order under sub-section *(1)*, or the Additional Judge, in the case of any such decree or order which has been made by himself and with respect to which proceedings have not been taken by the Judge under this sub-section, may, of his own motion, or on application made by a party within fifteen days from the date of the order of the Registrar or of the execution of any process issued in pursuance of that order, reverse or modify the order.

(3) The period of fifteen days mentioned in sub-section *(2)* shall be computed in accordance with the provisions of the [a]Indian Limitation Act, 1877, as though the application of the party were an application for review of judgment.

[a] *See* now the Indian Limitation Act, 1908 (IX of 1908).

22. Adjournment of cases by chief ministerial officer.

When the Judge of a Court of Small Causes is absent and an Additional Judge has not been appointed or, having been appointed, is also absent, the Registrar or other chief ministerial officer of the Court may exercise from time to time the power which the Court possesses of adjourning the hearing of any suit or other proceeding, and fix a day for the further hearing thereof.

23. Return of plaints in suits involving questions of title.

(1) Notwithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immovable property or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title.

(2) When a Court returns a plaint under sub-section *(1)*, it shall comply with the provisions of the second paragraph of section 57 of the Code of Civil Procedure[a] and make such order with respect to costs as it deems just, and the Court shall, for the purposes of the Indian Limitation Act, 1877,[b] be deemed to have been unable to entertain the suit by reason of a cause of a nature like to that of defect of jurisdiction.

[a] Act XIV of 1882. *See* now the Code of Civil Procedure, 1908 (V of 1908), Sch. I, Order VII, Rule 10. [b] *See* now the Indian Limitation Act, 1908 (IX of 1908).

SECTION 23 — SYNOPSIS

1. Suits involving questions of title—Power of Court to try.

2. Return of plaint—Effect of.

1. Suits involving questions of title—Power of Court to try. — [1] Section 23 does not oust the jurisdiction of Small Cause Court to decide questions of title. It merely gives option to the Court to send a case to the Court having jurisdiction to determine the title. 1937 All 676 (677) [AIR V 24] ✠ 1959 Manipur 14 (14) [A I R V 46 C 7] ✠ 1914 All 527 (528) [AIR V 1] ✠ 1921 Lah 91 (91) [AIR V 8] ✠ ('12) 23 Mad L Jour 193 (194) (DB). (Suits involving question of title directed to be tried as regular suits in the interest of parties.) ✠ 1916 Pat 75 (76) [AIR V 3] (DB).

[2] Though a question of title cannot be fully decided in a small cause suit, it can be decided incidentally for the purpose of deciding the chief point in the case which is

Section 23 — Note 1 *(contd.)*

properly within the jurisdiction of the Small Cause Court. 1927 Mad 459 (460) [AIR V 14]✠ 1956 Nag 124 (124, 125) [AIR V 43 C 44]: ILR (1956) Nag 74. (A suit for damages for breach of covenant for title is not excluded from the jurisdiction of a Court of Small Causes. It is not the rule that the vendee cannot bring an action for breach of covenant of title until actual eviction.) ✠ 1934 All 695 (696) [A I R V 21]. (If a *bona fide* question of title arises incidentally in a Small Cause Court suit, the Court should determine it. But when Court has not considered it necessary to decide the question of title, and did not consider that the question was a *bona fide* one, it cannot be said that the Court acted illegally.)✠1934 Lah 355 (355) [AIR V 21]. (Suit for use and occupation against alleged trespasser — Judge has discretion.) ✠ 1921 Lah 91 (91) [AIR V 8] ✠ 1922 Mad 300 (301) [AIR V 9] (Question not raised in pleading — Decision incidentally necessary—Plaint should not be returned.) ✠ 1922 Pat 368 (369) [A I R V 9]. (Suit for wrongful destruction of house and removal of materials therefrom — Question of title incidentally arising.) ✠ 1915 Low Bur 8 (9) [A I R V 2]. (Suit for damages for use and occupation — Question of title may be incidentally gone into.) ✠ 1929 Sind 43 (43) [AIR V 16] : 23 Sind L R 411. (Validity of award incidentally arising.) ✠ ('12) 6 Sind L R 85 (85).

[3] All questions of title should be determined finally and not cursorily. Therefore intricate questions of title should not be tried in a summary way. Hence where the Judge is satisfied that the question of title which arose was so intricate that it should not be summarily tried, he should return the plaint. 1935 All 148 (149) [AIR V 22]✠1955 NUC (All) 2744 [AIR V 42] ✠ ('50) 1950 A M L J 3 (4) ✠ 1940 Pesh 34 (35) [AIR V 27]. (Where complicated questions of title are involved a Small Cause Judge should take action under S. 23 (1).) ✠ ('12) 14 Ind Cas 2 (4) (Oudh).

[**See however** 1919 Cal 205 (207) [AIR V 6] (DB). (Although the decision of a Small Cause Court on question of title may not be conclusive the Court is not precluded from trying it; question of title to land in a suit for damages for trespass.)]

[4] Section 23 limits the enquiry to the right and relief claimed by the plaintiff. It is no necessary that the plaintiff and defendant should be rival claimants for returning the plaint for presentation to proper Court. 1935 All 148 (150) [AIR V 22].

[5] The power under S. 23 cannot be exercised by a Court which has ruled that it has no jurisdiction over a suit. 1922 Mad 300 (301) [AIR V 9].

[6] It is for the Small Cause Court to decide whether a question of title is involved in a case. 1929 All 816 (816) [AIR V 16].

[7] Where plaint and written statement show that issue is one of title, suit cannot be considered to be of small cause nature. 1926 Mad 656 (656) [AIR V 13] (DB) ✠ ('12) 14 Ind Cas 2 (4) (Oudh). (Question of title raised by defendant.)

[**See however** 1925 All 821 (822) [AIR V 12] (Nature of defence set up does not alter the character of the suit.) ✠ 1926 Nag 276 (277) [AIR V 13]. (Alleged lessee sued — Lessee pleading that lease was taken from a third person—Plaint cannot be returned.)]

[8] Section 23 cannot be availed of for returning a plaint where only the right claimed depends upon the proof of title but the relief claimed could be granted without any reference to the question of title. ('28) 1928 Mad W N 193 (196)✠1926 All 344 (345) [AIR V 13]. (Where one party is precluded from disputing title of other party by estoppel, it would be wrong to apply S. 23.) ✠ 1925 Oudh 687 (688) [AIR V 12]. (Tenant setting up title in third party.)✠1939 Pesh 14 (16) [AIR V 26] (DB). (Rent suit based on deed — Defendant denying right of plaintiff—Execution of deed not denied — Procedure under S. 23 does not apply.)

[9] A suit wherein alternative reliefs are asked one of which can be granted by the the Small Cause Court but the other only by the Munsif Court, the suit is triable only by the latter Court. 1916 All 343(343) [AIR V 3].

[10] In the following cases it was held that the Small Cause Court had no jurisdiction :

(a) Suit for damages in respect of a lease reserving right to sue for ejection. 1930 Pat 389 (390) [AIR V 17].

(b) Suit for rent by landlord where his right to it was denied and plaintiff's co-sharers also were added as defendants. 1940 Mad 507 (508, 509) [AIR V 27].

(c) Plaintiff's suit for damages for trees appropriated by tenant where his title to the trees is questioned. 1934 All 290 (292) [AIR V 21].

(d) Suit for damages where relief depends upon the determination of status of defendant as a tenant. 1917 Cal 23 (23) [AIR V 4] (DB).

(e) Suit for rent where determination of title is necessary. 1914 Mad 305 (305) [AIR V 1] (DB).

(f) Suit where power of testator to dispose of by will the suit lands is challenged. 1918 Mad 1044 (1045) [AIR V 5].

(g) Suit to recover deposit devised to trustees for a thakurji treating depositee as a stake-holder. ('43) 1943 All L W 403.

[11] A Court of Small Causes is not competent to "finally" determine the question of title to immovable property. So even if the decree passed by it is valid otherwise, it cannot operate as res judicata so far as the question of title is concerned. 1948 All 296 (297) [AIR V 35 C 117] : ILR (1948) All 283 ✠ ('49) 1949 Jaipur L R 246 (247) (DB). (Suit for arrears of rent — Defendant admitting tenancy from deceased owner but disputing adoption of plaintiff—*Held* question of adoption was only indirectly involved in the suit and decision thereon was not res judicata.)

2. Return of plaint—Effect of.—[1] Proper course for a Small Cause Court is to return the plaint where the suit is not cognizable by it and not to dismiss the suit. ('13) 11 All L Jour 238 (240).

24. Appeal from certain orders of Courts of Small Causes.

Where an order specified in [a][clause *(ff)* or clause *(h)* of sub-section *(1)* of section 104 of the Code of Civil Procedure, 1908.] is made by a Court of Small Causes, an appeal therefrom shall lie to the District Court [b][on any ground on which an appeal from such order would lie under that section.]

[a] *Substituted* for "section 588, cl. (29), of the Code of Civil Procedure" by the Civil Procedure (Amendment) Act, 1922 (IX of 1922), S. 5. [b] *Inserted*, *ibid*.

25. Revision of decrees and orders of Courts of Small Causes.

The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit.

Section 23 — Note 2 *(contd.)*

[2] Small Cause Court can return the plaint when a question of title is raised even though it is alleged to be res judicata. 1919 Cal 965 (965) [AIR V 6] (DB).

[3] Return of plaint for presentation to proper Civil Court. Civil Court cannot refuse to entertain plaint. 1914 Cal 739 (739) [AIR V 1] (DB).

[4] Where a Judge having both small cause and regular jurisdiction transferred a suit instituted as small cause on to regular file he rightly exercised the power under S. 23. 1914 Bom 302 (302) [AIR V 1] : 38 Bom 190.

[5] Where small cause suit was tried by Munsif on the regular side without returning plaint to himself, his jurisdiction is not affected in spite of irregularity in procedure. ('21) 64 Ind Cas 436 (437) (Cal).

[6] Plaint returned for being presented to be tried as ordinary suit — Trial of suit after that as a small cause suit is illegal. 1915 Cal 375 (379) [AIR V 2].

[7] Small cause suit transferred to regular list and became regular suit — Judge cannot without reasons in writing re-transfer it to small cause list. 1925 Bom 246 (247) [A I R V 12] (DB).

[8] Where plaint is returned as involving ownership of trees cut, case nonetheless retains its small cause nature. 1921 Oudh 144 (144) [AIR V 8] ✱1926 Cal 83 (84) [AIR V 13] ✱1917 Mad 897 (897) [AIR V 4] (DB).

[9] Where in a suit cognizable by a Small Cause Court, the Small Cause Court returns the plaint to be presented before another Court, he refuses to exercise jurisdiction that was vested in him under the law and his order is fit to be set aside in revision. 1958 Pat 22 (24) [AIR V 45 C 11] (DB). (Question regarding jurisdiction of Special Officer to assess latrine tax—Suit only of Small Cause nature—Should not be returned.)

[10] Effect of order returning plaint under S. 23 is to remove bar to jurdisdiction of ordinary Courts imposed by S. 16. Suit may be presented to any Court having jurisdiction to try suit. ('11) 10 Ind Cas 267 (268) (DB).

[*See also* 1932 Bom 486 (488, 489) [AIR V 19] : 46 Bom 387 (DB). (Section 24 (4) Civil P. C. is intended to enable the transfer of a suit from a Small Cause Court to one which is not such a Court. It is intended to remove the bar laid down by S. 16.)]

[11] Section 23 would be attracted where the suit is cognisable by a Small Cause Court, but at the same time, the Court is required to decide a question of title relating to immoveable property. The section would not apply to a suit not triable by a Small Cause Court. 1961 Madh Pra 152 (153) [A I R V 48 C 53]. (The powers under the section are discretionary and the applicant, by suppressing a material fact, disentitles himself to indulgence at the revisional stage.)

Section 24 — Note 1

[1] When Small Cause Court grants costs as compensation under S. 35A, Civil P. C., appeal lies to District Judge. 1926 All 554 (555) [AIR V 13].

[2] No appeal lies against order under S. 95, Civil P. C. passed by Small Cause Court. 1937 Nag 126 (127) [AIR V 24] : I L R (1938) Nag 361 ✱1915 Mad 1072 (1072) [AIR V 2].

SECTION 25 — SYNOPSIS

1. Scope.
2. Revision only in small cause suits.
3. Other remedies available — Revision whether lies.
4. 'Decided'—Meaning of — Interlocutory orders.
5. 'According to law.'
6. Substantial justice.
7. Discretionary orders—Revision.
8. Ex parte decree.
9. Return of plaint.
10. Error of procedure.
11. Interference on questions of fact.
12. Error of law.
13. Question of limitation.
14. Question of jurisdiction.
15. Question of costs.
16. Court-fee.
17. Questions regarding review.
18. New pleas.
19. Successive applications.
20. Reference to High Court.
21. Restoration of revision dismissed for default.
22. Difference of opinion amongst Judges in revision.
23. Limitation for revision.

1. Scope.—[1] The High Court can exercise powers under this section suo motu

OBJECTS AND REASONS

"The opinion appears to be universal that the ruling of the Privy Council in *Amir Hassan* v. *Sheo Baksh Singh* (ILR 11 Cal 6) has rendered it absolutely necessary to extend the jurisdiction which the High Courts possess over the judicial proceedings of Courts of Small Causes and of other Courts invested with their powers. It is of course desirable that nothing should be done to encourage needless resort to the High Court, but, as the Hon'ble the Chief Justice and Judges of the High Court at Fort William have observed, this consideration should be one rather for the High Court than to be used to remove an important branch of the lower judicature from all control and so to deprive it of the advantage of a subordinate relation to that authority which exists for the express purpose of guiding the inferior tribunals by its exposition of the law." — S. C. R.

STATE AMENDMENT

UTTAR PRADESH

In its application to the State of Uttar Pradesh, for section 25 *substitute* the following, namely,—

"**25.** *Revision of decrees and orders of Courts of Small Causes.*—The District Judge, for the purpose of satisfying himself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as he thinks fit." —U. P. Act XVII of 1957, S. 2 [4-6-1957].

Section 25 — Note 1 *(contd.)*

without any application by any of the parties. 1924 Nag 154 (155) [AIR V 11]✣1959 Ker 329 (Pr 16) [A I R V 46 C 106] : I L R (1957) Ker 920.

[2] The power of interference which the High Court has under S. 25 is purely discretionary. 1939 All 77 (78) [AIR V 26]✣('97) 21 Bom 250 (255) (DB)✣1946 Cal 526 (528) [AIR V 33 C 120]✣1917 Mad 735 (737) [A I R V 4] (DB)✣('12) 1912 Mad W N 1227 (1229)✣1926 Oudh 519 (519, 520) [AIR V 13] : 1 Luck 323 ✣('98) 11 C P L R 91 (92)✣('10) 5 Ind Cas 322 (323) (DB) (All) ✣ 1924 Rang 54 (54) [A I R V 11] : 1 Rang 372 : 26 Cri L Jour 523.

[3] Section 25 does not confer any right or privilege on any person. 1958 All 409 (Pr 4) [AIR V 45 C 98] : ILR (1958) 1 All 70 (FB)✣ 1958 All 404 (Pr 1) [A I R V 45 C 97] : I L R (1958) 1 All 635 (DB).

[4] The powers of revision under S. 25 are discretionary. The High Court will not interfere with the decision of the Court below when no injustice has resulted thereby. 1946 Cal 526 (528) [AIR V 33 C 120].

[5] Section 25 does not confer any right or privilege on any person. In this respect upon its substitution by U. P. Act 17 of 1957 by another S. 25, neither cl. (c) nor cl. (e) of S. 6 of the U. P. General Clauses Act is attracted. 1958 All 409 (Pr 4) [A I R V 45 C 98] : ILR (1958) 1 All 78 (FB).

[6] Though the power under S. 25 of the Provincial Small Cause Courts Act of sending for the records is discretionary, once the record has been sent for, and the decree of trial Court found to be not in accordance with law, the High Court cannot refuse to interfere. ('50) 1950 All L Jour 308 (309).

[7] The powers of the High Court in revision under this section are wider than those under S. 115, C. P. C. 1921 All 325 (325) [AIR V 8] (DB) ✣ 1961 Mad 152 (Pr 3) [A I R V 48 C 38]. (But the power is not equivalant to appellate power.) ✣ 1960 Ker 306 (Pr 5) [AIR V 47 C 144] : ILR (1960) Ker 539 (DB) ✣ 1957 Pat 168 (Pr 31) [AIR V 44 C 58] : 35 Pat 986 (DB) ✣ 1955 Mad 271 (Pr 5) [(S) A I R V 42 C 77] ✣ ('55) 8 Sau L R 17 (19) ✣ ('55) 8 Sau L R 202 (204) ✣ ('46) 1946 Jaipur L R 184 (185) ✣ 1939 All 590 (591) [A I R V 26] : I L R (1939) All 709 ✣ ('05) 27 All 192 (193) ✣ ('05) 27 All 531 (537) (DB) ✣ 1941 Bom 67 (68) [AIR V 28] : ILR (1941) Bom 153 (DB) ✣ 1928 Lah 274 (275) [A I R V 15] ✣ 1920 Lah 37 (38) [A I R V 7]✣1921 Nag 105 (106) [AIR V 8] : 17 Nag L R 20 ✣ 1924 Rang 54 (54) [A I R V 11] : 1 Rang 372 : 26 Cri L Jour 523 ✣ 1926 Rang 205 (206) [AIR V 13] : 4 Rang 221 (DB) ✣ 1945 Bom 197 (199) [AIR V 32] : ILR (1945) Bom 382 (FB).

[8] The power of revision under S. 12 of the Hyderabad Small Cause Courts Act (corresponding to S. 25, Provincial Small Cause Courts Act) is wider than that under S. 115, C. P. Code. Under S. 115, C. P. Code, the High Court cannot interfere when the lower Court having jurisdiction has arrived at a wrong decision on a question of fact or even on a point of law. But the powers conferred under S. 12, Hyderabad Small Cause Courts Act, are wide enough to justify an interference in some cases on a question of fact and law also. 1953 Hyd 212 (Pr 17) [AIR V 40 C 101]: ILR (1953) Hyd 366. (Wrongly refusing amendment of plaint—High Court will interfere under S. 12 Hyderabad Small Cause Courts Act.)

[9] Section 25, affords ground for interference within an ambit wider than that provided by Para. 35 of the Himachal Pradesh (Courts) Order, (1948). Hence, S. 25, cannot be said to affect the special law contained in Para. 35 of the Order within the intendment of S. 3 (c) of the Act. 1953 Him Pra 68 (Pr 4) [AIR V 40 C 30].

[10] High Court can, not only interfere on similar grounds as under S. 115, C. P. C. but also where there has been no proper trial, or palpable injustice has been done. It can interfere even when there is simple error of law when it is of general importance. 1941 Bom 67 (68) [AIR V 28] : ILR (1941) Bom 153 (DB).

[11] Section 622, Civil P. C. 1882, should be taken as a guide indicating the lines along which a Judge would do well to exercise his discretion in admitting an application under S. 25, but that does not compel the Judge to refuse any application made under S. 25

Section 25 — Note 1 *(contd.)*

which could not be admitted under S. 622 of the Civil P. C. ('99) 21 All 89 (90) (DB).

[12] The section is not intended to give in effect a right of appeal in all cases either on law or fact and the High Court cannot undertake duties of Court of first appeal in an application under S. 25. 1939 Oudh 141 (141) [A I R V 26] : 14 Luck 588 (DB) ✣ 1941 Bom 67 (68) [A I R V 28] : I L R (1941) Bom 153 (DB) ✣ 1943 Nag 117 (123, 126) [A I R V 30]: ILR (1943) Nag 176 (FB) ✣ 1926 Oudh 519 (519) [AIR V 13]:1 Luck 323✣('97) 21 Bom 250 (254, 255) (DB) ✣ 1944 Mad 181 (183) [A I R V 31] : I L R (1944) Mad 643 : 45 Cri L Jour 464 (DB). (Cannot review evidence.)

[13] There is no authority for the proposition that an application in revision stands on exactly the same footing as an appeal, and that both are vested rights which can be taken away only by express enactment or necessary intendment. 1958 All 409 (Pr 3) [AIR V 45 C 98] : ILR (1958) 1 All 70 (FB). (AIR 1932 P C 165, *Expl.*)

[14] Section 25 must not be construed in a sense which would virtually give a right of appeal on law and on facts in every Small Cause Court Case and which would be inconsistent with the finality which the legislature intended to attach to the judgment of the Small Cause Court. 1955 N U C (Mad) 3211 [A I R V 42]. (Appreciation of evidence held did not merit interference— Principles when High Court will interfere, stated.) ✣ 1961 Mad 152 (Pr 3) [A I R V 48 C 38] ✣ 1960 Ker 306 (Pr 5) [AIR V 47 C 144] : ILR (1960) Ker 539 (DB).

[15] The object of S. 25 is to enable the High Court to see that there has been no miscarriage of justice, that the decision was given according to law. Wherever the Court comes to the conclusion that the unsuccessful party has not had a proper trial according to law, then the Court can interfere. But, the Court ought not to interfere merely because it thinks that possibly the Judge who heard the case may have arrived at a conclusion which the High Court would not have arrived at. 1938 Bom 223 (223) [AIR V 25].]

[*See* 1937 Pat 524 (525) [AIR V 24].

[16] Under S. 25, the High Court can interfere in revision in any case decided by a Court of Small Causes when it appears that the decision is not according to law. ('46) 1946 Jaipur L R 184 (185).

[17] Court should not interfere unless it clearly appears that some substantial injustice to a party has directly resulted from a material misapplication or misapprehension of law or material error in procedure in Court of Small Causes. ('91) 13 All 277 (278) (FB)✣ 1925 All 273 (274) [AIR V 12] : 47 All 136✣ 1939 All 77 (78, 79) [A I R V 26] ✣ ('88) 1888 Pun Re No. 79, p. 206 (209) (DB) ✣ 1920 Lah 352 (353) [A I R V 7] ✣ ('04) 1904 Pun Re No. 66, p. 186 (190, 191) (DB) ✣ 1924 Rang 54 (54) [A I R V 11] : 1 Rang 372 : 26 Cri L Jour 523. (Substantial justice done — No interference even if Court may technically have erred.) ✣ 1920 Sind 14 (15) [AIR V 7] : 13 Sind L R 210 (DB).

[18] Powers under S. 25 should not ordinarily be exercised unless the High Court has reason to suppose that there has been real mismanagement of the case or actual perversity in decision. 1932 Oudh 60 (60) [A I R V 19] ✣ 1932 Oudh 283 (284) [A I R V 19] : 7 Luck 116✣1926 Oudh 264 (265) [AIR V 13] : 1 Luck 297.

[19] The High Court will interfere only in exceptional circumstances with orders of the Judge of the Court of Small Causes, but when the Judge is clearly wrong and if his order is upheld, there would, in fact, be a fraud perpetrated upon the plaintiff and he would be debarred from bringing a suit which suit he is entitled to bring, the High Court will interfere. 1937 Sind 155 (155, 158) [AIR V 24] (DB).

[20] Where the applicant has not shown that the view of the case as taken by the lower Court is wrong but has succeeded, at the utmost, in throwing some doubt on its correctness, the High Court will not interfere in revision. 1923 Nag 309 (310) [A I R V 10].

[21] No revision lies unless it can be shown that any question of law or fact was determined by the Court without proper jurisdiction or that in the course of the decision any material irregularity of procedure touching the decision was committed. 1955 N U C (Punj) 5722 [AIR V 42].

[22] Section 25 gives power only to the High Court to entertain a Revision against a decree in a small cause suit and the District Court has no powers at all of either entertaining an appeal or a Revision. If the High Court thinks that the C. R. petition in the High Court and the appeal pending in the District Court required to be jointly heard, the proper order would be to withdraw the appeal from the District Court to the file of the High Court to be heard and disposed of along with the C. R. petition and not to return the C. R. petition for presentation to the District Court to be heard along with the appeal. 1959 Ker 329 (Pr 9) [AIR V 46 C 106]: ILR (1957) Ker 920.

[23] Revision petitions under Provincial Small Cause Courts Act — O. 41, R. 27, Civil P. C. whether applies — (Quaere). 1950 Mad 438 (Pr 7) [AIR V 37 C 190].

[24] Giving of reasons is not necessary for order on revision. 1955 N U C (Ajmer) 1328 [AIR V 42].

[25] Remand — Admission by plaintiff in trial court on particular point—Remand will not be ordered to enable plaintiff to adduce evidence contrary to admission. 1955 N U C (Ajmer) 1263 [AIR V 42].

[26] According to R. 12 of the Rules for judicial business in Madhya Bharat High Court, it is compulsory to file a copy of the judgment with a petition for revision and the presentation of a revision petition without such a copy is no valid presentation of the revision. 1954 Madh B 18 (Pr 1) [AIR V 41 C 14].

U. P. Amendment

[27] The U. P. Amendment Act does not say anything about its effect or enforcement

Section 25 — Note 1 *(contd.)*

except that it was to come into force at once. The obvious meaning of the U. P. Amendment Act 17 of 1957 coming into force on 4-6-1957, the date of its publication, was that on and after that date the District Judge had the power of calling for a case decided by a Court of Small Causes and revising a decree or order made by it. There was nothing in the Amendment Act to suggest that it would not apply to a case instituted or decided before it came into force. By holding that since the enforcement of the Amendment Act only a District Judge has the power to revise an order of a Court of Small Causes, the Court is not at all giving, what is called retrospective effect to the Amendment Act. 1958 All 404 (Prs 4, 11) [AIR V 45 C 97] : ILR (1958) 1 All 635 (DB). (AIR 1947 Oudh 232, *Dissented from.*)

[28] Where applications in revision are filed in the High Court under S. 25 of the Provincial Small Cause Courts Act prior to 4th June, 1957 when the U. P. Act 17 of 1957 came into force, then in spite of the substitution of S. 25 by the U. P. Act XVII of 1957 whereby the jurisdiction conferred on the High Court is transferred to the District Courts, the High Court retains its jurisdiction to hear applications in revision filed in the High Court under S. 25 of the Provincial Small Cause Courts Act prior to 4th June, 1957, in all cases in which prior to that date the High Court had directed the record to be called for. 1958 All 409 (Prs 7, 9) [AIR V 45 C 98]: ILR (1958) 1 All 70 (FB). (Civil Revn. No. 789 of 1950, D/- 18-11-1957 (All), *Overruled.*)

[29] Per *V. Bhargava and M. L. Chaturvedi, JJ.* — The consequence of the applicability of the provisions of S. 6 (b), U. P. General Clauses Act, is that the High Court having validly called for the record and its order not being affected by the subsequent amending Act, it continues to have jurisdiction to pass further orders in pursuance of that valid Act and, consequently, to pass such order with respect to the case as it may think fit. 1958 All 409 (Prs 6, 9, 10) [AIR V 45 C 98] : ILR (1958) 1 All 70 (FB).

2. Revision only in small cause suits. — [1] High Court can exercise power only when the case is tried by a Small Cause Court. 1920 Pat 740 (740) [AIR V 7].

[2] Where a suit of a Small Cause nature is transferred by an order of a superior Court under S. 24, Civil P. C. from the Court of Small Causes to that of a Munsif, the latter Court must under S. 24 (4), Civil P. C. be deemed to be a Court of Small Causes. 1928 All 609 (609) [AIR V 15] (DB) ✠ 1953 Mad 582 (Pr 5) [AIR V 40 C 226].

[3] Suit instituted in Small Cause Court—Court subsequently abolished—Case sent to ordinary Civil Court having jurisdiction under S. 35—Such Court acquiring before date of trial power to deal with suit as small cause suit—Section 32, is applicable and decision of Court must be deemed to be that of Small Cause Court and final under law and only open to revision under S. 25. 1935 Cal 556 (557) [AIR V 22].

[4] Where decree of a Small Cause Court has been transferred to another Court for execution on its regular side, order of transferee Court that execution is barred by limitation is not open to revision. 1941 Pat 624 (624, 625) [AIR V 28].

[5] Small Cause decree transferred for execution to Court of original jurisdiction — Latter Court passing order for arrest under S. 51, Civil P. C. — The order is not appealable but revision lies under S. 25. 1957 Mad 761 (Pr 2) [AIR V 44 C 247]. (AIR 1955 Mad 1179, *Distinguished.*)

[6] Suit cognizable by Small Cause Court tried as original suit — Decision in appeal by the District Judge cannot be challenged under S. 25. 1936 Oudh 129 (129) [AIR V 23].

[7] Although no appeal lies from decision of Subordinate Judge in suit of small cause nature within pecuniary limits of his jurisdiction and no cross-objection lies when whole litigation is before High Court it may well be considered in light of powers of High Court under S. 25. 1936 Pat 562 (563) [AIR V 23] (DB).

[8] A small cause suit loses its character as such immediately it is withdrawn to the original side and tried along with an original suit. Where three small cause suits filed by the plaintiff against three different defendants were by consent taken and tried along with an original suit filed by the same plaintiff and they were tried on common evidence and a joint decree against four separate main defendants was also given — *Held* that a small cause suit could not continue in the category of small causes once it was taken on to the original side and disposed of along with an original suit. Hence the revision petitions should be returned to be re-presented as appeals on which an *ad valorem* fee should be paid. 1951 Mad 275 (Pr 2) [AIR V 38 C 64].

3. Other remedies available — Revision whether lies.—[1] Whereas in a case governed by S. 115, Civil P. C. no revision will lie at all if the order is appealable, that cannot be said of a case governed by S. 25 and the revision will not be rejected on the narrow ground that the order is appealable. ('55) 8 Sau L R 202 (204).

[2] The exercise of the right of interference under S. 25 does not depend upon the question whether an appeal lies or not. 1933 Oudh 477 (478) [AIR V 20].

[**See however** 1926 All 554 (555) [AIR V 13]. (Speedy and cheaper remedy available —Revision should not be allowed.)]

[**But see** 1933 Oudh 454 (455) [AIR V 20]. (Existence of right to appeal — High Court will not intefere in revision.) ✠ 1937 Oudh 358 (359) [AIR V 24] : 13 Luck 331. (Refusal to grant instalments under S. 5 (1), U. P. Agriculturists' Relief Act — Appeal provided for under S. 5 (2) — Revision under S. 25 of Provincial Small Cause Court does not lie.)]

[3] The powers of revision under S. 25 are not curtailed by the fact that a separate remedy by way of appeal is provided under S. 24. Hence, a revision under S. 25 is compe-

Section 25 — Note 3 *(contd.)*

tent against an order under S. 35A, Civil P. C., even though such order is appealable under S. 24. 1947 Nag 247 (Pr 5) [AIR V 34 C 71]: ILR (1947) Nag 409.

[4] Normally High Court would be reluctant to interfere in revision where an alternative remedy is provided by law, and particularly so where such a remedy has been availed of. 1949 Mad 396 (Pr 3) [AIR V 36 C 171].

[5] Order for ejectment passed by Civil Judge Junior division under S. 28, Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947) is appealable under S. 29 of the Act — Revision under S. 25 of the Small Cause Courts Act is not maintainable. 1959 Mys 145 (Pr 11) [AIR V 46 C 57].

[6] Failure of plaintiff to prosecute the suit twice and suit dismissed under O. 9, R. 2 — High Court would not interfere in revision though it has power to set aside the order in spite of other remedies being available. 1932 Oudh 106 (107) [AIR V 19].

[7] Ex parte decree — No application filed for setting it aside — *Held* High Court would not interfere. 1958 Raj 286 (Pr 2) [AIR V 45 C 95] : ILR (1958) 8 Raj 837.

4. 'Decided' — Meaning of — Interlocutory orders.—[1] The word 'case' is wide enough to cover an interlocutory order which also can be revised under S. 25. 1937 Nag 136 (137) [AIR V 24] : ILR (1937) Nag 266 ✣ 1920 Lah 452 (452) [AIR V 7] ✣ 1936 Sind 160 (162, 163) [AIR V 23] : 30 Sind L R 226 (DB). (Small cause suit filed in sub-judge's Court transferred to another Court as the sub-judge went on leave and successor had no small cause power — Sub-Judge returning from leave transferred suit to his own file to be tried as small cause case — *Held* that it was not an interlocutory order and assuming it was so the order amounted to a case decided and therefore revisable.) ✣ 1933 All 106 (107) [AIR V 20] : 54 All 1048. ('Case' is wider than "Suit" and includes termination of legal proceedings, which so long as the order is not set aside cannot be revoked.) ✣ 1926 Pat 575 (576) [AIR V 13].

[But see ('11) 9 Ind Cas 467 (468) (Rang) ✣ ('39) 41 Pun L R 864 (866). (Order holding that Court has jurisdiction to hear a case is an interlocutory order and therefore not revisable.)]

[2] The words 'case' has a wider meaning than the word "suit." 1958 Pat 22 (Pr 6) [AIR V 45 C 11] (DB).

[3] The term 'decide' in S. 25 should not be restricted to mean 'adjudicate finally on the merits.' ('11) 14 Cal L Jour 118 (120) (DB). (Order returning a plaint for presentation to proper Court is a 'case decided' and is capable of being revised.) ✣ 1926 Nag 276 (277) [AIR V 13]. (Returning plaint is deciding the case.) ✣ 1915 Mad 495 (495) [AIR V 2]. (Decided means disposed of.)

[But see 1925 All 393 (394) [AIR V 12]. (Award set aside in suit — Revision of order does not lie till suit proceeds to judgment.) ✣ 1955 Kutch 23 (Pr 3) [AIR V 42 C 13]. (Under S. 25, High Court has revisional powers when any case is decided by a Court of Small Causes. Unless a case is decided, this section would have no application — Order directing plaintiff to implead certain parties—No revision lies.) ✣ 1934 Lah 165 (166) [AIR V 21]. (Order rejecting amendment is not revisable.)✣ 1925 Oudh 254 (254) [AIR V 12]. (Order rejecting application for leave to amend.)✣1918 All 11 (12) [AIR V 5] : 41 All 42. (Decision on preliminary issue of jurisdiction—No revision lies.)]

[4] The words 'case decided' in S. 25 must be liberally construed and must be taken to include decision on all questions materially affecting the rights of the parties, though, not all interlocutory orders would amount to a 'case decided.' It will be a question of fact in each case whether the question decided amounts to a 'case decided' or not. Where the Court assumes jurisdiction which it does not legally possess the order will amount to a 'case decided' and a revision lies against it. 1956 Ajmer 9 (Pr 5) [AIR V 43 C 9].

[5] If a remedy is provided against an interlocutory order and if a party has the right to challenge that interlocutory order within the period allowed by the statute of limitation, it would not be correct to deprive him of that right merely because before he could secure the remedy in the superior Court, a final order is passed by the trial Court or has proceeded further and has heard or even finally decided the suit in which the interlocutory order was passed. 1956 Ajmer 9 (Pr 2) [AIR V 43 C 9]. (AIR 1937 Oudh 364, *Dissented from.*)

[6] Suit dismissed for non-payment of additional court-fee restored on a petition under S. 151, Civil P. C. and decreed — Application attacking order — *Held* that the order was wrong but the High Court could not interfere under S. 25 of Provincial Small Cause Courts Act as the suit had terminated and that the proper remedy for the applicant would be to apply under S. 25 attacking decree itself. 1937 Oudh 364 (364, 365) [AIR V 24]:13 Luck 263.

[7] Small Cause Court deciding that its jurisdiction is barred under Art. 29 of the Act has finally decided so far as that Court is concerned. 1937 Nag 68 (69) [AIR V 24].

[8] An order for inspection of accounts passed under O. 11, R. 18, Civil P. C., does not dispose of the whole case or any part of it and it does not amount to a case decided within S. 25. 1956 Ajmer 32 (Pr 5) [AIR V 43 C 21].

[9] Small Cause Court returning plaint for presentation before another Court—Judge is deemed to have decided the fate of the case so far as Small Cause Court is concerned. 1958 Pat 22 (Pr 6) [AIR V 45 C 11] (DB)✣1926 Nag 276 (277) [AIR V 13] ✣ ('11) 14 Cal L Jour 118 (120) (DB).

5. 'According to law.' — [1] High Court will interfere, when decision of Small Cause Court is not in accordance with law. ('46) 1946 Jaipur L R 184 (185). (Under S. 25, its powers are wider than those under S. 115, Civil P. C.) ✣ ('54) Madh B L J 1954 H C R 97(97). (When the finding is perverse or against

Section 25 — Note 5 *(contd.)*

weight of evidence, High Court will interfere.) ✣ 1953 Madh B 158 (Pr 4) [AIR V 40 C 59]. (Perverse finding of fact — High Court will interfere.)

[2] The expression 'according to law' in the section limits the power of High Court in revision to grounds of law that might have been raised in a second appeal—Questions of fact are not covered by the expression. 1935 All 372 (373) [AIR V 22].

[3] The phrase 'according to law' implies according to the forms of law prescribed for ensuring a fair trial. Where the trial has taken place in a manner not contemplated by the Code, and is nothing more than a travesty of the trial, a judgment based on such a trial could in no manner be accepted as being according to law within the meaning of S. 25. 1956 Raj 9 (Pr 6) [AIR V 43 C3] : ILR (1955) 5 Raj 869.

[4] The real test is whether the decision resulted in substantial miscarriage of justice by misapplication or misapprehension on a point of law or by material error in procedure or perversity in decision as to facts. ('53) ILR (1953) Madh B 331 (336).

[5] There is a difference between the phrases "was according to law" and was made according to law. If the decision made was not according to law, the High Court has discretion to pass such orders as it thinks fit. This confers wide discretion and it is this that distinguishes the revisional jurisdiction under S. 25 from the cases of second appeal. ('53) ILR (1953) Madh B 331 (335).

[6] Decree cannot be said to be in accordance with law (1) if the decision is not based on any evidence, (2) where it is based on erroneous and improper appreciation of evidence, amounting to gross misappreciation of evidence, (3) where it is based on evidence on which no reasonable man would reach the conclusion reached by the Court, (4) where it is based on erroneous view of law, (5) when it is based ignoring the rules of burden of proof and legal presumptions. This list is not exhaustive. But it will not be open to High Court to interfere with the finding of fact merely because on the evidence, the High Court takes a different view. This it can do in appeal but not in revision. 1961 Andh Pra 461 (Prs 11, 12) [AIR V 48 C 128] (DB).

[7] Judgment is open to revision if it (1) assumes facts (2) refuses to receive and consider pleas of parties (3) does not decide material points of dispute. 1914 Lah 42 (42) [AIR V 1].

[8] Section 25 ought to be considered with O. 20, R. 4 (1) of Civil P. C., and hence a judgment should be sufficiently intelligible to enable the High Court to be satisfied that the decision is according to law. 1943 Bom 416 (417) [AIR V 30] ✣ ('55) 8 Sau L R 17 (19) ✣ ('26) 27 Pun L R 135 (136).

[9] Discretion vested under S. 203 (corresponding to O. 20, R. 4) of Civil P. C., should be judicially exercised. Hence in cases involving difficult questions of law or mixed questions of fact and law the Judge should set out so much of his reasoning as would make it clear as to how he reached the conclusion. ('95) 1895 Pun Re No. 78, p. 373 (374) ✣ 1937 Cal 308 (308) [AIR V 24]. (Material circumstances on which reliance is placed by the Judge ought to be stated.) ✣ 1930 All 832 (832) [AIR V 17]. (Case disposed of without even stating whether the Judge believed the evidence — *Held* the case was not properly tried.) ✣ ('91) 13 All 533 (537). (Judgment dismissing suit and for reasons referring to a decision by some other Judge in another case is one which should be remanded for retrial.) ✣ 1920 Mad 310 (310) [AIR V 7] ✣ 1932 Mad 336 (340, 343) [AIR V 19] : 55 Mad 671 (DB).

[10] The use of the word "may" in S. 25 suggests that even if the decree or order made in a case is not according to law, the High Court can refuse to interfere with the decree or order, especially when no injustice had been done to any party. When it appears to the High Court that interference under S. 25 will not be beneficial to any of the parties and will simply put them to extra expenses and inconvenience and will also cause delay in the disposal of the suit, it is but proper that the High Court should refuse to interfere with the order. 1956 Bhopal 54 (Pr 6) [AIR V 43 C 28].

[11] Since the High Court is empowered under S. 25 to satisfy itself that the decree or order of the Court of small causes was in accordance with law or not, a correlative duty is cast on the trial Court to make its judgment sufficiently intelligible. 1950 Lah 128 (Pr 6) [AIR V 37 C 35] : Pak L R (1950) Lah 177. (Judge might without giving reasons for the decision, elucidate the points for determination in such detail as to make the decision intelligible.)

[12] Under S. 25 the High Court has jurisdiction to interfere with the decision of a Small Cause Court if it refuses to follow a plainly worded and unambiguous statute. When there is a special statute governing the case, the Small Cause Court acting judicially cannot ignore it and decide either on the general law or on some vague and general principle. If it does so, the jurisdiction of the High Court is attracted under the section. 1949 Nag 330 (Prs 3, 5) [AIR V 36 C 127] : I L R (1949) Nag 506 (DB).

[13] Where the Court wrongly orders the restoration of a suit dismissed by it on merits the order though without jurisdiction will not be interfered with by the High Court in the exercise of its discretion under S. 25 when the effect of setting aside the wrong order would be to put the parties to additional expenses and inconvenience. 1956 Bhopal 54 (Pr 6) [AIR V 43 C 28].

[14] Where in a suit on the basis of a khata the Court after recording evidence directed the plaintiff to bring his roznamcha for its own satisfaction and not at the instance of the defendant, the Court does not act illegally in disallowing the defendant's counsel to cross examine the plaintiff on the point. 1949 Ajmer 43 (Pr 6) [AIR V 36 C 19].

[15] Judgment based on speculative reasoning is contrary to law. 1935 Pat 452 (453)

Section 25 — Note 5 *(contd.)*

[AIR V 22]. (Account books rejected without definite finding as to whether they were forged or not.)

[16] Small Cause Court misdirecting itself by casting burden of proof wrongly, by not drawing correct inferences from documents, by basing its findings not on evidence but on conjectures or assumptions for which there was nothing in fact to support and by overlooking important principles of the law of evidence — This resulting in miscarriage of justice—High Court will interfere in revision. 1953 Madh B 32 (Pr 20) [AIR V 40 C 16].

[17] Where it is found that the trial Judge had not applied his mind in deciding the dispute the High Court can interfere in revision. 1944 Nag 145 (146) [AIR V 31] : I L R (1944) Nag 419 ✣ ('01) 1901 Pun Re No. 57, p. 180 (181).

[18] Where the Court has either not tried the points in dispute on merits or has decided those points in favour of the plaintiff but has dismissed the suit on taking an erroneous view of the law applicable, the case is a fit one for taking action under S. 25. 1947 Oudh 15 (Pr 5) [AIR V 34 C 8] : 21 Luck 536.

[19] Where the trial Court fully understood the question in issue and carefully ascertained the facts and had given reasons for its decision there is no case for revision. 1927 Oudh 569 (570) [AIR V 14] ✣ 1926 Oudh 478 (479) [AIR V 13]✣ 1933 Oudh 129 (130) [AIR V 20]. (*A* taking premises for rent from *B* admitting him as landlord — Subsequent denial by *A* of *B's* right and dealing with *C* as landlord—*B's* suit for rent for a particular period and *C's* suit for the period following it decreed on the basis of *A's* admission — *Held* suit was correctly decided and did not call for High Court's interference simply on the ground that the result was anomalous.) ✣ ('26) 95 Ind Cas 4 (5) (Lah). (Judgment not deciding pleas of limitation and jurisdiction set up by defendant is liable to be set aside.) ✣ ('30) 1930 Oudh W N 1202 (1203).

[20] Deciding case without considering the evidence in the case and basing the decision upon the opinion formed by a personal inspection is not legal. 1926 Rang 205 (206) [AIR V 13] : 4 Rang 221 (DB).

[21] Where evidence of plaintiff has not been sufficiently considered and the suit is dismissed High Court will interfere in revision. 1924 Pat 354 (355) [AIR V 11] ✣ 1922 Pat 39 (40) [AIR V 9] ✣ ('36) 1936 Mad W N 1376 (1376). (Case set up by defendant not stated in written statement and not supported by evidence — Plaintiff's claim cannot be dismissed without reasons stated in the judgment.) ✣ 1933 All 577 (579) [AIR V 20].

[22] Statement of plaintiff the only evidence on record — Judge not framing issues arising in the pleadings — Decision one that did not inevitably follow from the questions raised in the statement—*Held* there was no proper trial. 1933 All 339 (340) [AIR V 20].

[23] Judge failing to apply proper tests to point at issue—Trial is not proper. 1944 Nag 101 (102, 103) [AIR V 31] : I L R (1944) Nag 462.

[24] Decree based upon statement of plaintiff contradicted by all his witnesses is not in accordance with law. 1925 Oudh 188 (188) [AIR V 12].

[25] Plaintiff raised new case at hearing. Defendant having notice of precise grounds on which plaintiff led evidence, did not ask for adjournment to furnish further evidence to rebut. Decree passed is not wrong. 1929 Cal 654 (656) [AIR V 16].

[26] Where decree is opposed to public policy it is not improper to interfere with it. 1930 Cal 596 (598) [AIR V 17] : 57 Cal 1093.

[27] Municipal tax illegally recovered—Order of Court to refund amount to tax payer with interest as damages — *Held* the order allowing interest was not according to law within meaning of S. 25. 1944 Bom 233 (233) [AIR V 31] : I L R (1944) Bom 134.

[28] There is no error in law in passing a decree payable by instalments on condition of defendant executing a mortgage of his property. 1927 Oudh 236 (236) [AIR V 14].

6. Substantial justice. — [1] High Court can interfere only to cure injustice. 1920 Sind 14 (15) [AIR V 7] : 13 Sind L R 210.

[2] Duty of the High Court under S. 25 is to see that substantial justice is done between the parties. 1941 Oudh 485 (487) [AIR V 28]✣ 1949 Nag 113 (Pr 9) [AIR V 36 C 41] : ILR (1948) Nag 431. (No interference where substantial justice has been done.)

[3] The revisional powers can be exercised only to correct palpable errors and miscarriage of justice. 1941 Oudh 277 (279) [AIR V 28].

[4] The High Court ordinarily will not exercise its dircretionary powers in revision under S. 25 unless some error had been committed resulting in injustice. 1946 Oudh 1 (5) [AIR V 33 C 1] : 20 Luck 517✣1932 Oudh 230 (231) [AIR V 19]✣('99) 23 Bom 334 (336, 341) (DB)✣1930 All 87 (88) [AIR V 17] : 52 All 153 (DB). (Defendant applied to have ex parte decree set aside and filed surety bond with two sureties — One of them withdrew and other was rejected as insufficient — Court thereupon dismissed defendant's application—*Held*, there was substantial injustice done and the High Court could interfere in revision.)✣ 1942 Oudh 202(203) [AIR V 29]✣1929 Nag 70 (71) [AIR V 16]✣1935 All 716(717) [AIR V 22]. (Decree for wages barred by time causes substantial injustice.)✣1947 Nag 157 (158) [AIR V 34 C 47] : ILR (1947) Nag 45. (The paramount consideration is to see if substantial justice is done in a particular case and where the High Court comes to the conclusion that substantial justice has not been done, the power of interference under S. 25 is unfettered.)

[5] The substantial injustice must result directly from a misapplication or misapprehension of law or a material error in procedure. 1927 Oudh 627 (627) [AIR V 14] ✣ ('13) 14 Cri L Jour 496 (496) : 7 Low Bur Rul 76 ✣ 1935 All 379 (381) [AIR V 22].

[6] Where there has been no substantial injustice committed by lower Court in exercise of its jurisdiction, no revision lies. 1935

Section 25 — Note 6 *(contd.)*
Lah 190 (190) [AIR V 22]✣1922 Pat 106 (110) [AIR V 9]✣('37) 1937 Mad W.N 398(398, 399) ✣ 1927 All 463 (464) [AIR V 14] : 49 All 457.

[7] Where interference would result in perpetuating an injustice and substantial justice has been done by the lower Court, High Court will not interfere on the ground of a technical defect. 1946 Oudh 1 (5) [AIR V 33 C 1] : 20 Luck 517✣('97) 21 Bom 250 (255) (DB) ✣ 1936 Pesh 1 (2) [AIR V 23] ✣ 1941 Nag 273 (274) [AIR V 28] : ILR (1942) Nag 294 ✣ 1946 Nag 130 (131) [AIR V 33 C 34]✣1933 All 145 (146) [AIR V 20]✣1932 All 575 (577) [AIR V 19] (DB)✣1933 All 13 (13) [AIR V 20] : 54 All 409 (DB).

[8] Point for determination not set out in judgment — Trial Court, however, applying its mind to the question — No interference will be made only because the decision was not in accordance with law. ('54) Madh B L J 1954 HCR 1287 (1288).

[9] Where the view taken by the lower Court is not on the face of it incorrect and no injustice has been done the Chief Court should not use its discretionary power of revision under S. 25. ('01) 1901 Pun Re No. 19, p. 63 (65) (DB).

7. Discretionary orders — Revision. — [1] In a matter of discretion unless there are very special circumstances High Court is reluctant to interfere with the orders of the Court below. 1936 Lah 140 (140) [AIR V 23] (DB).

[2] Suit for use and occupation against trespasser involving question of title but cognizable by Small Cause Court — Judge trying it as small cause without returning plaint under S. 23 — *Held*, High Court could not interfere because the Judge has discretion whether to act under S. 23 or not. 1934 Lah 355 (355) [AIR V 21].

[3] Judge trying suit in a summary way in exercise of discretion under S. 23 — Question of title not decided one way or other — Decision revisable by High Court. ('12) 14 Ind Cas 2 (4) (Oudh).

[4] Powers under S. 23 are discretionary. When the applicant is guilty of suppressing a material fact, he is disentitled to the indulgence of the High Court at the revision stage. 1961 Madh Pra 152 (Pr 8) [AIR V 48 C 53].

[5] Discretion of Court in holding the security sufficient or otherwise will not be interfered with in revision. 1928 Oudh 488 (489) [AIR V 15].

[6] Where the Judge has not chosen to wait for the lawyer before taking up case the High Court will not interfere in revision as the matter is within the discretion of the trial Judge. 1921 Sind 50 (50) [AIR V 8] : 15 Sind L R 172 (DB).

[7] Exercise of discretion of Small Cause Court, not to stay suit under S. 34, Arbitration Act—Revision shall not be entertained. 1953 All 149 (Pr 7) [AIR V 40 C 66].

[8] Where in a small cause suit for recovery of arrears of rent, the trial Court, after considering the evidence, allows payment of decretal amount by instalments, the High Court will not in revision, interfere with the order as it cannot be said that that discretion has been exercised in so perverse a manner as to invite the interference of the High Court. 1956 Ajmer 69 (Pr 4) [AIR V 43 C 45].

[9] Court wrongly refusing amendment of plaint—High Court will interfere in revision under the Act. 1953 Hyd 212 (Pr 17) [AIR V 40 C 101] : ILR (1953) Hyd 366.

8. Ex parte decree.—[1] High Court can, in revision interfere with Lower Court's order setting aside ex parte decree. 1944 Nag 103 (103) [AIR V 31] : ILR (1944) Nag 161.

[2] Where Court uses discretion in setting aside an ex parte decree the High Court will not interfere. 1937 Oudh 206 (207) [AIR V 24].

[3] Ex parte decree — No application for setting it aside—*Held*, High Court would not interfere in revision. 1958 Raj 286 (Pr 2) [AIR V 45 C 95] : ILR (1958) 8 Raj 837.

[4] Ex parte decree — Application under O. 9, R. 13, Civil P. C., rejected — Revision against decree and also rejection order — Ex parte decree can be set aside on grounds mentioned in O. 9, R. 13, in revision against decree. 1949 Mad 396 (Pr 3) [AIR V 36 C 171].

[5] Small Cause Court after considering the grounds alleged for restoration holding them insufficient — No revision lies. 1935 All 437 (438) [AIR V 22].

[6] Ex parte decree — Setting aside of for sufficient cause—Whether cause for non-appearance was sufficient is a factual matter — Court accepting cause as sufficient — Matter cannot be agitated in revision. 1961 Madh Pra 2 (Pr 2) [AIR V 48 C 2].

[7] Application for setting aside ex parte decree—Defendant furnishing security beyond time and against the directions of Court — *Held*, in revision, that Court had no jurisdiction to set aside decree. ('38) 1938 All L Jour 742 (745).

[8] Under O. 9, R. 13, Civil P. C., it is for petitioners applying to have an ex parte decree set aside to satisfy Court that the service was not duly effected—Lower Court not satisfied that petitioners are entitled to have ex parte decree set aside—There can be no interference in revision. 1933 Lah 288 (289) [AIR V 20].

[9] Where ex parte decree was passed without declaring that summons was duly served the decree was set aside. 1922 Mad 417 (417) [AIR V 9].

[10] Suit dismissed for default restored and decreed ex parte the same day — *Held*, High Court had power to set aside the ex parte decree. 1935 Mad 196 (199) [AIR V 22].

[11] Where an ex parte decree is set aside on the term of payment of costs, the party accepting the costs cannot afterwards object to the order by way of revision under S. 25. When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. 1958 Andh Pra 483 (Pr 9) [AIR V 45 C 143] (DB).

Section 25 *(contd.)*

9. Return of plaint. — [1] Revision lies from an order which holds that the Small Cause Court has no jurisdiction and returns the plaint. 1925 Oudh 687 (687) [AIR V 12]✻ 1934 Oudh 429 (430, 431) [AIR V 21] : 10 Luck 199 (DB)✻ 1921 Lah 91 (91) [AIR V 8]✻ 1926 All 344 (345) [AIR V 13]. (Though remedy by way of suit is open.)

[But see ('09) 1 Ind Cas 288 (288) (DB) (Cal).]

[2] An order under S. 23 for returning the plaint which amounts to failure by the Court to exercise the jurisdiction vested in it—High Court can interfere in revision. 1920 Pat 519 (520) [AIR V 7]✻ ('11) 14 Cal L Jour 118 (120) (DB).

[3] Question of title incidental— It is in discretion of Small Cause Court to try suit itself or to return the plaint for presentation to proper Court — Court deciding to try the suit itself—Court does not commit any error. 1954 Nag 128 (Prs 3, 4) [AIR V 41 C 50].

[4] Plaint returned for proper presentation—Suit filed thereupon rejected — Appeal dismissed by Additional District Judge—*Held* that the Additional District Judge ought to have made a reference to the High Court and that the High Court could revise the order returning the plaint. 1934 Nag 257 (257, 258) [AIR V 21].

10. Error of procedure.—[1] High Court will not ordinarily exercise the powers under S. 25 unless it appears that some substantial injustice has directly resulted from a material error in procedure. 1928 Oudh 144 (144) [A I R V 15]. (A I R 1926 Oudh 264, *Foll.*)✻ ('11) 8 All L Jour 929 (930)✻ 1915 Mad 338 (339) [AIR V 2]. (Wrong substituted service held no ground for interference.)

[2] No revision lies unless in the course of the decision any material irregularity of procedure touching the decision was committed. 1955 N U C (Punj) 5722 [AIR V 42].

[3] Material irregularity — Small Cause suit — Date of hearing fixed in the absence of officer empowered to act as Court of Small Causes is invalidly fixed — Court taking up case on such date and passing ex parte decree without issuing notice to defendant acts with material irregularity. 1946 Lah 62 (63) [AIR V 33 C 17].

[4] Trying of Small Cause Court suit as an ordinary suit — Dismissal — First appeal — Second appeal cannot be converted into revisional application under S. 115, Civil P. C.— Appellant having been deprived of his right to come in revision under S. 25—Suit remanded to trial Court for trial by a Judge invested with Small Cause Court powers. 1945 Bom 197 (199) [AIR V 32] : ILR (1945) Bom 382 (FB).

[5] Where a Judge after completion of evidence and arguments sent for the parties to argue in his presence and decided the case on their unrecorded statements and evidence already taken, a re-trial was ordered as the proceeding was very irregular. 1921 Cal 558 (558) [AIR V 8].

[6] Where an ex parte decree was set aside on unregistered security bond having been given and accepted order was revised. 1917 Cal 195 (196) [AIR V 4] (DB).

[7] Application to set aside ex parte decree— Deposit not made—Court ordering to furnish cash security — Default — Application to file a security bond — Court allowing it and setting aside the decree—*Held* there was non-compliance with mandatory provisions of S. 17 causing sufficient injustice to plaintiff and therefore the High Court could interfere. ('38) 1938 All L Jour 742 (745).

[8] Court cannot dismiss suit for failure to prove consideration where defendant admitted claim but pleaded for instalments. 1918 Cal 476 (477) [AIR V 5] (DB).

[9] Court taking up case on date of original hearing even though adjournment was granted on application by plaintiff—Judgment and decree set aside and retrial ordered. 1955 N U C (Ajmer) 4789 [AIR V 42].

[10] Judgment delivered seven months after hearing evidence, the record of which was incomplete and imperfect — *Held* bad and retrial ordered. ('12) 8 Nag L R 91 (92).

[11] Where Court has not placed on record grounds on which its decision proceeds—High Court will interfere in revision. 1917 All 68 (69) [AIR V 4].

[12] Law does not ordain that reasons should be set out in decree of a Small Cause Court. 1934 Pat 243 (244) [AIR V 21].

[13] Where the parties have led evidence and the Small Cause Court had ample material to come to the conclusion, its decree is not liable to be set aside on account of its failure to frame an issue on simple point when the applicant has not been prejudiced. 1944 Nag 120 (121) [AIR V 31]: ILR (1944) Nag 46.

[14] Rules of procedure laid down in O. 27 violated — High Court is not bound by questions of waiver as between parties and is bound to interfere. 1934 All 107 (108) [AIR V 21].

[15] Small cause suit — Judge departing from usual procedure prescribed for conduct of cases cannot fall back on provisions of such procedure to suit his convenience— Decree set aside in revision and case remanded for trial from stage when wrong procedure was followed. 1933 Lah 452 (453) [AIR V 20].

[16] Suit for two alternative reliefs one of which is not cognizable by Small Cause Court and which cannot be given in law— Suit dismissed—High Court in revision remanded the suit for trial with a direction to strike out that relief by amendment of plaint. 1916 Pat 109 (109) [AIR V 3] (DB).

[17] Court postponing case for two months behind back of plaintiff and before date of hearing — Procedure held not in accordance with law. 1936 Pat 472 (473) [AIR V 23] : 15 Pat 561 (FB).

[18] Taking up new case after 5 p. m. in contravention of directions of High Court— Dismissal in default of plaintiff — *Held* in revision that there was a material irregularity and the suit must be restored. 1922 All 72 (73) [AIR V 9] : 44 All 325.

[19] Suit instituted in Small Cause Court— On date of first hearing defendant applying

Section 25 — Note 10 (*contd.*)
for adjournment without any affidavit to support application—Defendant unwilling to pay adjournment costs also—Court holding that defendant should have obtained leave under O. 37, Civil P. C., to appear and defend suit — Application for adjournment rejected and plaintiff's claim decreed—Provisions of O. 37, Civil P. C. held were inapplicable and it was not incumbent on the defendant to obtain previous leave to appear and defend suit — Nor was it necessary for him to agree to pay adjournment costs—If he did not pay costs he would not have been allowed to file written statement — Order refusing adjournment held erroneous and liable to be set aside. 1959 Manipur 14 (Pr 6) [AIR V 46 C 7].

[20] Small cause suit—Plaintiff alleging of having supplied ghee to defendant — Defendant not admitting plaintiff's claim—Judge putting plaintiff to proof— *Held* that relevant issue was framed and that the Judge did consider the issue raised by the pleadings — No interference in revision. 1953 Him Pra 68 (Pr 8) [AIR V 40 C 30].

[21] Suit instituted in Small Cause Court—On date of first hearing defendant applying for adjournment without any affidavit to support application — Defendant unwilling to pay adjournment costs also—Court holding that defendant should have obtained leave under O. 37 to appear and defend suit—Application for adjournment rejected and plaintiff's claim decreed — Provisions of O. 37, C. P. Code held were inapplicable and it was not incumbent on the defendant to obtain previous leave to appear and defend suit — Nor was it necessary for him to agree to pay adjournment costs — If he did not pay costs he would not have been allowed to file written statement — Order refusing adjournment held erroneous and liable to be set aside. 1959 Manipur 14 (Pr 6) [AIR V 46 C 7].

[22] See also Note 5.

11. Interference on questions of fact.— [1] It is true that revisional powers are reserved to the High Court under S. 25 but in exercising those powers the High Court will not, and is not intended to, perform the function of a Court of appeal and will not therefore ordinarily interfere on questions of pure fact. 1952 Ajmer 45 (2) (Pr 3) [AIR V 39] ✠ 1953 Sau 108 (Pr 2) [AIR V 40 C 55].

[2] In a revision under S. 25 the High Court will not ordinarily interfere on a question of fact but it is not absolutely debarred from doing so. 1927 Rang 159 (159) [AIR V 14] ✠ 1921 Bom 407 (407) [AIR V 8]: 45 Bom 292 (DB) ✠ 1935 All 690 (691) [AIR V 22].

[But see 1935 All 372 (373) [A I R V 22]. (S. 25 does not cover revision on questions of fact).]

[3] Although the powers of a Court of revision under S. 25, Provincial Small Cause Courts Act, are limited, though more extensive than under S. 115, C. P. Code, and it is not the practice of the High Court to lightly interfere with findings of fact yet, where there is an obvious injustice to the plaintiff and perversity in the decision by the lower Court, the High Court can set aside the decision of the lower Court. 1954 Sau 26 (Prs 2, 3) [AIR V 41 C 13] ✠ 1927 Bom 454 (454) [AIR V 14]: 51 Bom 814 (DB).

[4] A trial Court is in a far better position to judge the credibility of the oral evidence having an opportunity to hear and see the witnesses, which opportunity is denied to the High Court. The latter will not therefore interfere with the conclusion of the trial Court on a question of fact. 1957 Raj 279 (Pr 9) [AIR V 44 C 104]: ILR (1957) 7 Raj 898 ✠ 1961 All 347 (Pr 15) [A I R V 48 C 90] (DB) ✠ ('54) Madh B L R 1954 (Civil) 477 (478).

[5] High Court will not interfere with the conclusion of the trial Judge on a pure question of fact. 1956 Bom 236 (Pr 2) [A I R V 43 C 91] ✠ 1958 All 32 (Pr 6) [AIR V 45 C 11] ✠ 1958 Raj 286 (Pr 5) [A I R V 45 C 95]: I L R (1958) 8 Raj 837 ✠ 1955 N U C (Ajmer) 4750 [AIR V 42]. (Finding supported by evidence—No interference.) ✠ ('54) Madh B L J 1954 H C R 97 (97, 98). (Finding not perverse or against weight of evidence — No interference.) ✠ ('46) 1946 Jaipur L R 184 (185). (Decision apparently in accordance with evidence — No interterence.)

[6] Where the evidence makes it clear that a question of fact was gone into by the Judge and this decision is apparently in accordance with the evidence, the High Court will not usually interfere in revision merely because it is possible to take a different view of the evidence to that of the Court below. 1955 Mad 271 (Pr 5) [(S) AIR V 42 C 77] ✠ 1961 Andh Pra 461 (Prs 11, 12) [AIR V 48 C 128] (DB) ✠ 1961 Mad 152 (Pr 3) [AIR V 48 C 38] ✠ 1947 Cal 288 (289) [AIR V 34 C 83] (DB) ✠ 1933 Oudh 393 (393) [AIR V 20]: 8 Luck 119 ✠ ('43) 1943 Oudh W N 132 (132) ✠ 1936 Cal 497 (503) [AIR V 23] : ILR (1937) 1 Cal 1 (FB) ✠ 1925 All 273 (274) [AIR V 12]: 47 All 136. (Finding as to wilful negligence.) ✠ 1936 Oudh Oudh 176 (176) [AIR V 23] (DB). (Finding regarding genuineness of signature.) ✠ 1918 Nag 204 (205) [AIR V 5] ✠ 1931 All 210 (211) [AIR V 18] (DB).

[7] Generally revisional power under S. 25 will not be exercised as though it were an appellate power, even though High Court were of view that different conclusion could have been arrived at. Something much more than this must be shown. 1961 Mad 152 (Pr 3) [AIR V 48 C 38].

[8] Interference is not justified on the ground that finding of fact is inadequate or incorrect. 1955 N U C (Mad) 4544 [A I R V 42].

[9] Where there is no clear finding of fact, High Court is entitled to interfere in revision. 1925 Oudh 486 (486) [AIR V 12].

[10] Under S. 25 the High Court will not interfere on a pure question of appreciation of evidence. 1949 Ajmer 43 (Pr 8) [AIR V 36 C 19] ✠ 1953 Sau 108 (Prs 2, 3) [AIR V 40 C 55]. (Question whether plaintiff's suit was false and ought not to have been decreed, is one of fact.)

[11] Interference in regard to appreciation of evidence should, in general, only be exercised when there is a very clear case of mis-

Section 25 — Note 11 *(contd.)*

appreciation which has resulted in injustice and makes the decree one that cannot be regarded by a revisional Court as 'according to law'. 1953 Madh B 158 (Pr 4) [AIR V 40 C 59] ✠ 1955 N U C (Mad) 4331 [AIR V 42] ✠ 1921 Bom 407 (408) [AIR V 8]: 45 Bom 292 (DB) ✠ 1934 Pat 243 (244) [AIR V 21]. (Court disbelieving evidence and dismissing suit — Decision not shown to be not in accordance with law — No interference.)

[12] Finding of fact by Small Cause Court is binding in revision unless it is shown that in coming to it the Judge has acted illegally or with material irregularity. ('97) 1897 Pun Re No. 32 P. 149 (151) (DB).

[13] Where the finding of fact is based upon an obvious error in the appraisement of the evidence, then it cannot be described as a finding in accordance with law and the High Court will interfere. 1950 Cal 201 (Pr 8) [AIR V 37 C 70]: ILR (1951) 1 Cal 279.

[14] Though the Court will not ordinarily interfere with decisions on fact it will interfere with a question of fact when it is obviously perverse. 1955 Ajmer 46 (Prs 6, 7, 8) [AIR V 42 C 41]. (High Court will interfere on question of limitation — 1925 A M L J Sup 6 and 1946 A M L J 42 (1), *Not foll.*) ✠ 1957 Pat 168 (Pr 31) [AIR V 44 C 58] : 35 Pat 986 (DB) ✠ ('55) 1955 A M L J 101 (103) ✠ 1955 N U C (Mad) 4331 [AIR V 42] ✠ 1953 Madh B 158 (Pr 4) [AIR V 40 C 59].

[*See also* ('54) Madh B L J 1954 H C R 97 (97, 98.)]

[15] Unless it can be shown that the conclusions on fact were so perverse as to lead to a conclusion that the Judge made no serious attempt to deduce them from the evidence before him or was utterly incapable of making such deduction a High Court will not interfere in revision on questions of fact. 1925 Rang 310 (311) [AIR V 12] : 3 Rang 471 ✠ 1933 All 373 (374) [AIR V 20] ✠ 1927 All 393 (393) [AIR V 14] ✠ 1925 All 172 (173) [AIR V 12] (DB) ✠ 1944 Mad 181 (183) [AIR V 31]: ILR (1944) Mad 643 : 45 Cri L Jour 464 (DB) ✠ 1927 Mad 960 (960) [AIR V 14] ✠ 1916 Mad 433 (434) [AIR V 3] (DB). (Question of negligence is one of fact.) ✠ 1939 Nag 19 (19) [AIR V 26] ✠ ('37) 31 Sind L R 1 (3, 4) (DB).

[16] A finding based upon no evidence is not a good finding in law and can be interfered with by the High Court. 1925 Lah 278 (278) [AIR V 12] ✠ 1955 N U C (Kutch) 4307 [AIR V 42]. (Finding that amount due on khata was repaid by predecessor of defendant.) ✠ 1922 Oudh 130 (130, 131) [AIR V 9] ✠ ('10) 1910 Pun W R No. 89 p. 245 (247) ✠ 1914 Lah 166 (166) [AIR V 1]. (Finding based on extremely meagre evidence.)

[17] Finding on question of fact without reference to material evidence rejected in revision. 1920 Mad 512 (513) [AIR V 7] : 43 Mad 617 (DB).

[18] Perverse conclusion on question of fact leading to inference that it was not deduced from evidence — Decision is not according to law and is not binding. 1955 NUC (Kutch) 4308 [AIR V 42].

[19] Where the finding of fact is clearly opposed to the evidence on record resulting in injustice to a party the High Court will interfere. 1914 Sind 98 (100) [AIR V 1] : 8 Sind L R 164 (DB) ✠ 1917 Lah 180 (181) [AIR V 4] ✠ 1933 Pat 145 (146) [AIR V 20].

[But see ('12) 1912 Mad W N 181 (182).]

[20] A decision based upon assumption against the whole weight of evidence will be interfered with. 1927 Rang 159 (159) [AIR V 14].

[21] Court having jurisdiction to decide the matter — No interference even if decision is based on insufficient evidence. 1955 N U C (Punj) 5722 [AIR V 42].

[22] The revisional powers under S. 25 are discretionary and there should be no interference on a question of fact or of law even though the decision may appear to be erroneous, unless the conclusion of the Small Cause Court is one which no judge acting judicially could reasonably reach. 1959 Ker 356 (Pr 6) [AIR V 46 C 120] : I L R (1958) Ker 1151. (The High Court declined to interfere even though the trial court's view on question of limitation was not accepted). ✠ 1955 Mad 271 (Pr 5) [(S) AIR V 42 C 77] ✠ 1943 Nag 117 (121 125, 128) [AIR V 30] ILR (1943) Nag 176 (FB). (AIR 1923 Nag 292 and AIR 1927 Nag 77, *Overruled.*) ✠ 1928 Bom 504 (505) [AIR V 15] : 52 Bom 770 (DB).

[23] Revision lies on ground of error of law or fact when there is injustice — Application for restoration dismissed without calling upon plaintiff to corroborate allegations — There is injustice to plaintiff. ('52) 1952 Raj L W 406 (406).

[24] When the trial Court has brushed aside the documentary and oral evidence without giving any good reason for doing so and has returned a finding contrary to the evidence on record, the finding arrived at by the trial Court can be overset in revision. 1952 J & K 27 (Pr 4) [AIR V 39] : 10 J & K L R 183.

[25] When, a finding is based upon a misinterpretation or brushing aside of a very valuable piece of evidence, e. g., not taking into consideration important admissions of the plaintiff, it is not only permissible but necessary for the High Court to vacate that finding in the interest of justice. ('52) I L R (1952) 2 Raj 860 (863) ✠ 1941 Oudh 161 (165) [AIR V 28] : 16 Luck 402 (DB).

[26] High Court should not interfere in revision with finding of fact on mere ground that Court misdirected itself as to the burden of proof. 1917 Mad 349 (350) [AIR V 4] (DB).

[27] Judge without coming to any decisions recording finding of fact in favour of defendant solely on theory that when neither could be believed contention of defendant should be preferred even though burden of proof lay on defendant — Finding should be interfered with. 1940 Sind 228 (229) [AIR V 27] (DB).

[28] Question of fact gone into by Judge — Fact that it is not mentioned in judgment is of no significance — High Court will not interfere in revision. 1947 All 24 (25) [AIR V 34 C 14].

Section 25 — Note 11 (*contd.*)

[29] Instalment bond—Suit on, by *P* against *D* — Trial Court accepting *P's* interpretation of words "each year" in bond—*D* in revision advancing other interpretation which was not the only one possible and was not advanced in trial Court—*D* held could not agitate interpretation in revision. 1947 Cal 288 (289) [AIR V 34 C 83] (DB).

[30] Short delivery — Suit for damages—Facts to make out case of misconduct not asked for in lower Court from defendant — That material informations were not given cannot be made grievance in High Court. 1947 Pat 118 (119) [AIR V 34 C 43].

[31] The question whether the property in dispute is a residential house to which the Sind Rent Control (Residential Premises) Order, 1942, applies is a question of fact which cannot be determined in revision under S. 25. 1947 Sind 146 (147) [AIR V 34 C 53] : ILR (1946) Kar 329 (DB).

[32] Appreciation of evidentiary value of entries in document not of title — It is question of fact — No interference. 1955 N U C (Ajmer) 4800 [AIR V 42].

[33] Where the finding of fact is that a clerical mistake in the documents was corrected, that would not be regarded as a material alteration. There is no question of law involved in such a case. 1955 N U C (Assam) 5528 [AIR V 42].

[34] Liability for claim arising on admission or proof—Party under liability not alleging or proving discharge — Conclusion that party claiming cannot be believed is perverse finding and is not binding being a decision not according to law. 1955 N U C (Kutch) 4308 [AIR V 42].

[35] Finding that cash consideration was not paid is one of fact—No interference. 1955 N U C (Kutch) 1812 [AIR V 42].

[36] Small Cause suit for arrears of rent brought by heir to property of J—Judge holding that plaintiff was not heir of J—Question whether plaintiff was heir of J or not held was question of fact — Finding of Judge not being perverse or obviously wrong High Court held could not interfere on revision side. 1953 Madh B 242 (Pr 3) [A I R V 40 C 90].

[37] Question whether amount decreed was correct or not is one of fact — Cannot be raised in revision. 1960 Madh Pra 30 (Pr 7) [AIR V 47 C 15].

[38] Point of jurisdiction raised after all evidence let in — Court holding it has no jurisdiction — Court is yet entitled to record finding on other points for determination — If it finds plaintiff's claim not proved which is a finding of fact, High Court will not interfere, even if question of jurisdiction is wrongly decided. 1955 Kutch 8 (Prs 4, 5) [(S) AIR V 42 C 4].

[39] Question whether rate of interest was excessive is one of fact — Nothing to show that finding of Court that 12 P. C. was proper rate of interest was substantially unfair — High Court will not interfere. 1956 Ajmer 79 (Pr 2) [AIR V 43 C 50].

[40] The question whether certain tins of 'til' oil were contracted to be sold by defendants, is one of fact, and the High Court will not therefore ordinarily interfere. 1952 Ajmer 45 (2) (Pr 3) [AIR V 39].

[41] Question as to quantum of profits — Question cannot be considered in petition under S. 25. ('61) 65 Cal W N 1067 (1069).

12. Error of law. — [1] Gross errors of law are revisable under S. 25 of the Act. 1924 All 691 (691) [AIR V 11].

[2] The scope of S. 25 is wider than that of S. 622, Civil P. C. (1882) and the Chief Court acting thereunder is competent to correct errors of law made by Small Cause Court Judge. ('95) 1895 Pun Re No 66, p. 330 (332).

[3] Trial Court taking erroneous view of law—High Court will interfere. 1957 Pat 168 (Pr 31) [AIR V 44 C 58] : 35 Pat 986 (DB).

[4] Question of law can be raised in revision under S. 25. 1955 Ajmer 46 (Prs 6, 7) [AIR V 42 C 41] ✠ ('55) 1955 A M L J 101 (103).

[5] In the absence of an error of law the High Court will not interfere in revision. ('22) 67 Ind Cas 851 (852) (DB) (Cal).

[6] Section 25 gives discretion to the High Court and the High Court will not interfere in every case in which a possible error of law has been made. 1936 Pat 132 (132) [AIR V 23].

[7] Where the question of law involved is doubtful there is no ground for interference by High Court. ('11) 14 Oudh Cas 343 (354) (DB). (That High Court would have decided it if there was second appeal is not a ground.)✠ 1939 Nag 64 (65) [AIR V 26]. (High Court will interfere only when the law is well known.) ✠ 1915 All 241 (242) [AIR V 2]. (Decision on merits — Question of law very doubtful — Substantial justice done between parties—High Court will not interfere.)

[8] Error of law — No interference unless the conclusion is one which no judge acting judicially could reasonably reach. 1959 Ker 356 (Pr 6) [AIR V 46 C 120] : ILR (1958) Ker 1151.

[9] The fact that the view taken by the lower Court is incorrect on a question of law constitutes no ground for interference unless substantial injustice has resulted therefrom. 1943 Oudh 412 (413) [AIR V 30] : 19 Luck 291 ✠ ('52) 1952 Raj LW 406 (406). (Application for restoration dismissed without calling upon plaintiff to corroborate allegations—There is injustice to plaintiff.) ✠ 1933 Oudh 346 (346) [AIR V 20] ✠ 1939 All 590 (591) [AIR V 26] : I L R (1939) All 709. (Erroneous view of law resulting in substantial injustice — High Court will interfere in revision.) ✠ 1921 All 325 (325) [AIR V 8] (DB) ✠ 1936 Pat 84 (84) [AIR V 23]. (There is substantial injustice where there is clear error of law or when there is obvious perversity in the decision of a question of fact.)✠1921 Sind 99 (100) [AIR V 8] : 15 Sind L R 193 (DB) ✠ 1917 Low Bur 34 (35) [AIR V 4] ✠ ('07) 5 Cal L Jour 413 (415) (DB). (Error of law must be substantial.) ✠ 1929 Sind 117 (117, 118) [AIR

Section 25 — Note 12 (*contd.*)

V 16] (DB). (Court having jurisdiction committing error of law. No interference in the absence of failure of justice.) ✣ ('42) 1942 Nag L Jour 311 (313). (Where there has been a palpable injustice and a simple error of law, the High Court may well exercise its powers of revision.) ✣ 1931 Lah 606 (607) [AIR V 18].

[10] The mistake of law should be shown to have affected the result of the case or to have prejudiced the petitioner before High Court could interfere. 1924 Pat 793 (793) [AIR V 11].

[11] Where substantial justice has been done, a decision though it has erred on a question of law will not be interfered with. 1915 Lah 209 (210) [AIR V 2] ✣ 1915 Mad 307 (307) [AIR V 2]. (Substantial justice done —High Court should be slow to interfere.)

[12] High Court can maintain a decree which is not in accordance with a correct view of the law where the setting aside the decree would result in injustice. 1921 Nag 66 (67) [AIR V 8].

[13] High Court should not interfere either on question of fact or law, even if judgment is erroneous unless conclusion is one which no Judge acting judicially could reasonably reach. 1944 Sind 168 (169) [AIR V 31] : I L R (1944) Kar 42 (DB) ✣ 1943 Nag 117 (122, 128) [AIR V 30] : I L R (1943) Nag 176 (FB). (Per *Bose, J.*—Illustrative instances in which interference would be possible are when the Small Cause Court deliberately refuses to follow a decision of its own High Court or of the Privy Council or a plainly worded and unambiguous statute. AIR 1923 Nag 292 impliedly *overruled*.)

[14] Where the question to be decided is a question of fact and is also partly a question of law the High Court can interfere in revision. 1930 Bom 68 (69) [AIR V 17] : 54 Bom 14 (DB).

[15] Where the decision of the suit depends on legal inferences to be drawn from established facts and the question is an important question of law a revision will lie. 1936 Pesh 148 (148) [AIR V 23] ✣ 1942 Rang 70 (74) [AIR V 29] : 1941 Rang L R 724. (High Court in revision can go into the question whether a particular statement by a person amounted to a withdrawal of the tender made by him or not.) ✣ 1935 Lah 206 (208) [AIR V 22]. (Question whether facts found do not in law constitute misconduct can be determined in revision.) ✣ 1930 Bom 129 (131) [AIR V 17] : 54 Bom 105 (DB). (Suit for damages against Railway Company—Whether there was sufficient evidence for the Judge to justify the inference drawn by him and required by the risk note to fix liability on the company, can be determined in revision.)

[16] Although High Court will seldom interfere with question of fact, where the initial error in law has entirely vitiated the whole treatment of the case by the Judge of the Small Cause Court, the High Court will interfere and will do what it thinks just. 1943 Nag 141 (142) [AIR V 30] : ILR (1943) Nag 272.

[17] Where suit was premature but was decreed, the High Court can interfere in revision. 1924 Pat 135 (136) [AIR V 11].

[18] Appreciation of evidence by trial Court is not binding in revision on the High Court. ('35) 18 Nag L Jour 97 (97, 98).

See also Note 14.

[19] In the following cases it was held that there was error of law calling for interference in revision:

(a) Inference from proved documents. 1932 Oudh 283 (284) [AIR V 19] : 7 Luck 116.
(b) Failure to take the presumption imported by law while construing the nature of the document. 1935 All 410 (411) [AIR V 22].
(c) Omission to decide material issue as to genuineness of mortgage. 1920 Pat 521 (522) [AIR V 7] : 5 Pat L Jour 248.
(d) Court declining to give effect to stipulation for forfeiture of a deposit on a wrong view of law. 1923 Rang 47 (48) [AIR V 10] : 11 Low Bur Rul 420.
(e) Dismissal of suit on erroneous view of law after deciding points in dispute in plaintiff's favour. 1947 Oudh 15 (17) [AIR V 34 C 8] : 21 Luck 536.
(f) Trial Court stating that the right sought for was easement where in fact it was not so. 1923 Rang 205 (205) [AIR V 10] : 1 Rang 281.
(g) Onus wrongly placed. 1922 Pat 17 (19) [AIR V 9] ✣ 1932 All 164 (166) [AIR V 19] : 54 All 375 ✣ 1936 Pat 132 (132) [AIR V 23].
(h) Allowing appeal on grounds not covered by O. 47, R. 7. 1925 All 395 (395) [AIR V 12].
(i) Omission to consider material evidence or mistake in appreciation resulting in substantial injustice. 1933 Cal 501 (502) [AIR V 20] ✣ 1931 Cal 163 (164) [AIR V 18].
(j) Court requiring standard of proof higher than that required by Evidence Act. 1947 Nag 157 (158) [AIR V 34 C 47] : ILR (1947) Nag 45.

[20] In the following cases it was held that revision did not lie:

(a) Doubting genuineness of document. 1916 Lah 304 (304) [AIR V 3].
(b) Court failing to decide whether a question was bona fide or a decision thereon necessary for the disposal of the suit. 1934 All 695 (696) [AIR V 21].
(c) Technical plea of res judicata where the previous decision was not correct. 1934 Mad 563 (564) [AIR V 21].
(d) Memorandum of evidence not showing any statement as to consideration—Defence plea of denial of execution of bond under which money was claimed —Court holding defence plea false has not committed any error in law. 1923 Cal 319 (319) [AIR V 10] (DB).
(e) Suit for damages against Railway company in respect of goods damaged by rain water. Court refusing to infer misconduct from certain circumstances in

Section 25 — Note 12 *(contd.)*

the absence of any finding or evidence on which a finding of misconduct could be based — *Held* there was no error of law. 1936 Pat 257 (258) [AIR V 23].

(f) Finding that clerical mistake in documents was corrected—It is not a question of material alteration—There is no question of law involved in such a case. 1955 N U C (Assam) 5528 [AIR V 42].

13. Question of limitation.—[1] Revision lies on a decision of Small Cause Court on the question of limitation. ('13) 11 All L Jour 295 (296)+1955 Ajmer 46 (Prs. 6, 7, 8) [A I R V 42 C 41]. (1925 A M L J Sup 6 and 1946 A M L J 42 (1), *Not foll.*) ✣ ('13) 20 Ind Cas 175 (176) (DB) (All) ✣ 1928 Lah 274 (275) [AIR V 15]. (Order dismissing suit as barred by limitation.) ✣ 1918 Oudh 329 (330) [A I R V 5] : 21 Oudh Cas 139.

[**See however** 1938 Mad 252 (253) [A I R V 25] (DB). (Where the trial Court only tries the issues of limitation and no decree or order has been made in the case the High Court cannot proceed under S. 25.)]

[**But see** ('46) 1946 A M L J 42 (1) (42). (A revision will not lie against the decision of a Small Cause Court Judge on a legal point of limitation only.) ✣ ('12) 15 Oudh Cas 319 (320).]

[2] Wrong decision on a question of limitation is not per se revisable. 1928 Lah 51 (52) [AIR V 15].

[3] The fact that the Small Cause Court whose order is sought to be revised might have come to an erroneous finding on a question of limitation, is no ground for revision under S. 25. ('95) 17 All 422 (423) DB)+1926 Oudh 62 (63) [AIR V 13]. (That Court might have gone wrong by a few days on some nice question relating to limitation is no ground.)

[4] High Court will not exercise its revisional powers under S. 25 where no injustice had been done even though the decision on the question of limitation is erroneous. ('36) 161 Ind Cas 423 (424) (Oudh)+1960 Andh Pra 89 (Pr 12) [A I R V 47 C 30] ✣ 1946 Cal 526 (528) [A I R V 33 C 120]. (No interference, specially when interference would result in injustice to opposite party.) ✣ 1936 Oudh 297 (298) [AIR V 23]. (Defendant dishonestly stating that he made no part-payment of the decree where in fact he had made the payment — Order holding that such a payment was paid which saved limitation without considering the question whether uncertified payment would save limitation would not be interfered with in revision.)

[5] A decision which has rendered substantial justice as between the parties will not be interfered with even though it is erroneous on a point of limitation. ('28) 108 Ind Cas 378 (378) (Lah)+1935 Lah 137 (138) [A I R V 22].

[6] Where the question of limitation raised is even one of law, interference is not justified if the Court is satisfied that far from furthering any ends of justice, it would perpetuate an injustice in interfering with the decree of the lower Court. 1942 Oudh 161 (163) [A I R V 29] : 17 Luck 226 ✣ 1936 Oudh 247 (248) [AIR V 23] (DB).

[7] Error of law on question of limitation—No interference by High Court if the conclusion of question of limitation was not one which no Court acting judicially could reach. 1959 Ker 356 (Pr 6) [AIR V 46 C 120] : I L R (1958) Ker 1151.

[8] The Court certainly can revise a decision of a Small Cause Court on a question of limitation, where such decision is wrong and has resulted in an injustice to a party. 1952 Ajmer 51 (2) (Pr 3) [A I R V 39] ✣ 1960 Andh Pra 89 (Pr 12) [AIR V 47 C 30].

[9] High Court could interfere in revision where the Court dismissed a suit without reference to provisions of Limitation Act applicable to the case. ('22) 20 All L Jour 89 (89)+1915 All 161 (162) [AIR V 2].

[10] Where the trial Court has decreed a time barred claim and the decree has been found to be not in accordance with law the High Court will interfere in revision. Plea of limitation has to be treated as any other plea of law. ('50) 1950 All L Jour 308 (309).

[11] Small Cause Court entertaining time-barred suit by wrongly holding that limitation was saved by application of the U. P. Temporary Postponement of Execution of Decrees Act (10 of 1937) and decreeing suit—Suit dismissed by High Court in its revisional jurisdiction under S. 25. ('50) 1950 All L Jour 314 (315).

14. Question of jurisdiction.—[1] Decree passed in a suit of Small Cause nature by a Judge having Small Cause power is not appealable but is revisable under this section. ('35) 62 Cal L Jour 530 (532).

[2] Small Cause Court was held to have jurisdiction to decide the validity or otherwise of a valuation by the Municipal Commissioners of Calcutta of properties for assessment of rates and the High Court will not interfere under S. 622, Civil P. C. ('02) 6 Cal W N 480 (483).

[3] Where the Small Cause Court fails to exercise its jurisdiction the High Court can interfere. 1916 Pat 75 (75, 76) [AIR V 3] : 1 Pat L Jour 465 (DB). (Subsequent contract pleaded in defence—Plaintiff contending that it was rescinded by defendant's default — Failure of Court to decide the question of non-performance of contract — High Court can interfere.)+1940 Lah 13 (13) [AIR V 27]. (Failure to decide a point of local jurisdiction raised by the plaintiff in his pleas.)

[4] Where decree is passed without jurisdiction by the lower Court, High Court ought to interfere in revision. 1935 Mad 554 (555) [AIR V 22]+1925 Oudh 103 (103) [AIR V 12]. (Court trying the case owing to misrepresentation of the plaintiff.) ✣ 1936 Pesh 193 (194) [A I R V 23]. (Security bond not of nature specified in S. 17 — Bond in correct form not filed within limitation — Order setting aside ex parte decree — Order, held was without jurisdiction and would be set aside in revision.) ✣ 1940 Oudh 245 (247, 248) [A I R V 27]. (Suit for return of deposit forfeited by

Section 25 — Note 14 (*contd.*)

Inspector General of Prisons for non fulfilment of conditions of tender entertained by Small Cause Court even though excluded from its jurisdiction.) ✣ 1915 Cal 378 (379) [A I R V 2] (DB). (Third munsif to whom Small Cause suit was transferred by District Judge during leave of absence of second munsiff passing order under S. 23—Second munsif on return from leave trying it as Small Cause ignoring the order under S. 23 — *Held* action of second munsif was without jurisdiction and illegal.)

[5] High Court can interfere in revision where a Small Cause suit is wrongly entertained on the original side. ('10) 20 Mad L Jour 722 (725) (DB) ✣ 1916 Pat 31 (32) [A I R V 3]. (Small Cause suit tried on original side —Defendant not objecting — High Court has discretion to interfere in revision if justice demands.) ✣ 1914 All 119 (119) [A I R V 1]. (Successor of a Judge who had no small cause power continuing to try suit as small cause suit—Irregularity was such as to cause material prejudice to parties.)

[See however 1937 Mad 644 (644, 645) [AIR V 24]. (Where High Court is satisfied with the decree of trial Court it need not interfere.)]

[6] Appellate decree passed in appeal from decree in small cause suit is one without jurisdiction liable to be set aside in revision. 1917 All 159 (160) [AIR V 4] : 39 All 101.

[7] Suit cognizable by Small Cause Court—Plaint returned for presenting before another Court — It is refusal to exercise jurisdiction vested in Small Cause Court — Revision lies. 1958 Pat 22 (Pr 6) [A I R V 45 C 11] (DB). (Revision under S. 115, Civil P. C.)

[8] Where the lower Court does not exercise its jurisdiction properly High Court can interfere. 1933 All 90 (90) [A I R V 20] : 54 All 539. (Passing instalment decree without allowing future interest is not proper exercise of jurisdiction.)✣1926 Mad 679 (680) [A I R V 13]. (Deciding case on merits after holding that it has no jurisdiction.)

[9] High Court should desist from interfering unless the facts from which want of jurisdiction on the part of a Court may be inferred are patent upon the face of the record. ('92) 14 All 413 (416) (DB).

[10] Acquiescence of parties cannot give jurisdiction to the Court when there is a complete absence of jurisdiction. 1933 Mad 346 (347) [AIR V 20] ✣ 1921 Lah 72 (72) [A I R V 8].

[See however 1929 Pat 722 (723) [AIR V 16]. (Forum chosen by plaintiff at instance of defendants — Defendant cannot ask the High Court to hold that trial Court had no jurisdiction.)]

[11] High Court will not interfere, if objection as to jurisdiction is not raised in trial Court unless it is necessary to interfere on the merits of case. 1925 Oudh 88 (89) [AIR V 12] ✣ 1916 Cal 230 (230) [AIR V 3] (DB) ✣ 1927 Lah 399 (400) [AIR V 14].

[See however 1930 All 873 (874, 875) [AIR V 17] : 52 All 947. (Objection to jurisdiction not merely as to the place of suing but as to the nature of the Court itself can be raised in revision for the first time.) ✣ 1935 All 842 (843) [AIR V 22]. (Question of jurisdiction involved not a trivial case — Interference in revision proper even though equities may be in favour of opposite party.) ✣ 1938 Pat 378 (379) [AIR V 25]. (Case clearly showing the absence of jurisdiction in judge—Interference is proper even though objection was not taken in trial Court.)]

[But see 1927 Bom 663 (664) [AIR V 14] (DB).]

[12] When the question of jurisdiction was not raised before the Small Cause Court and that question is linked with a question of fact it will not be proper for the High Court to entertain the plea, in revision. 1958 All 32 (Pr 5) [AIR V 45 C 11].

[13] Where a Court tried an original suit as a Small Cause suit without any objection, the High Court is not bound to allow the point of jurisdiction to be taken for the first time. The High Court is not bound to interfere in revision so far as the decision of the trial Court is concerned, whether it be a case where a Munsif tried a Small Cause suit as original suit, or an original suit as a Small Cause suit. ('61) 1961-2 Andh W R 140 (144).

[14] On setting aside a decree passed without jurisdiction the plaint should be returned for presentation to the proper Court. 1918 Cal 869 (870) [AIR V 5] (DB) ✣ 1926 Mad 679 (680) [AIR V 13] ✣ 1921 Lah 72 (72) [AIR V 8]. (High Court can suo motu order return of plaint.) ✣ ('10) 20 Mad L Jour 722 (725) (DB). (High Court can order suo motu.)

[15] No revision lies unless any question of law or fact was determined without proper jurisdiction. 1955 N U C (Punj) 5722 [AIR V 42].

[16] Though the power under S. 25, is discretionary, and if a long time has elapsed since the decree was passed the High Court should not exercise its discretion in favour of the defendants, yet when, the point of jurisdiction was raised in the trial Court and was incorrectly decided there is no reason why the incorrect decision should be maintained. ('58) 1958 All L Jour 876 (879).

[17] A technical contention cannot be permitted to be raised in revision unless it is shown that substantial injustice has resulted by reason of infringement of the rules as to the trial of suits. 1956 Bom 102 (Pr 8) [AIR V 43 C 28].

[18] Where the point as to jurisdiction of the trial Court is raised after all the evidence in the case is recorded and the Court holds that it has no jurisdiction to entertain the suit, nevertheless it is entitled to record findings on all the other points for determination arising in the case. If the trial Court has found that the claim of the plaintiff is not proved which is a finding of fact, the High Court in revision would not interfere with the decree even if it holds that the question of jurisdiction was wrongly decided. 1955 Kutch 8 (Prs 4, 5) [(S) AIR V 42 C 4].

[19] Suit in Small Cause Court by vendee to recover back earnest money paid for pur-

Section 25 — Note 14 *(contd.)*
chase of house — Defendant, in written statement challenging jurisdiction of Court to try suit on ground that it was in substance a suit for specific performance of contract and for its rescission — Court passing decree without framing issue as to jurisdiction — *Held* on revision that the issue of jurisdiction arose and the Court should have raised it — The claim attracted Art. 15, Sch. II of the Provincial Small Cause Courts Act and was outside the jurisdiction of the Small Cause Court. (Decree set aside.) 1956 Bom 254 (Pr 3) [AIR V 43 C 107].

15. Question of costs. — [1] High Court will not ordinarily upset an order of the Small Cause Court as to costs as such orders are discretionary. 1925 Oudh 539 (540) [AIR V 12].

[2] Where the reason given for disallowing the costs of a successful plaintiff is unsatisfactory the High Court will interfere in revision. ('12) 1912 Mad W N 360 (366) ✠ 1915 Nag 65 (66) [AIR V 2]: 11 Nag L R 189. (Reasons given for disallowing cost not adequately supported by facts on record.) ✠ ('11) 1911 Pun L R No. 113, p. 433 (434).

16. Court-fee.—[1] Court-fee payable on an application in revision under S. 25 is governed by Art. 1 (d), Sch. II of the Court-fees Act. ('15) 1915 Pun L R No. 14, p. 35 (36).

17. Questions regarding review. — [1] Power of High Court where review is refused by the lower Court is wider where the lower Court exercises Small Cause jurisdiction. ('11) 1911 Pun L R No. 195, p. 747 (749, 750).

[2] Although O. 47, R. 7 of the C. P. Code is not applicable to Small Cause Courts, its provisions may well guide the High Court in revising an order granting review. 1919 Mad 111 (112) [AIR V 6].

[**See however** 1928 Mad 56 (56) [AIR V 15]. (Not every order in which the terms of O. 47, C. P. C. are not complied with should be interfered with.)]

[3] While revising a final decree the High Court can consider whether the application for review was rightly admitted. ('09) 19 Mad L Jour 56 (58).

[4] An application for review of a judgment in a Small Cause Court suit refused wrongly, on ground of supposed deficiency of court-fee upon the application — Order held, was open to revision. ('07) 29 All 468 (470).

18. New pleas. — [1] A new plea which was not taken either in the trial Court, or in the application for revision, cannot be allowed in the revision proceedings. 1936 Pat 428 (429) [AIR V 23]. (Objection on the ground that a certain suit for compensation in Small Cause Court for an act which would be punishable under Chap. 17 of the Penal Code was not cognizable by it.) ✠ 1953 Mad 582 (Pr 7) [AIR V 40 C 226]. (Point about which there is no hint either in the pleadings or the issues framed will not be allowed to be raised in revision.) ✠ 1922 Oudh 130 (130, 131) [AIR V 9]. (Question whether evidence of uncertified payment can be considered by Court not urged before trial Court —High Court will not consider it in revision.) ✠ 1932 Oudh 230 (231) [AIR V 19].

[2] New points depending upon questions of fact which are not raised in the trial Court cannot be entertained for the first time at the stage of revision. 1942 Pat 417 (419) [AIR V 29] ✠ 1936 Oudh 223 (224) [AIR V 23] (DB) ✠ 1933 Sind 363 (363) [AIR V 20] (DB).

[3] A new plea raising a question of law can be entertained in revision though not specifically raised in the trial Court or in the grounds of revision. 1941 Oudh 111 (112) [AIR V 28].

[4] In revisions under S. 25 questions of law can certainly be raised as they are raised in second appeals under S. 100, C. P. Code, even if such a question of law was not raised in the first Court, provided it does not involve an investigation of facts. 1957 Pat 168 (Pr 31) [AIR V 44 C 58] : 35 Pat 986 (DB).

[5] Question of jurisdiction not raised before Small Cause Court — Question linked with question of fact — High Court will not entertain plea in revision. 1958 All 32 (Pr 5) [AIR V 45 C 11].

[6] Plea of res judicata can be raised for the first time in revision though not raised in the lower Court or in the grounds of revision. ('10) 7 Mad L T 175 (175).

[7] Plea of limitation can be raised for the first time before the High Court. 1936 Cal 497 (503) [AIR V 23]: ILR (1937) 1 Cal 1 (FB). (AIR 1915 Cal 574, *Overruled.*) ✠ 1920 All 172 (173) [AIR V 7].

[8] A new plea neither as regards his own pleading nor as regards the pleading of his adversary is open to an unsuccessful litigant. 1930 Bom 361 (362) [AIR V 17] (DB).

[9] Small Cause suit transferred under S. 23 to original side — Parties then agreeing that no question of title was involved desiring trial of suit as small cause matter — Trial as small cause without setting aside order under S. 23— *Held* objection as to jurisdiction of court to try it as small cause without setting aside order under S. 23 cannot be taken in revision. 1920 Mad 544 (544) [AIR V 7] (DB).

[10] Award of compensation under S. 95, Civil P. C— The aggrieved party cannot for the first time raise in revision the plea that having compromised with the defendant on condition of his foregoing his claim for compensation, the compensation should not have been granted. 1930 Sind 173 (174) [AIR V 17] (DB).

[11] Objection that a particular person suing on behalf of another is not his agent cannot be taken for the first time in revision. 1915 All 80 (80) [AIR V 2].

[12] The objection that the execution application filed by one of the joint decree-holders is defective if it does not state explicitly that it has been filed on behalf of all the creditors, should be raised in the trial court and the judgment-debtor cannot be allowed to raise it for the first time in the High Court in revision under S. 25. 1951 Ajmer 73 (1) (Pr 2) [AIR V 38 C 68].

[13] Objection to suit on ground of want of executor's assent cannot be raised in revi-

26. Amendment of the second schedule to the Code of Civil Procedure.
[Repealed by the Presidency Small Cause Courts Law Amendment Act, 1888 (10 of 1888), S. 4.]

27. Finality of decrees and orders.

Save as provided by this Act, a decree or order made under the foregoing provisions of this Act by a Court of Small Causes shall be final.

SECTIONS 27A to 27R STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, after Chap. IV *insert* the following new Chapter, namely,—

"CHAPTER IV-A

DISTRESSES

27A. *Extent of Chapter IV-A and its application.* — The provisions of this Chapter extend to the areas within the local limits of the jurisdiction of a Court of Small Causes :

Provided that nothing in this Chapter shall apply—

(1) to a Judge or Court, other than a Small Cause Court, invested with the jurisdiction of a Court of Small Causes ;

(2) to any rent due to Government ;

(3) to any rent which has been due for more than twelve months before the date of the application made under section 27B ;

(4) to any rent which is in arrears for a period less than three months.

Section 25 — Note 18 *(contd.)*

sion for first time. 1956 Bom 102 (Pr 4) [AIR V 43 C 28].

[14] The question whether korfa (under raiyati) right is heritable by custom is a mixed question of law and fact and cannot be allowed to be raised for the first time in revision in absence of any evidence on record on the point. 1954 Pat 32 (Pr 4) [A I R V 41 C 11].

[15] Failure of lessee to pay property tax which he was bound to pay — Landlord paying same — Suit by him for reimbursement — Allegation in plaint bringing case within Ss. 69 and 70, Contract Act — Allegations neither denied nor controverted — It amounts to admission by lessee of his liability — No issue on question framed — Revision against decree — Plea that landlord had not made out case under Ss. 69 and 70, Contract Act, cannot be raised for first time. 1955 Mad 555 (Pr 5) [(S) AIR V 42 C 159].

19. Successive applications. — [1] A fresh petition under S. 25 is competent where the first petition has been dismissed. ('98) 1898 Pun Re No. 23, p. 66 (66) ✣ 1937 Lah 685 (686) [AIR V 24].

20. Reference to High Court. — [1] District Judge is competent to make references of cases tried by Small Cause Court, to the High Court. 1916 Cal 422 (422) [A I R V 3] (DB). (Small Cause Court subordinate to District Court.)

21. Restoration of revision dismissed for default.— [1] High Court has no power to restore a revision petition dismissed for default. 1943 Mad 260 (260) [AIR V 30].

22. Difference of opinion amongst Judges in revision. — [1] Judges sitting in revision differing — Opinion of senior Judge prevails. 1925 Mad 281 (285) [A I R V 12] (DB). (S. 98, Civil P. C. does not apply.)

23. Limitation for revision. — [1] Delay of nearly seven months in filing the revision application would in itself be a sufficient ground for declining to accept it. 1926 All 228 (228, 229) [AIR V 13].

[2] Long time elapsing since the passing of small cause decree — High Court would not ordinarily interfere — But when point of jurisdiction was raised before Small Cause Court and was incorrectly decided by it, the High Court will interfere. ('58) 1958 All L Jour 876 (879).

[3] Rejection of application for substitution of legal representative — Remedy of revision not followed — Second infructuous application for substitution — Application for revision — Limitation of 45 days expiring — Relaxation of limitation cannot be permitted. ('55) Madh B L J 1955 H C R 505 (506).

Section 27 — Note 1

[1] A Small Cause Court decree is final in the sense that no appeal lies against it but it cannot on that ground be urged that it may not be set aside by separate suit on ground of fraud. 1921 Cal 298 (298) [AIR V 8]: 48 Cal 298 (DB).

[2] Section 27 does not apply to a decree passed by the successor of a Judge of a Small Cause under S. 35. 1931 All 574 (578) [AIR V 18]: 54 All 171 (FB).

[3] Where a Small Cause suit instituted in the Court of a munsif invested with Small Cause Court powers is heard and decided by the Munsif as a regular suit and not summarily decree is not appealable. 1917 All 159 (160) [AIR V 4]: 39 All 101 ✣ 1956 Punj 233 (234) [AIR V 43 C 93] ✣ 1954 Vindh Pra 49

27B. *Application for distress warrant.* — *(1)* Any person claiming to be entitled to arrears of rent of any house or premises to which this Chapter extends situate in the local limits of the jurisdiction of a Court of Small Causes or his duly constituted attorney, may apply to such Court for issuing a warrant under section 27C :

Provided that before making an application such person shall give 15 days' notice to the tenant making a demand of the said arrears.

(2) The application made under sub-section *(1)* shall be supported by an affidavit or affirmation in Form A in the Third Schedule.

27C. *Issue of distress warrant.*—The Court of Small Causes may thereupon direct the issue of a warrant in Form B in the Third Schedule returnable within six days, addressed to any one of the bailiffs appointed for the purpose :

Provided that the Court may, on personal examination of the person applying for such warrant, decline to issue the same.

27D. *Time for distress.*—Every distress under this Chapter shall be made after sunrise and before sunset, and not at any other time.

27E. *What places bailiff may force open.*—*(1)* The bailiff directed to make the distress may force open any stable, outhouse or other building and may also enter any dwelling-house the outer door of which may be open and may break open the door of any room in such dwelling house for the purpose of seizing property liable to be seized under this Chapter.

(2) Where a room in a dwelling house is in the actual occupancy of a woman, who according to custom, does not appear in public, the bailiff shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution consistent with these provisions, to prevent its clandestine removal.

27F. *Property which may be seized.* — In pursuance of a warrant issued under section 27C, the bailiff shall seize the moveable property found in or upon the house or premises mentioned in the warrant and belonging to the person from whom the rent is claimed (hereinafter called the debtor) or such part thereof as may, in the bailiff's judgment, be sufficient to cover the amount of the said rent, together with the costs of the said distress :

Provided that the bailiff shall not seize—
(a) things in actual use; or

Section 27 — Note 1 *(contd.)*
(49) [AIR V 41 C 19]✣ 1955 NUC (Punj) 5722 [AIR V 42]. (Nature of suit should be determined with reference to relief claimed.) ✣ 1950 Cal 109 (110) [AIR V 37 C 32] ✣ ('01) 25 Bom 417 (417, 418) (DB) ✣ 1933 Cal 784 (784, 785) [AIR V 20] ✣ ('35) 62 Cal L Jour 530 (533) ✣1941 Mad 867 (867) [AIR V 28] ✣ 1937 Mad 227 (228) [AIR V 24] ✣ 1928 Pat 451 (451) [AIR V 15] ✣ 1939 Pesh 14 (15) [AIR V 26] (DB) ✣ 1934 Rang 312 (312) [AIR V 21] ✣ 1930 Rang 139 (139, 140) [AIR V 17]: 7 Rang 809.

[4] If the suit is really of a Small Cause nature the appellate Court has no jurisdiction whatever to interfere with the decree of the trial Court even though the latter proceeded on the basis that the suit was triable as an original suit. 1947 Mad 382 (383) [A I R V 34 C 202] ✣ ('10) 33 Mad 323 (326) (FB).

[5] A suit transferred under S. 23 is triable as an ordinary suit and the decision is open to appeal. 1940 Cal 399 (400) [A I R V 27]. (No second appeal lies.) ✣ ('31) 1931 All L Jour 967 (968) (DB). (Do.)✣1943 Cal 464 (465) [AIR V 30] (DB). (Do.) ✣ 1926 Mad 622 (622) [AIR V 13] (DB). (Do.) ✣ 1914 Bom 302 (302) [AIR V 1] : 38 Bom 190 (DB).

[6] An order under S. 23 returning a plaint for presentation to the proper Court is not appealable. 1933 All 106 (107) [AIR V 20] : 54 All 1048.

[7] No appeal lies from an order passed in execution proceedings of Small Cause Court decree. 1917 Pat 371 (372) [A I R V 4] (DB)✣ 1921 Cal 242 (243) [AIR V 8] (DB)✣1917 Mad 363 (364) [AIR V 4] (DB).

[But see ('09) 31 All 1 (2) (DB). (Order in execution proceedings transferring decree to High Court for execution—Order appealable.) ✣1928 Bom 534 (537) [AIR V 15] : 53 Bom 46 (DB). (Decree by Small Cause Court transferred to sub-judge's Court for execution—First appeal lies from an order of the executing Court—Second appeal does not lie.)]

[8] Order scaling down decree of a Small Cause Court is not appealable. 1953 Mad 908 (908) [AIR V 40 C 55].

[9] Where a decree passed by Small Cause Court is sought to be set aside on the ground of fraudulent suppression of summons and fraud is not proved, the decree cannot be set aside merely on the finding that summonses were not properly served. 1950 Pat 284 (285) [AIR V 37 C 70] (DB).

[10] Where upon the facts stated in the plaint the cause against the defendant was that his action was wrongful or illegal but was not necessarily penal, it was held that the suit was of small cause nature and when the valuation of such a suit was within the pecuniary jurisdiction of the Court exercising Small Cause powers, to that extent, his decision was final and not open to appeal. 1954 Vind Pra 49 (49, 50) [AIR V 41 C 19].

(b) the necessary wearing apparel, cooking vessels, beds and bedding of the debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman ; or

(c) tools of artisans, and, where the debtor is an agriculturist, his implements of husbandry and such cattle and seed grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section ; or

(d) books of account ; or

(e) goods in the custody of the law.

27G. *Partial exemption of agricultural produce.* — The State Government may, by general or special order published in the Official Gazette declare that such portion of agricultural produce or of any class of agricultural produce, as may appear to the State Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the debtor and his family, shall, in the case of all agriculturists or any class of agriculturists, be exempted from liability to seizure in pursuance of a warrant issued under section 27C.

27H. *Impounding distress.*—The bailiff may impound or otherwise secure the property so seized in or on the house or premises chargeable with the rent.

27I. *Inventory. Notice of intended appraisement and sale.—(1)* On seizing any property under section 27F, the bailiff shall make an inventory of such property and shall give a notice in writing in Form C in the Third Schedule to the debtor, or to any other person upon his behalf in or upon the said house or premises.

(2) The bailiff shall, as soon as may be, file in the Court of Small Causes copies of the said inventory made, and notice given, under sub section *(1)*.

27J. *Application to discharge or suspend warrant.* — *(1)* The debtor or any other person alleging himself to be the owner of any property seized under this Chapter, or the duly constituted attorney of such debtor or other person, may, at any time within fifteen days from such seizure, apply to the Court of Small Causes to discharge or suspend the warrant, or to release a distrained article, and the Court may discharge or suspend such warrant or release such article accordingly upon such terms as it thinks just and may give reasonable time to the debtor to pay the rent due from him :

Provided that where the Court is satisfied that there is sufficient cause for extending the period within which an application may be made under this sub-section, it may extend the period to such extent as it may consider necessary.

(2) Upon an application made under sub-section *(1)*, the costs attending it and attending the issue and execution of the warrant shall be in the discretion of the Court, and shall be paid as it directs.

27K. *Claim to goods distrained made by a stranger.* — *(1)* If any claim is made to, or in respect of, any property seized under this Chapter, or in respect of the proceeds or value thereof, by any person not being the debtor, the Court of Small Causes upon the application of the bailiff who seized the property, may issue a summons calling before the Court the claimant and the person who obtained the warrant.

(2) On issuing a summons under sub-section *(1)*, any suit which may have been brought in any other Civil Court in respect of such claim shall be stayed, and such other Court on proof of the issue of such summons and that the property was so distrained, may order the plaintiff to pay the costs of all proceedings in such suit after the issue of such summons.

(3) The Court of Small Causes shall adjudicate upon such claim as is referred to in sub-section *(2)* and make such order between the parties in respect thereof and of the costs of the proceedings as it thinks fit; and such order shall be enforced as if it were an order made in a suit brought in such Court.

(4) The procedure in a Court of Small Causes in cases under this section shall conform, as far as may be, to the procedure in an ordinary suit in such Court.

27L. *Power to award compensation to debtor or claimant.* — *(1)* In any case under section 27J or section 27K, the Court of Small Causes may award such compensation by way of damages to the applicant or claimant, as the case may be, as the Court thinks fit and may for that purpose make any inquiry it thinks necessary.

(2) The order of the Court awarding or refusing compensation under sub-section *(1)* shall bar any suit for the recovery of compensation for any damage caused by the distress.

27M. *Power to transfer to District Court cases where subject-matter in dispute exceeds the pecuniary jurisdiction of Court of Small Causes.—(1)* In any case under section 27J or section 27K, if the value of the subject-matter in dispute exceeds the limits of the pecuniary jurisdiction of the Court of Small Causes, the applicant or claimant may apply to the District Court to transfer the case to itself, and the District Court, on being satisfied that it is expedient that the case should be disposed of by itself, may direct the case to be

transferred accordingly, and may thereupon alter or set aside any order passed in the case by the Court of Small Causes and may make such order therein as the District Court thinks fit.

(2) Every application under sub-section *(1)* shall be made within seven days from the date of the seizure of the subject-matter in dispute.

(3) In granting applications under sub-section *(1)*, the District Court may impose such terms as to payment of, or giving security for, costs or otherwise as it thinks fit.

(4) The procedure in cases transferred under this section shall conform, as far as may be, to the procedure in suits before the District Court in the exercise of its original Civil jurisdiction; and orders made under this section may be executed as if they were made in the exercise of such jurisdiction. Every such order awarding or refusing compensation shall bar any suit for the recovery of compensation for any damage caused by the distress which gave rise to the case wherein such order was made.

27N. *Appraisement and notice of sale.*—*(1)* In default of any order to the contrary by the Court of Small Causes or by the District Court, the Nazir of the Court appointed for the purpose may, at the expiration of fifteen days from a seizure of property under this Chapter, or, as the case may be, of the extended period under the proviso to sub-section *(1)* of section 27J, appraise the property so seized, and give the debtor notice in writing in Form D of the Third Schedule.

(2) The Nazir shall file in the Court of Small Causes a copy of every notice given under sub-section *(1)*.

27O. *Sale. Application of proceeds.*—In default of any such order to the contrary, the distrained property shall be sold by an officer of the Court on the day mentioned in the notice given under section 27N and the officer aforesaid shall, on realising the proceeds, pay over the amount thereof to the Court; and such amount shall be applied first in payment of the costs of the said distress and then in satisfaction of the debt; and the surplus, if any, shall be returned to the debtor :

Provided that when the property seized is subject to speedy and natural decay, it may, under special order of the Court, be sold at any time after it is seized :

Provided further that the debtor may direct that the sale shall take place in other manner, first giving security for any extra costs thereby occasioned.

27P. *Costs of distresses.*—No costs of any distress under this Chapter shall be taken or demanded except those mentioned in Form E of the Third Schedule.

27Q. *Account of costs and proceeds.*—The Court of Small Causes shall cause to be kept a book in which all sums received as costs upon distresses made under this Chapter, and all sums paid as remuneration to the bailiffs, and all contingent charges incurred in respect of such distresses, shall be duly entered. It shall also cause to be entered in the book all sums realised by sale of the property distrained and paid over to landlords under the provisions of this Chapter.

27R. *Bar of distresses except under this Chapter, and penalty for making illegal distresses.*—No distress shall be levied for arrears of rent except under the provisions of this Chapter; and any person, except a bailiff, a Nazir or an officer of the Court, levying or attempting to levy any such distress shall, on conviction, be punished with fine which may extend to five hundred rupees and with imprisonment for a term which may extend to three months, in addition to any other liability he may have incurred by his proceedings."

—Bom. Act LXXXVII of 1958, S. 7 [15-10-1958].

CHAPTER V

SUPPLEMENTAL PROVISIONS

28. Subordination of Courts of Small Causes.

(1) A Court of Small Causes shall be subject to the administrative control of the District Court and to the superintendence of the High Court, and shall—

(a) keep such registers, books and accounts as the High Court from time to time prescribes, and

(b) comply with such requisitions as may be made by the District Court, the High Court or the State Government for records, returns and statements in such form and manner as the authority making the requisition directs.

Section 28 — Note 1

[1] The District Munsif acting as a Small Cause Court Judge is subject to the administrative control of the District Court under S. 28, but he is not bound by an order of the District Judge, holding that a certain suit is not triable by a revenue Court, and passed in his judicial capacity on an appeal from the revenue Court. 1926 Mad 365 (365) [AIR V 13] (DB).

(2) The relation of the District Court to a Court of Small Causes, with respect to administrative control, shall be the same as that of the District Court to a Civil Court of the lowest grade competent to try an original suit of the value of five thousand rupees in that portion of the territories administered by the State Government in which the Court of Small Causes is established.

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in section 28 in sub-section *(2)*, for the words "five thousand rupees" *substitute* the words "ten thousand rupees".

—Bom. Act LVII of 1950, S. 3 [w. e. f. 8-1-1951] read with LXXXVII of 1958, S. 2 [15-10-1958].

29. Seal.

A Court of Small Causes shall use a seal of such form and dimensions as are prescribed by the State Government.

30. Abolition of Courts of Small Causes.

The State Government may, by order in writing, [a]abolish a Court of Small Causes.

[a] For instance of a notification abolishing a Court of Small Causes (Broach), *see* Bombay Government Gazette, 1907, Pt. I, page 339.

31. Saving of power to appoint Judge of Court of Small Causes to other office.

(1) Nothing in this Act shall be construed to prevent [a][the appointment of] a person who is a Judge or Additional Judge of a Court of Small Causes to be also a Judge of any other [b]Civil Court or to be a Magistrate of any class or to hold any other public office.

(2) When a Judge or Additional Judge is so appointed, the ministerial officers of his Court shall, subject to any rules which the State Government may make in this behalf, be deemed to be ministerial officers appointed to aid him in the discharge of the duties of the other office.

[a] *Substituted* for "the Local Government from appointing" by A. O., 1937. [b] For instances of notifications issued under this power, *see* U. P. Rules & Orders, Vol. I.

32. Application of Act to Courts invested with jurisdiction of Court of Small Causes.

(1) So much of Chapters III and IV as relates to—

(a) the nature of the suits cognizable by Courts of Small Causes,

(b) the exclusion of the jurisdiction of other Courts in those suits,

(c) the practice and procedure of Courts of Small Causes,

Section 31 — Note 1

[1] By enactment of S. 31 the Act contemplates the Small Causes judges being entrusted with civil or criminal jurisdiction not of Small Cause nature. ('49) 2 Sau L R 223 (225).

Section 32 — Note 1

[1] It is manifest from S. 32 that Chapter III in which S. 15 occurs is applicable only in regard to the nature of suits cognizable by Court of Small Causes and has no reference to the value of suits contemplated by S. 15. 1959 Andh Pra 3 (5) [AIR V 46 C 2] : ILR (1958) Andh Pra 740 (DB).

[2] Section 32 (2) in terms is not comprehensive enough to take in a case where a suit was instituted in one Court and the jurisdiction of a Court of Small Causes was conferred on a different Court. 1957 Andh Pra 133 (135) [(S) AIR V 44 C 51] : ILR (1957) Andh Pra 270 (DB).

[3] Where on the date of the filing of a suit, the presiding officer has no pecuniary jurisdiction to try a suit as a Small Cause Court, which however is conferred during trial, he cannot try the suit as a Small Cause suit. The trial is void. 1922 All 112 (112) [AIR V 9] ✣ ('11) 1911 Pun L R No. 227, p. 859 (860)✣1943 Mad 503 (503, 504) [AIR V 30].

[4] If a suit cognizable by a Small Cause Court is instituted in the Court of Munsif who at the time of its institution was not vested with the power of a Small Cause Court it should be tried as a regular suit even if after its institution the Munsif is replaced by another who is invested with the powers of a Small Cause Court. 1919 Pat 376 (377).

(d) appeal from certain orders of those Courts and revision of cases decided by them, and

(e) the finality of their decrees and orders subject to such appeal and revision as are provided by this Act,

applies to Courts invested by or under any enactment for the time being in force with the jurisdiction of a Court of Small Causes so far as regards the exercise of that jurisdiction by those Courts.

(2) Nothing in sub-section *(1)* with respect to Courts invested with the jurisdiction of a Court of Small Causes applies to suits instituted or proceedings commenced in those Courts before the date on which they were invested with that jurisdiction.

33. Application of Act and Code to Court so invested as to two Courts.

A Court invested with the jurisdiction of a Court of Small Causes with respect to the exercise of that jurisdiction, and the same Court with respect to the exercise of its jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes, shall, for the purposes of this Act and the [a]Code of Civil Procedure, be deemed to be different Courts.

[a] *See* now the Code of Civil Procedure, 1908 (V of 1908).

Section 32 — Note 1 *(contd.)*

[AIR V 6] : 4 Pat L Jour 13 (DB)✣1951 Raj 149 (149) [A I R V 38 C 68] : ILR (1951) 1 Raj 176✣('49) 2 Sau L R 223 (225) ✣1935 Mad 284 (285) [AIR V 22]. (Suit instituted as original suit—Transfer to small cause side—Trial of suit as small cause—*Held* that the suit still retained character of original suit in view of S. 32 (2). The trial was, therefore, irregular and the case should be retried as original suit.)✣1937 Nag 200 (200, 201) [A I R V 24] : I L R (1937) Nag 399 ✣ 1930 Pat 270 (271) [A I R V 17] ✣ 1919 All 55 (56) [A I R V 6] : 42 All 195 ✣ ('11) 9 Ind Cas 264 (265) (All)✣ 1923 Bom 454 (455) [AIR V 10] (DB).

[But see 1927 Cal 388 (389) [AIR V 14].]

[5] If a suit is instituted in a Court of Small Causes and if that Court is subsequently abolished, the case will have to be sent to the ordinary Civil Court having jurisdiction under the provisions of S. 35 of the Act. If the Court to which the case is sent under the provisions of S. 35 acquires before the date of the trial the powers to deal with the said suit as a Small Cause Court suit the provisions of sub-section (1) of S. 32 would be applicable. 1935 Cal 556 (557) [A I R V 22].

[6] Court tries suit under summary procedure in the ordinary manner — The character of the suit is not thereby altered, and its decree is not appealable. 1937 Cal 631 (631) [AIR V 24] ✣ ('13) 40 Cal 537 (540) (DB).

[7] According to S. 32 read with S. 28 of the Saurashtra Distt. and Subordinate Civil Courts Ordinance, an assistant Judge who is neither a senior nor a junior division Judge cannot be invested with Small Cause powers. ('49) 2 Sau L R 223 (226).

Section 33 — Note 1

[1] A Small Cause Court acting as such, cannot attach immovable property in execution of its decree. This is so even though the Small Cause Court is also an ordinary Court, unless the decree has been formally transferred to the ordinary side. ('31) 132 Ind Cas 208 (208) (Lah).

[2] According to S. 16 read with S. 33 a Court which has Small Cause jurisdiction cannot try a suit of Small Cause nature otherwise than as a Small Cause suit. A Small Cause suit instituted as a Small Cause suit does not lose its character of a Small Cause suit by reason of its being mistakenly transferred to the original side of the Court and tried as a regular suit, and S. 27 bars any right of appeal from a decree in such a suit. 1937 Mad 227 (228) [A I R V 24]✣1954 Vind Pra 49 (49) [AIR V 41 C 19].

[3] A subordinate Judge with Small Cause powers is precluded by S. 33 from entertaining the counter-claim which is beyond the pecuniary limit of his Small Cause Court jurisdiction. ('90) 14 Bom 371 (372) (DB).

[4] Suit of small value instituted in Small Cause Court side of Munsif's Court—As there was an Honorary Munsif, case was transferred to his Court a decree was made and in appeal, the Subordinate Judge set aside the decree and placed the record before the District Judge with a request that the case might be transferred to the Munsif : *Held*, that case should be tried by Munsif as a Judge of a Small Cause Court and not on regular side. 1933 Bom 662 (663) [AIR V 20] (DB).

[5] Where a suit for less than Rs. 500 was of a Small Cause nature and was tried by the Munsif on the Original Side and the decision was confirmed in appeal, the High Court refused to interfere in revision and to remand the suit for retrial on the Small Cause side. 1922 Mad 352 (353) [AIR V 9] (DB).

[6] Two Small Cause decrees passed by same Court against same judgment-debtor—one decree transferred for execution to original side of same Court and assets realised —Other decree not transferred to original side prior to receipt of assets — Other decree-holder not entitled to claim rateable distribution under S. 73, Civil P. C. 1961 Andh-Pra 422 (423) [AIR V 48 C 117].

34. Modification of Code as so applied.

Notwithstanding anything in the last two foregoing sections,—

(a) when, in exercise of the jurisdiction of a Court of Small Causes, a Court invested with that jurisdiction sends a decree for execution to itself as a Court having jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes, or

(b) when a Court, in the exercise of its jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes, sends a decree for execution to itself as a Court invested with the jurisdiction of a Court of Small Causes,

the documents mentioned in section 224 of the Code of Civil Procedure[a] shall not be sent with the decree unless in any case the Court, by order in writing, requires them to be sent.

[a] Of Act XIV of 1882. *See* now Code of Civil Procedure, 1908 (V of 1908), Order XXI, Rule 6.

35. Continuance of proceedings of abolished Courts.

(1) Where a Court of Small Causes, or a Court invested with the jurisdiction of a Court of Small Causes, has from any cause ceased to have jurisdiction with respect to any case, any proceeding in relation to the case, whether before or after decree, which, if the Court had not ceased to have jurisdiction, might have been had therein, may be had in the Court which, if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try the suit.

(2) Nothing in this section applies to cases for which special provision is made in the [a]Code of Civil Procedure as extended to Courts of Small Causes or in any other enactment for the time being in force.

[a] *See* now the Code of Civil Procedure, 1908 (V of 1908).

Section 34 — Note 1

[1] Where *A* and *B* obtain decrees against the same judgment-debtor in Small Cause suits tried by the same Small Cause Court and *A's* decree is transferred to the original side of that Court for execution on the ground that sale of immovable property is involved the assets received by sale in execution of *A's* decree must be regarded as received on the original side of the Court and therefore *B* cannot claim rateable distribution unless his decree is also transferred to the original side. 1943 Mad 262 (263) [AIR V 30].

[2] Where in a suit for rent under Bengal Tenancy Act a decree for rent is passed by ordinary Civil Court and that decree is transferred for execution to a Small Cause Court such latter Court has jurisdiction to execute that decree. 1939 Cal 600 (600) [A I R V 26] : ILR (1939) 1 Cal 233 (DB).

Section 35 — Note 1

[1] When the Court of Small Cause Judge ceases to have jurisdiction with respect to a case on account of that officer's transfer and all proceedings in the case are under S. 35 taken in the Court of Munsif which is the Court in which the suit would have been filed on the regular side it brought after the transfer of the previous Small Cause Court Judge and the Munsif tries the suit on the regular side and not as a Judge of a Court of Small Causes, there is no reason why an appeal should not lie against his decree. 1937 Oudh 398 (399) [AIR V 24] : 13 Luck 369 (DB) ✠ 1927 All 95 :(96) [AIR V 14] : 48 All 818 ✠ 1922 All 161 (162) [AIR V 9]: 44 All 59✠ 1915 All 219 (220, 221) [AIR V 2]: 37 All 450 (DB).

[But see 1935 Mad 919 (920) [AIR V 22]. (Section 35 does not operate to change in any way a small cause suit into an original suit. What S. 35 does is to invest a Court which otherwise would be incompetent to hear any or certain small cause suits with power to hear certain of such suits, viz., those pending in that Court at the time that Court's jurisdiction is changed.)]

[2] The suit was originally instituted before a Munsif having Small Cause Court powers. This Munsif ceased to have jurisdiction and the case was taken up in the ordinary way by his successor who had no Small Cause Court powers. The evidence had been recorded by the first Munsif. His successor proceeded to decide the suit without rehearing the evidence—*Held*, that even if it be held that the Munsif who decided the case should have reheard the evidence and recorded it in full as in a regular suit, his omission to do so was merely an irregularity in procedure to which S. 99 of the C. P. Code applied and which could not be made a ground for setting aside the decree unless it had affected the decision on the merits. 1925 All 569 (569) [AIR V 12]: 47 All 925 (DB).

[3] A suit cognizable by Small Cause Court was instituted before a Subordinate Judge invested with Small Cause powers. He was succeeded by another who had no Small Cause powers then. He was afterwards in-

Section 35 — Note 1 *(contd.)*

vested with Small Cause powers, but all the evidence in the case had been finished and arguments addressed to him before his investiture with the powers of a Small Cause Court and so held, that the decree passed by him was appealable. 1930 Lah 44 (45) [AIR V 17].

[4] If a suit is instituted in a Court of Small Causes and if that Court is subsequently abolished, the case will have to be sent to the ordinary Civil Court having jurisdiction under the provisions of S. 35. If the Court to which the case is sent under the provisions of S. 35 acquires, before the date of the trial, the powers to deal with the said suit as a Small Cause Court suit, the provisions of sub-s. (1) of S. 32 would be applicable, and the decision of the Court must be taken to be a decision of a Small Cause Court Judge and final under the law and only open to revision under S. 25. 1935 Cal 556 (557) [AIR V 22].

[5] When the Munsif, who is invested with the jurisdiction of a Court of Small Causes, is transferred and his *locum tenens* is not possessed of the same jurisdiction, the suit must be tried by a Court in which it might have been instituted in the absence of the Court in which it was as a matter of fact instituted, and where in such a case a Small Cause Court having local jurisdiction over the suit in question is in existence, the decree by the Court in which the suit was actually instituted is *ultra vires* and the appeal from such a decree is equally incompetent. 1925 Oudh 101 (101) [AIR V 12] : 27 Oudh Cas 240.

[6] A Small Cause Court is established first and the Judge of that Court is appointed afterwards. Therefore, the Court does not cease to exist if at any time there should be no Judge to preside over it. Suits can be instituted in the Court even if there should be no Judge appointed for the time being. The suits so instituted would remain in the Court until they are withdrawn therefrom. A Small Cause Court dismissed a suit. The High Court in revision directed the trial Court to re-entertain the suit. In the meanwhile a new officer came to be the Judge in the trial Court and he was invested with Small Cause Court powers. But the value of the suit exceeded the limits of his pecuniary jurisdiction. The District Judge transferred the suit to another Court—*Held*, that the Court to which the suit was transferred had small cause jurisdiction with regard to the suit. 1925 Lah 561 (561) [AIR V 12] (DB).

[7] Decree passed by Small Cause Court — Subsequent reduction in pecuniary limits of jurisdiction below decretal amount — Small Cause Court ceasing to have jurisdiction to execute decree — Decree-holder can apply for execution to a Court which would have jurisdiction and get order of transfer under S. 39, Civil P. C. 1947 Mad 36 (37, 38) [A I R V 34 C 10] : ILR (1947) Mad 81 (FB).

[8] An order on an application for execution of a decree of a Small Cause Court filed in the Court of a Munsif the Small Cause Court having ceased to exist, is an order passed by the Munsif qua Munsif and as such is appealable. 1917 All 304 (304) [AIR V 4] : 39 All 357 (DB).

[9] Where a Judge having small cause powers passes a small cause decree, and is succeeded by another who has no such powers, the execution proceedings of the decree should go to another Court exercising those powers in the same area if there is such Court. If there is no such Court then the proceedings can properly continue in the same Court whether he has Small Cause Court powers or not, though they will be dealt with under the succeeding Judge's ordinary powers. 1941 Lah 356 (356) [AIR V 28].

[10] New Small Cause Court having no jurisdiction to execute decree of predecessor can transfer it to himself on regular side and deal with it as Sub-Judge — He can order attachment in latter capacity. 1941 Pesh 18 (20) [AIR V 28] (DB).

[11] Ex parte decree passed by Court of Small Causes—Application to set aside decree disposed of by Court not having Small Cause Court powers there being Court having jurisdiction to hear such application — Order passed by Court is *ultra vires*. 1919 Oudh 355 (356) [AIR V 6] : 22 Oudh Cas 152.

[12] Subordinate Judge passing *ex parte* decree in small cause suit — Application by defendant to set it aside — In the meanwhile Court of Subordinate Judge ceasing to exist and application sent to file of District Munsif —Suit beyond Small Cause jurisdiction of District Munsif — Application dismissed by District Munsif—*Held*, that order was passed in exercise of civil jurisdiction and therefore appeal lay. 1941 Mad 103 (105, 107) [A I R V 28].

[13] Where a person has obtained an *ex parte* decree in a Small Cause Court, which is subsequently abolished and the defendant makes an application to the Munsif to set aside the decree, his application is to be governed by S. 17 and not by Civil Procedure Code. 1934 All 943 (944) [AIR V 21].

[14] By virtue of S. 35 (2) the section is subject to the provisions of the Civil Procedure Code such as S. 21. 1930 All 873 (874) [AIR V 17] : 52 All 947.

[15] Suit transferred from Subordinate Judge with small cause powers to Munsif without such powers—*Held* under S. 24 (2), Civil P. C. Court as regards the suit is Court of Small Causes—Decision is not appealable. 1918 All 290 (292) [AIR V 5] : 40 All 525 (DB) ✱ 1916 All 110 (111) [AIR V 3].

[16] While a small cause suit was pending before a Munsif who had small cause powers, he was transferred and succeeded by a gentleman who was not invested with the powers of a Judge, Small Cause Court, at the date. The Additional District Judge thereupon made the following order : "The Small Cause Court cases pending in the Court of the Munsif of Basti will be tried by the present incumbent of the office as regular suits, as he has not got the Small Cause Court powers. The attention of the said learned Munsif be drawn to S. 35, Small Cause Courts Act and these cases should be dealt with as provided by the Small Cause Courts Act." In pursuance of this order or

36. Amendment of Indian Limitation Act. *[Repealed by the Indian Limitation Act, 1908 (IX of 1908).]*

37. Publication of certain orders.

All orders required by this Act to be made in writing by the State Government shall be published in the Official Gazette.

THE FIRST SCHEDULE. — Enactments repealed. *[Repealed by the Amending Act, 1891 (XII of 1891), S. 2 and Sch. I.]*

THE SECOND SCHEDULE

SUITS EXCEPTED FROM THE COGNIZANCE OF A COURT OF SMALL CAUSES

(See section 15.)

[a][*(1)* A suit concerning any act done or purporting to be done by or by order of the Central Government, the Crown Representative or the State Government ;]

[a] *Substituted* by A. O., 1937.

(2) a suit concerning an act purporting to be done by any person in pursuance of a judgment or order of a Court or of a judicial officer acting in the execution of his office ;

Section 35 — Note 1 *(contd.)*

direction, the successor took cognizance of the case and tried it as a regular suit. He decreed the claim of the plaintiffs, and the defendant filed an appeal which was rejected on the ground that no appeal lay. *Held*, (i) that the order of the Additional District Judge was not an order of transfer within the meaning of S. 24, Civil P. C., but was merely drawing the attention of the Munsif to the fact that there was a provision in the Small Cause Courts Act in S. 35 to the effect that the successor of the Judge, Small Cause Court should try the suit; (ii) that the Munsif had no jurisdiction to try the case under S. 35 and his decree was appealable. *Held*, further, when an officer who has no Small Cause Court jurisdiction, hears a case which was pending before his predecessor-in-office who had Small Cause Court jurisdiction, and makes a decree, the decree is appealable. 1931 All 574 (578, 580) [AIR V 18] 54 All 171 (FB).

Sch. II, Art. 1 — Note 1

[1] President, District Board is not Government Officer and suit against him for damages for unlawful prohibition to collect tolls, is triable by the Small Cause Court. 1923 Mad 689 (689) [AIR V 10] : 46 Mad 808 (DB) ✠ 1933 Lah 124 (125) [AIR V 20].

[2] A suit for refund of profession tax illegally levied is not one concerning an act purporting to be done by any person by order of the local Government and is not, therefore, excluded from the jurisdiction of a Court of Small Causes. 1919 Lah 68 (68) [AIR V 6].

Sch. II, Art. 2 — Note 1

[1] A claim by an auction-purchaser for refund of the purchase-money by reason of the dispossession under the orders of the Collector falls under Art. 2. 1927 Mad 253 254) [AIR V 14].

[2] Small Cause Court cannot take cognizance of suit by purchaser at revenue-sale against under-tenure-holder for damages based on rent. 1939 Cal 468 (470) [AIR V 26].

[3] Supraddar having custody of attached crops handing them over in good faith on being informed of compromise between parties—Supraddar ordered to deposit decretal amount—Suit to recover amount from decree-holder *held* was excepted from cognizance of Small Cause Court under Art. 2. 1927 All 27 (28) [AIR V 14].

[4] Suit for damages for money paid by plaintiff for which defendant was liable, is not barred by Art. 2. 1933 Oudh 146 (147) [AIR V 20].

[5] A suit for the refund of the money paid as price for the goods by a purchaser of stolen goods who has been deprived of the goods by the police under the orders of the Sessions Judge for returning them to their owner, can be tried by a Court of Small Causes. 1928 Lah 515 (516) [AIR V 15].

[6] Article 2 of Sch. II of the Provincial Small Cause Courts Act refers to acts done by persons not acting as suitors in pursuance of a judgment or order which gives permission so to act, but as ministerial officers or otherwise obeying the order of the Court. Where the essence of an action relates to the recovery of the amount paid by the plaintiff himself as a mere suitor, *i. e.*, as the defendant in a former pauper suit of a certain sum representing the court-fee payable to Government under a decree later superseded, the suit is not outside the jurisdiction of the Court of Small Causes and where its value does not exceed Rs. 500, a second appeal is incompetent. 1950 Mad 33 (33, 34) [AIR V 37 C 17] ✠ 1960 Madh Pra 30 (31) [AIR V 47 C 15].

[7] Suits which concern acts purporting to be done by any person who is not a party to the suit in pursuance of a judgment or order of a court are excepted from cognizance of

(3) a suit concerning an act or order purporting to be done or made by any other officer of the Government in his official capacity, or by a Court of Wards, or by an officer of a Court of Wards in the execution of his office ;

(4) a suit for the possession of immovable property or for the recovery of an interest in such property ;

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, after the words "such property", *add* the following :—

"but not including a suit for ejectment where—

(a) the property has been let under a lease by a written instrument or orally and

(b) the Court of Small Causes would be competent to take cognizance of a suit for the rent of the property, and

(c) the only substantial issue arising for decision is as to whether the lease has determined by efflux of the time limited thereby or has been determined by a notice in accordance with clause *(h)* of section 111 of the Transfer of Property Act, 1882."

— Bom. Act VI of 1930, S. 3 (1) [9-5-1930]; IX of 1932, S. 2 [10-11-1932]; read with LXXXVII of 1958, S. 2 [15-10-1958].

Sch. II, Art. 2 — Note 1 *(contd.)*

Small Cause Court — Suit by *A* — *B* standing surety for plaintiff for costs — Suit dismissed and decree for costs passed against *A* — Decree realised from *B*—Suit by *B* against *A* for recovery of amount realised from him — Suit held excepted under Art. 2 and not cognizable by Small Cause Court. 1952 Raj 188 (190) [AIR V 39] : ILR (1952) 2 Raj 348.

Sch. II, Art. 3 — Note 1

[1] Article 3 applies to a suit relating to some distinct act done by an officer of the Government. A mere failure on the part of the Government to carry out a contract cannot be regarded as such an act. 1914 Mad 578 (578) [AIR V 1] : 37 Mad 533 (DB).

[2] Article 3 operates to take out of the purview of Small Cause Courts claims arising out of an act or order purporting to be done by an officer of Government in his official capacity, and no distinction arises from the fact that such an order, which is actually made by an officer of Government in his official capacity, might have been made by a person in his private capacity. 1940 Oudh 245 (247) [AIR 27].

[3] A suit to recover from Government a sum less than Rs. 500 under a contract for the repair of a tank is of a small cause nature. 1914 Mad 578 (578) [AIR V 1] : 37 Mad 533 (DB).

[4] Where the essence of the suit is that it is a claim founded on the allegations that the head of the Government Department concerned was not entitled to cancel the acceptance or, at any rate, to forfeit the security money and that the Government is liable for damages arising out of the other consequences of that act the suit is excepted from the cognizance of Court of Small Causes. 1940 Oudh 245 (248) [AIR V 27].

SCHEDULE II, ARTICLE 4 — SYNOPSIS

1. Suits under Article.
2. Suits under Article as amended by Bombay Act 6 of 1930.

1. Suits under Article.—[1] For the purposes of the Act, the definition of immovable property in the General Clauses Act will apply. Hence standing crops are immovable property. ('11) 9 Ind Cas 133 (134) (Cal).

[2] Growing palm trees are immovable property in Burma for the purposes of the Provincial Small Cause Courts Act. 1929 Rang 200 (203) [AIR V 16] : 7 Rang 706 (DB).

[3] A claim to grazing rights under a village custom is a claim to an interest in immovable property not to be *mooted* in a Small Cause Court. 1916 Nag 21 (21) [A I R V 3] : 12 Nag L R 83.

[4] Suit by a zamindar for recovery of the price of manure which he alleged belonged to him because of his interest in the village and by reason of a particular custom is excepted from the cognizance of the Court of Small Causes under cl. (4) and is in essence one for the recovery of an interest in immovable property. 1925 Oudh 318 (319) [AIR V 12].

[5] Suit for recovery of price of crops when defendants set up rights as settled raiyats is not triable by Small Cause Court. 1931 Cal 91 (91) [AIR V 18] (DB).

[6] A suit for ground rent of site in a town, the land being neither revenue paying nor agricultural land, is cognizable by a Small Cause Court. 1933 Nag 382 (382) [AIR V 20].

[7] Suit for value of fruit removed from trees is not governed by Art. 4. 1938 Lah 759 (760) [AIR V 25] : ILR (1939) Lah 100.

[8] A suit for damages in respect of mango trees cut down and sold as fuel before the suit is triable by the Small Cause Court. 1937 Cal 631 (632) [AIR V 24].

[9] A suit by the landlord against the tenants for damages resulting from their unauthorisedly cutting some trees standing on the leasehold is a small cause suit and Arts. 4 and 11 of Sch. II are inapplicable. 1959 Mys

(5) a suit for the partition of immovable property ;

(6) a suit by a mortgagee of immovable property for the foreclosure of the mortgage or for the sale of the property, or by a mortgagor of immovable property for the redemption of the mortgage ;

(7) a suit for the assessment, enhancement, abatement or apportionment of the rent of immovable property ;

Sch. II, Art. 4 — Note 1 *(contd.)*

162 (164) [AIR V 46 C 65] : ILR (1958) Mys 826.

[10] Suit for damages for illegal removal of goat's head by a shebait lies in the Small Causes Court even if title of the shebait is incidentally in issue. ('11) 14 Cal L Jour 118 (120).

[11] A document, though it may be evidence of an interest in land, is not itself an interest in land. A suit for recovery of the document is not necessarily a land suit. 1925 Lah 335 (335) [AIR V 12] : 6 Lah 33.

[12] Suit to reopen decree for obtaining relief under S. 36, Bengal Money-lenders Act, is cognizable by Small Cause Court and should be brought in that Court. 1947 Cal 97 (97) [AIR V 34 C 28] (DB).

[13] A suit to recover the price of skins of certain animals alleged to belong by custom to the plaintiff is not excepted from the cognizance of a Small Cause Court. ('11) 1911 Pun L R No. 159 p. 583 (584).

2. Suits under Article as amended by Bombay Act 6 of 1930. — [1] 'Substantial issue' means an issue arising, not only upon the allegations in the plaint, but upon those allegations combined with the allegations made in the written statement. There can be no question at issue unless there is a difference between the parties, and in order to determine what the issue is, the allegations of both sides must be considered. A substantial issue is an issue which goes to the root of the case, other issues being merely incidental or concerned with matters of the detail. 1939 Bom 353 (353, 354) [AIR V 26] ✣ 1945 Bom 470 (473) [AIR V 32] ✣ 1938 Sind 122 (123) [AIR V 25] : ILR (1939) Kar 60 (DB).

[2] In a suit to recover possession and rent on the strength of a lease, the question of the hollowness of the lease is a matter which goes to the root of the whole case. The Small Cause Court has, therefore, no jurisdiction to try such a suit. 1939 Bom 353 (354) [AIR V 26].

[3] Where, in an ejectment suit, a plea under Bombay Rent Restriction Act is taken, a substantial issue arises as to the liability of the tenant to be evicted and in particular, whether the landlord bona fide requires the property for his own use. Such a suit is not covered by the Bombay Amendment of 1930 made to the Provincial Small Cause Courts Act which has given limited power to Small Cause Courts to try suits for possession. Small Cause Court, therefore, has no jurisdiction to try such a suit. 1945 Bom 469 (470) [AIR V 32] : ILR (1945) Bom 437.

[4] A suit for ejectment of a tenant under a tenancy-at-will falls within Art. 4 (c) and is cognizable by the Small Cause Court. 1936 Bom 98 (98) [AIR V 23].

Sch. II, Art. 6 — Note 1

[1] Where the amount in dispute was Rs. 252-10-0 and the claim was based on hypothecation bond but all claims against the mortgaged property had been abandoned and the suit was framed purely as a money suit and the question was whether second appeal lay, held, that neither Art. 6 nor Art. 11 of Sch. II of the Provincial Small Cause Courts Act applied. 1925 All 205 (205) [AIR V 12].

[2] Where the tenants execute a *rehan* bond in lieu of rent due to the landlord, the relationship of landlord and tenant gives place to the relationship of creditor and debtor in respect of the money and Art. 6, Provincial Small Cause Court Act does not apply to the suit for the recovery of the sum. A suit by the plaintiff merely to recover the mortgage debt personally from the mortgagor is a Small Cause suit. 1934 Pat 43 (43) [AIR V 21].

Sch. II, Art. 7 — Note 1

[1] Claim for enhanced kattubadi below Rs. 500 on ground of defendant's default in payment of money rate is not one under Art. 7. 1916 Mad 1008 (1008) [AIR V 3] : 17 Cri L Jour 193. (19 Mad 329, *followed*.)

[2] Suit for rent of small cause nature — Plaintiff's co-sharers added as defendants — Suit involving question of title as shares of co-sharers came up for determination — Suit, held ceased to be of Small Cause nature and fell under Sch. II, Art. 7. 1940 Mad 507 (509) [AIR V 27].

[3] A suit for reteable portion only of stipulated rent by reason of a fraction of the demised premises not having been delivered to the lessee involves a question of apportionment in the absence of any adjustment by the parties and is therefore not a suit of a Small Cause nature. 1918 Mad 557 (558) [AIR V 5] : 41 Mad 370 (DB). (Letters Patent appeal from AIR 1918 Mad 551, in which Sadasiva Iyer, J. took contrary view disagreeing with Spencer J.)

[4] A suit for arrears of rent in respect of a wooden cabin which cannot at all be used for residential purposes and in which a question of apportionment of rent arises is not cognizable by a Small Cause Court in view of Sch. II, Arts. 7 & 8 of the Provincial Small Cause Courts Act. 1952 Ajmer 47 (2) (47) [AIR V 39].

[5] Suit for recovery of arrears of rent of shop with costs and interest — Suit is not covered by Art. 7. ('53) 1953 Raj L W 295 (296).

(8) a suit for the recovery of rent, other than house-rent, unless the Judge of the Court of Small Causes has been expressly invested by the State Government with authority to exercise jurisdiction with respect thereto ;

STATE AMENDMENT

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in Sch. II *omit* Art. (8).
—U. P. Act XXIV of 1954, S. 2 & Sch., item 3 (1) [30-11-1954].

Sch. II, Art. 7 — Note 1 *(contd.)*

[6] The defendant took a lease of pasture lands from the Government subject to certain conditions. The defendant cultivated the land in breach of the condition imposed and penalty was imposed on him by the collector according to the terms of engagement. On failure of the defendant to pay the same, a suit for its recovery was brought on the small cause side — *Held* that the suit was one for damages for breach of contract pure and simple and was cognizable by the Small Cause Court, although in fixing the quantum of damages the collector had regard to the income or profits which the defendant might be expected to have received from the unauthorised use of the land. Neither Art. 7 nor Art. 31 of Sch. II was applicable. 1951 Mad 710 (710) [AIR V 38 C 225].

SCHEDULE II, ARTICLE 8 — SYNOPSIS

1. "Rent"—Meaning of.
2. Suits for rent—Illustrative cases.
3. Suits not for rent—Illustrative cases.
4. Damages for use and occupation.
5. Note for rent—Suit on.
6. House rent.
7. Suit by assignee of landlord.
8. "Court expressly invested with power."

1. "Rent" — Meaning of.—[1] Rent is to be taken in ordinary sense as including compensation paid to owner of property for its use and occupation. 1917 Nag 37 (39) [AIR V 4] : 14 Nag L R 35.

[2] "Rent" means return in money or kind for enjoyment of specific property. 1925 Lah 196 (196) [AIR V 12].

[3] The word 'rent' as occurring in Article 8 of Sch. II, has reference to rent in respect of immovable property and it does not mean hire charges in respect of a moveable property such as a loud speaker. Hence, Article 8 does not exclude from the jurisdiction of Small Cause Court, a suit for hire charges in respect of such property. 1958 Madh Pra 52 (53) [AIR V 45 C 24] ✣ 1957 Raj 279 (281) [AIR V 44 C 104] : ILR (1957) 7 Raj 898 ✣ 1952 J & K 15 (15, 16) [AIR V 39] : 10 J & K L R 82.

[But see ('49) 1 Madh B L R 496 (497).]

[4] Every village cess which is paid, delivered or rendered in money, kind or services by tenant, as such, on account of use or occupation of land let to him is "rent" within the meaning of C. P. Tenancy Act. ('10) 6 Nag L R 117 (122).

[5] Money paid for enjoyment of trees is not rent. 1927 Rang 94 (94) [AIR V 14] : 4 Rang 503.

2. Suits for rent — Illustrative cases. — [1] Suit for damages for non-performance of the service which a tenant undertakes to perform as the consideration for his tenancy is in the nature of a rent suit over which the Small Cause Court has no jurisdiction. ('10) 12 Cal L Jour 480 (482) (DB).

[2] *Cess.* — Cesses are, by virtue of statute, made part of the rent payable by a tenure-holder or a raiyat and realizable as such and a decree passed therefor has the effect of a "rent decree." Such a suit is, therefore, excepted under the provisions of Art. 8. 1945 Pat 417 (419) [AIR V 32] : 24 Pat 307 (DB).

Produce Rent

[3] Suit for price of rent in kind is not triable by Small Cause Court. 1923 All 50 (52) [AIR V 10] : 45 All 7. (Case before amendment by U. P. Act 24 of 1954.)

[4] *Rent for forest rights.* — Money payable in respect of forest right for cutting wood, etc., is rent and suit for its recovery is not cognizable by Small Cause Court. 1915 Cal 135 (137) [AIR V 2] (DB).

[5] *Grazing fee:*—Cases prior to U. P. Act 24 of 1954—Suit for recovery of rent of grazing area is excluded from cognizance of Small Cause Court. 1924 All 557 (557) [AIR V 11] : 46 All 369 ✣ 1914 All 5 (6) [AIR V 1]. (Rent under S. 4 (3), Agra Tenancy Act.)

[See however 1951 Nag 50 (51) [AIR V 38 C 17] : ILR (1952) Nag 115.]

[6] *Fees for fishery.*—Suit for fee due for allowing to catch fish in village river, is not cognizable by Small Cause Court. 1917 Nag 37 (38) [AIR V 4] : 14 Nag L R 35.

[But see 1914 Oudh 272 (273) [AIR V 1]. (Theka of a right to fish and collect a produce is not lease, and the money payable by the Thekadar is not rent but fee, and hence a suit for the fee due under the Theka is not exempted from the cognisance of a Small Cause Court.)]

[7] *Nazrana.* — Suit against tenant for nazrana as price for grant of lease is suit for rent and is not cognizable by Small Cause Court. ('13) 9 Nag L R 94 (96, 97).

[8] Suit for rent other than house rent is not cognizable. 1915 Cal 302 (303) [AIR V 2]: 42 Cal 638 (DB) ✣ 1922 Pat 184 (185) [AIR V 9] (DB). (Provisions of S. 102, Civil P. C. do not apply.)

[9] Suit for rent due by landholder against his ryot under Estates Land Act is excepted from cognizance and no second appeal lies. 1922 Mad 119 (120, 123) [AIR V 9] : 44 Mad Mad 697 (DB). (This is also true under the Madras Estates Land Act.)

[10] Suit for rent of agricultural land is not cognisable. 1935 Rang 386 (387) [AIR V 22] : 13 Rang 633 (FB).

Sch. II, Art. 8 — Note 2 *(contd.)*

[11] Suit by plaintiff for damages alleging that defendant's tenants agreed to cultivate lands and later did not raise crops and that the plaintiff was deprived of his share of crops — *Held* suit was for rent and not cognizable by Small Cause Court. ('12) 16 Cal W N 89 (92, 93) (DB).

[12] Where the tenant agrees to give the landlord a fixed share of the produce as rent and not to appropriate the produce without first paying this share and the landlord sues the tenant for damages for loss suffered by misappropriation of the crop by the tenant the suit is really for rent and as such, not cognizable by a Small Cause Court. 1950 Kutch 61 (61) [AIR V 37 C 49].

[13] The plaintiff gave certain land to the defendant for a period of three years at a certain annual rent for the purpose of making bricks by excavating the earth therefrom and allowed the defendant to remain in possession. The plaintiff brought a suit for arrears of rent. *Held* that the case was not one of mere licence or profit a prendre or even the sale of the earth. It was a case of demise of land and therefore the suit for rent was barred from the cognizance of small cause Court under Sch. II, Art. 8. 1952 All 874 (874) [AIR V 39]. (Case before amendment by U. P. Act 24 of 1954.)

[14] A suit contemplated by S. 149, Bengal Tenancy Act, also bears the character of a suit for a declaratory decree. Where the plaintiff in a suit under S. 149 sues for a declaration that he is entitled to the rent deposited in Court and claims the money as a consequential relief, the suit is not cognizable by a Court of Small Causes under Arts. 8 and 19 of Sch. II. 1949 Dacca 16 (17) [AIR V 36 C 10].

3. Suits not for rent—Illustrative cases. —[1] Suit to realise money due on settlement by auction of date and palm trees is suit of Small Cause nature. It is not suit between landlord and tenant and does not come under Bengal Tenancy Act. 1936 Pat 403 (403) [AIR V 23] : 15 Pat 626 (DB).

[2] *Municipal Tax.* — Suit for recovery of rent for water meter by Municipality is not barred. The charge for the use of a water meter is a part of water tax and the person taking water is liable to pay that charge under the rules for the assessment of water rate. 1937 Nag 209 (209, 210) [AIR V 24].

[3] *Bazar Tax*—A person who occupies a site in a market does not have such an interest in land as would give rise to an action for rent for which he is liable for occupation of that site. He will not be liable for anything other than market toll or a sum of money in respect of a license by which license he is allowed to occupy a small portion of a market place for the sale of his goods. It is not rent and hence will not come under Art. 8. 1935 Pat 184 (185) [AIR V 22].

[4] Clauses 8 and 13 refer to suits against persons who actually occupy or use the land or other property for which they are liable to pay rent or "malikana" and "haq", etc., but have no application to case of person who holds intermediate position between owner and occupier of the land, viz., who agrees to pay a sum of money every year in consideration of his being given the *theka* of the bazar. Such a *theka* means only a right to realize the "*tah-bazari*" and other dues from the shopkeepers who attend the bazar. 1936 Oudh 223 (224) [AIR V 23] : 12 Luck 124 (DB).

[5] Suit for value of wages to be paid by produce, for agricultural labour for cultivating in partnership the *khas Khamar* land due under *kabuliat* showing no tenancy is cognizable by Small Cause Court. 1919 Cal 264(265) [AIR V 6] (DB). (In such cases Small Cause Court has power to decide question of defendant's status in spite of decision of Revenue Court passed without jurisdiction.)

[6] A suit for half share of paddy and straw grown under settlement from plaintiff with stipulation to deliver half share of the produce is cognizable by the Small Cause Court if there was nothing in the plaint suggesting that the defendant was a tenant. 1924 Cal 837 (838) [AIR V 11].

[7] A suit for recovery of the money value of the half share of produce of bhag cultivation from the defendant who is allowed to cultivate the land on the stipulation that he would be paid half the produce by way of wages is not a suit for rent and therefore is not excluded from cognizance of the Small Cause Court. 1954 Pat 32 (33) [A I R V 41 C 11].

[8] Bargadar agreeing to cultivate land and pay half produce to landlord — Suit by landlord for produce for period subsequent to year 1929—Section 3 (17), Bengal Tenancy Act, as amended in 1928 applies — Bargadar is not a tenant — Suit is cognizable by Small Cause Court. 1938 Cal 707 (709) [A I R V 25] ✠ ('10) 14 Cal W N 629 (632) (DB). (Bargadar stipulating that he would keep half the produce in return for his labour in cultivating land and remaining half to be paid to the owner, is not a tenant.)

[9] Ancestors of *A* planted certain mango trees in the gairmazrua land of the landlord *B* merely as trespassers, but there was agreement between *B* and the ancestors of *A* by which half the share in the trees and the fruit thereof was to be taken by *B* and the other half by the ancestors. *B* settled the land with *C* recognizing *C* as his tenant. *C*, by registered sale deed, transferred his rights to *D* who, by a suit in the Small Cause Court, claimed half the share in the fruit trees on the land from *A*. *Held*, the suit for the share was not a suit for rent within Art. 8 and hence was cognizable by the Small Cause Court. 1950 Pat 284 (286) [AIR V 37 C 70].

[10] Where the same land is used by larger number of persons for grazing their cattle and the only charge made is a fee per head of cattle there cannot be said to be tenancy nor a lease of the land. The licence to graze cattle would not in these circumstances amount to a lease since no right to the land is created, and the persons grazing their cattle are not tenants. A suit for recovery of grazing fee is

Sch. II, Art. 8 — Note 3 (*contd.*)
not a suit for rent. 1951 Nag 50 (51) [AIR V 38 C 17] : ILR (1952) Nag 115.

[11] A suit for licence fee is not a suit for rent. 1955 N U C (All) 5810 [A I R V 42]. (Case prior to amendment by U. P. Act 24 of 1954.)

[12] *Jodi.* — Suit for jodi by Zamindar or Mittadar from Inamdar is cognizable by Court of Small Causes. 1917 Mad 984 (985) [AIR V 4] : 40 Mad 93 (DB).

[13] *Kattubadi.*—Suit for arrears of *kattubadi* is of small cause nature. 1922 Mad 352 (353) [AIR V 9] (DB).

[14] *Ferry rent.* — Suit for recovery of sum payable under contract for plying boats in ferry is not a suit for rent and is cognizable by Small Cause Court. ('10) 14 Cal W N 994 (995) (DB).

[15] Co-sharer landlord in possession of holding under S. 22 (2), Bihar Tenancy Act — Suit against by other co-sharers for money payable is not a suit for rent and no second appeal lies. 1942 Pat 391 (392) [AIR V 29].

[16] Suit by plaintiff having a charge on the improvements for arrears of rent, to realize the amount of rent by sale of the improvements is not a suit for rent but is triable only as ordinary suit. ('10) 8 Ind Cas 864 (864) (DB) (Mad).

[17] Suit against partner in tenancy for share of rent is not suit for rent within Art. 8 but really one for damages for breach of contract and is cognizable by Small Cause Court. 1918 All 210 (210) [A I R V 5] : 40 All 51. (Case before amendment by U. P. Act 24 of 1954.)

[18] Plaintiff suing for price of goods sold to defendant, giving credit to rent due from plaintiff to defendant—Counter claim by defendant for rent over and above plaint claim, is not barred by Art. 8 or 31—Suit could not be described as suit for account. 1923 All 202 (202, 203) [AIR V 10]. (Case prior to amendment by U. P. Act 24 of 1954.)

[19] Plaintiff granted lease of right to defendant to recover rent for certain period — In a suit by lessor for recovery of sum realized by defendant lessee for period beyond lease — *Held*, that suit was cognizable by Small Cause Court. ('26) 96 Ind Cas 822 (823) (Lah).

4. Damages for use and occupation. — [1] Suit for damages against trespasser for use and occupation of land can be maintained. 1925 Lah 196 (196) [A I R V 12] ✠ 1947 Cal 407 (408) [AIR V 34 C 125] (DB) ✠ 1934 Lah 355 (355) [AIR V 21]. (Section 23 leaves a discretion with Judge in such a case and no ground for revision exists on the ground that a question of title is raised in the suit.) ✠ 1931 Lah 501 (502) [AIR V 18] ✠ 1925 Mad 890 (891) [AIR V 12]

[*See* 1926 Cal 541 (541) [AIR V 13] (DB). (Suit for compensation for use and occupation of excess of land not by way of damages but as rent is not cognizable by Small Cause Court.)]

[2] Suits for mesne profits, that is, suits in which damages for wrongful use and occupation are claimed, not being suits for rent are not excluded from the jurisdiction of the Small Cause Courts in Sch. II of the Provincial Small Cause Courts Act. ('49) 54 Mys. H C R 219 (227). (Such suits cannot be said to be included in suits referred to as suits for use and occupation in Sch. I of Mysore Small Cause Courts Act (8 of 1911)—Such suits are not cognizable on small cause side according to that Act.)

5. Note for rent — Suit on.—[1] Suit on note for rent is not suit for rent and is cognizable. Demand note or a bond does not cease to be so, just because a part or the whole of its consideration is made up of rent whether in arrears or in advance. 1923 Nag 285 (285) [AIR V 10].

6. House rent.—[1] Suit for rent of land is not suit for rent of house. Small Cause Court cannot entertain suit for arrears of rent of land. ('09) 4 Ind Cas 493 (494) (DB) (Cal).

[2] A suit by a landlord against a tenant for rent at an enhanced rate, on the allegation that he had served the defendant with notice, to vacate the house by a certain date and in default he would be charged with an enhanced rate is cognizable by the Small Cause Court. Suit is not one for enhancement of rent but rather a suit for rent and hence Art. 7 does not apply. And as it is a suit for house rent it is cognizable by Small Cause Court. ('13) 9 Nag L R 72 (73).

[3] Whether rent is ground rent or house rent depends upon contract. If lessee takes land and then builds upon it, rent is ground rent. If lessor builds house and then lets house and land together, rent is house rent. Suit for former is not cognizable; suit for latter whether regarded as suit for rent or for tax is cognizable. Objection to jurisdiction must be decided by Court itself. 1918 Pat 277 (277) [AIR V 5].

[4] "House" used in widest sense—Includes building used as shop — Rent for shop is house rent. 1927 All 194 (194) [AIR V 14] : 59 All 134. (Case before amendment by U. P. Act 24 of 1954.) ✠ 1939 Pesh 14 (15) [AIR V 26] (DB) ✠ 1928 Lah 284 (285) [AIR V 15] ✠ 1922 Nag 15 (16) [AIR V 9].

[5] Building actually used as shop but capable of being used as residence is a 'house' — Suit for arrears of rent of such building is cognizable. 1936 Pesh 55 (56) [AIR V 23].

[6] Motor garage is a house. 1935 Pesh 192 (192) [AIR V 22].

[7] Recovery of rent for stall is small cause. ('09) 4 Ind Cas 822 (823) (Upp Bur).

[8] Suit for recovery of rent of house site is not cognizable. Such a suit is different from suit for recovery of house rent. 1942 Oudh 145 (146) [AIR V 29] (DB).

[9] Open site for stacking fuel with chhappar for shelter is not a house. 1933 Lah 306 (307) [AIR V 20].

[10] 'Khattis,' whether situate within the limits of a residential house or otherwise are meant for storage of grain, and when let apart from the houses in which they are situate, cannot be considered to be places meant for human habitation. A suit for rent in respect of khattis is not one for recovery of rent of a house and hence is not cognizable. 1933 All

(9) a suit concerning the liability of land to be assessed to land-revenue ;

(10) a suit to restrain waste ;

(11) a suit for the determination or enforcement of any other right to or interest in immovable property ;

Sch. II, Art. 8 — Note 6 *(contd.)*

918 (919) [AIR V 20] : 56 All 261 (DB). (Case before amendment by U. P. Act 24 of 1954.)

[11] Mere fact that building could be used to shelter refugees from fire or earthquake in a pressing emergency does not make it house within the meaning of Cl. 8, Sch. II. 1941 Rang 36 (37) [AIR V 28] : 1940 Rang L R 820 (DB).

[**But see** 1933 Nag 382 (382) [AIR V 20]. (Suit for ground rent of site in town — Land neither revenue paying nor agricultural land — Suit is triable by Small Cause Court.)]

[12] A suit for rent of homestead land (though not agricultural land) situated in a town (Burdwan) is not cognizable. 1925 Cal 423 (423) [AIR V 12] (DB).

[13] Murtafa is a tax or rent in nature of house rent and a suit for its recovery for the occupation of houses is cognizable by Small Cause Court. 1919 Pat 480 (481) [AIR V 6] (DB).

[14] Plaintiff mortgagee in possession and entitled to receive rents from shopkeepers, leasing out this right to defendant. *Held*, that lease was lease of immovable property and suit by lessor to recover the arrears of lease money from lessee was not a suit for house rent but an ordinary suit for rent under the article and therefore did not lie in a Small Cause Court. ('12) 9 All L Jour 776 (777, 778). (Case prior to amendment by U. P. Act 24 of 1954.)

[15] A suit for recovery of house rent, the amount claimed being less than Rs. 1000/- would be cognizable by the Court of Small Causes, Delhi, unless the cognizance thereof is barred by any other statute. There is nothing in the Delhi and Ajmer Rent Control Act (1952) which bars the cognizance of the suit by the Court of Small Causes. 1960 Punj 11 (12) [AIR V 47 C 5] (DB).

[16] A suit for arrears of rent in respect of a wooden cabin which cannot at all be used for residential purposes and in which a question of apportionment of rent arises is not cognizable by a Small Cause Court in view of Arts. 7 and 8 of Sch. II. 1952 Ajmer 47 (2) (47) [AIR V 39].

[17] A suit for arrears of rent of a house is not a suit relating to immovable property. The rent itself which is due certainly relates to an immovable property but a suit for rent can always be filed in the Small Cause Court though no suit for immovable property can be filed there. 1956 All 131 (132) [AIR V 43 C 54].

[18] The landlord applied under S. 7B, U. P. (Temporary) Control of Rent and Eviction Act and when the Munsif acting under S. 7B (7) issued notice to him he got the application treated as a plaint in suit for arrears of rent. The suit was decreed and on appeal the appellate Court directed the plaint to be returned for presentation to the Small Cause Court. *Held*, that the Munsif had jurisdiction to hear and decide the suit for arrears of rent and the order directing the plaint to be returned for presentation to the Small Cause Court could not be upheld. ('54) 1954 All L Jour 708 (709). (Case prior to amendment by U. P. Act 24 of 1954.)

7. Suit by assignee of landlord.—[1] Suit by assignee from the land holder of rent for arrears of rent under S. 132, Agra Tenancy Act is not cognizable by Small Cause Court but by the Revenue Court under S. 230, Agra Tenancy Act. It is still a suit for recovery of rent other than the 'house rent.' 1934 All 893 (895) [AIR V 21] : 57 All 230 (DB). (Case before amendment by U. P. Act 24 of 1954.) ✣ 1941 Lah 313 (313) [AIR V 28] ✣ 1935 Lah 976 (977, 978) [AIR V 22].

[2] Suit by assignee of arrears of payment under a kabuliyat entered into by a usufructuary mortgagee who released part of his zurpeshgi lease and stipulated to pay a fixed sum of Rs. 28 as profits on account of raiyati right, does not fall under Art. 8, such a suit not being one for rent. 1936 Pat 406 (407) [AIR V 23].

[3] Plaintiff attached defendant's rent due in execution of his decree against defendant's landlord. He then brought a suit for recovery of the money. *Held*, that suit was not suit for rent and Small Cause Court had jurisdiction to try it. ('11) 10 Ind Cas 569 (569) (Cal).

[4] Some of the co-proprietors of land transferred their right to recover their share of rent from the tenants to the plaintiff. The plaintiff brought a suit against the non-transferor co-proprietor to recover the share of rent transferred to him. *Held*, that exception in Art. 8 did not apply because the defendant was not a tenant of the transferor and the suit was not for arrears of rent. Suit in Small Cause Court was maintainable. 1936 Lah 377 (378) [AIR V 23].

8. "Court expressly invested with power."—[1] The "Judge" in Cl. (8) means a Court invested with the jurisdiction of a Court of Small Causes. It is not necessary to invest the powers by reference to the name of the particular Judge. 1928 Bom 265 (266) [AIR V 15] (DB) ✣ 1936 Cal 497 (500) [AIR V 23] : ILR (1937) 1 Cal 1 (FB). (AIR 1916 Cal 574, *Overruled.*)

[2] Where the Judge of the Small Causes Court was not specially authorised under Art. 8 a decree passed by him for rent of a vacant land leased to defendant held was without jurisdiction. 1951 Punj 389 (2) (390) [AIR V 38 C 113].

Sch. II, Art. 11 — Note 1

[1] To bring suit within Art. 11 it must be one brought expressly for determination of enforcement of right to or interest in immovable property. 1928 Cal 593 (594) [AIR V 15] : 55 Cal 1193 (DB).

(12) a suit for the possession of an hereditary office or of an interest in such an office, including a suit to establish an exclusive or periodically recurring right to discharge the functions of an office ;

(13) a suit to enforce payment of the allowance or fees respectively called *malikana* and *hakk*, or of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in immovable property or in an hereditary office or in a shrine or other religious institution ;

Sch. II, Art. 11 — Note 1 *(contd.)*

[2] A suit by a mortgagor to recover part of mortgage consideration from the mortgagee is not cognizable by the Provincial Small Cause Court. 1923 Cal 567 (567) [AIR V 10].

[*See also* 1961 Madh-Pra 152 (153) [A I R V 48 C 53]. (Suit for interest due on mortgage of house in form of rent suit—Not maintainable in Small Cause Court.)]

[3] In view of Art. 11, a Small Cause Court is precluded from trying a suit to enforce a charge on immovable property. 1939 Nag 118 (119) [AIR V 26] : ILR (1941) Nag 356.

[4] Where a suit is framed by the chargeholder as a suit for money, the fact that there is a general prayer in the plaint asking for such other or further reliefs as the Court may in justice and equity consider the plaintiff to be entitled to cannot convert the suit into one under Art. 11. 1928 Cal 593 (594) [A I R V 15] : 55 Cal 1193 (DB).

[5] Where the plaintiff's suit is in essence and in substance a suit for payment of a sum of money as arrears of rent, the fact that incidentally the question of plaintiff's title to the property may have to be gone into does not take away the jurisdiction of the Small Cause Court. 1954 Madh-B 34 (35) [AIR V 41 C 22]: ILR (1954) Madh-B 172. (Nature of suit has to be decided *prima facie* upon the language of the plaint.)

[6] In a suit for recovery of rent of a plot of land, being the fraction of a khathan number, governed by the T. P. Act, the Small Cause Court has no jurisdiction to decide a disputed question as to the extent of the tenancy, if it is raised by the defendant-tenant. 1951 Cal 302 (302) [AIR V 38 C 65].

[7] Suit by vendor for unpaid purchase-money is not suit for determination or enforcement of right to or interest in immovable property or suit for specific performance of contract within Arts. 11 and 15. 1920 Mad 578 (578) [AIR V 7] (DB) ✠ 1926 Nag 65 (65) [AIR V 13] ✠ ('11) 10 Ind Cas 267 (267) (DB) (Mad).

[8] A suit for recovery of the price paid to the defendant for the purchase of property on the ground that the plaintiff has been dispossessed by a claimant, whose claim had been recognised by a decree of Court is a plain and simple suit for damages. When there is no prayer in that suit to determine the right or enforce the right or interest in any immovable property, it is not outside the jurisdiction of the Small Cause Court under Art. 11. 1957 Mad 673 (674) [AIR V 44 C 207].

[9] A suit to recover money from the property belonging to the defendants is not a suit of the nature specified in Cl. 11, even though the property includes immovable property. 1926 All 753 (754) [AIR V 13].

[10] In case of a suit by the landlord for damages resulting from unauthorised cutting away of trees by the tenants it cannot be said that any question relating to respective rights of the landlord and tenant to an interest in immovable property arises. Therefore Art. 11 is inapplicable. 1959 Mys 162 (163) [A I R V 46 C 65] : I L R (1958) Mys 826 ✠ ('10) 5 Ind Cas 322 (323) (DB) (All). (Suit for damages for cutting trees—Defendant alleging that trees did not exist and no trees were cut down — Suit is cognizable by Small Cause Court.)

[11] Although a Small Cause Court has no jurisdiction to decide questions involving a right to immovable property it is not bound to refuse to consider any question of title which is raised before it. If the question of title is only incidental and not the main relief, it can be gone into. 1929 Bom 228 (229) [A I R V 16] (DB) ✠ 1947 Mad 404 (404) [A I R V 34 C 215]. (Suit in respect of tamarind gathered from tree—Cognizable by Small Cause Court—Question of title to trees may be incidentally gone into.)

[12] A suit for damages for trespass is cognizable by Small Cause Court. ('09) 10 Cal L Jour 198 (200) (DB).

[13] A suit to obtain relief under S. 36, Bengal Money Lenders Act, does not fall within Art. 11. 1947 Cal 97 (97, 98) [A I R V 34 C 28] (DB).

[14] A suit for a share of the income of a Durbar Sahib as well as for a share of jaghir attached thereto is cognizable by the Court of Small Causes. ('11) 1911 Pun L R No. 93 p. 373 (377) : 1911 Pun Re No 20.

[15] Suit by mortgagee claiming share of cosharer in offerings of temple against *thekadar—Held* Art. 11 did not apply. 1936 Lah 100 (100, 101) [AIR V 23].

[16] A suit by lessees of lac produce, to recover value of lac illegally removed is cognizable by a Small Cause Court. ('19) 50 Ind Cas 629 (630) (Nag).

SCHEDULE II, ARTICLE 13 — SYNOPSIS

1. Scope and applicability.
2. Hakk.
3. Cess.
4. Other dues.
5. "By reason of his interest in immovable property".
6. Interest in hereditary office.
7. Interest in shrine.

1. Scope and applicability. — [1] The application of Art. 13 is limited only to suits instituted by persons claiming the dues in an hereditary office or in a shrine against persons by whom they are primarily payable; the

Sch. II, Art. 13 — Note 1 *(contd.)*

Article cannot be extended to suits to recover dues from the person to whom they have been wrongly paid. ('55) I L R (1955) 5 Raj 295 (296, 297). (Suit by one co-sharer against another for recovery of his share of dues realised by latter in entirety — Not excluded from cognizance of Small Cause Court.) ✠ 1926 Lah 276 (276) [AIR V 13] ✠ 1915 Nag 124 (125) [AIR V 2] : 12 Nag L R 47.

[2] Article has no application to case or person who holds intermediate position between owner and occupier of land. 1936 Oudh 223 (224) [AIR V 23] : 12 Luck 124 (DB).

[3] A suit by a Municipality to recover arrears of taxes due by force of a statute and not by reason of any interest in immoveable property is not a suit coming within Sch. II, Art. 13 when the plaintiff merely claims a money decree without claiming any charge given to it under S. 167, Bengal Municipal Act, and the Small Cause Court will have jurisdiction to entertain and decide the suit. 1950 Cal 415 (416) [AIR V 37 C 155] (DB).

[4] A suit to recover plaintiff's share in desaigiri allowance received by the defendant, is not a suit to enforce payment of any malikana, hakk or cess. This is a simple suit for money had and received and does not fall under Art. 13. 1945 Bom 496 (497) [AIR V 32].

[5] A suit for half share of the fruits of mango trees is not barred under Art. 13 because the payment was neither malikana, hakk, cess or other dues payable by a person by reason of his interest in immoveable property. 1950 Pat 284 (288) [AIR V 37 C 70] (DB).

[6] Suit by co-sharer for share in commutation allowance of Kulkarni Watan is suit for money had and received, and does not fall under Art. 13. 1925 Bom 439 (439) [AIR V 12] (DB).

[7] Defendants entering into contract with Collector to pay a sum for right of collecting weighment dues—Part paid—Suit for balance due is not to enforce payment of cess or dues from parties liable but is one to recover sum due under contract — Suit is Small Cause. 1923 All 420 (420) [AIR V 10].

2. Hakk.—[1] A suit for a haq chaharum is not cognizable by a Small Cause Court. 1921 All 68 (69) [AIR V 8] : 43 All 681 (DB).

[2] Suit by Zemindar to half price of trees sold by tenant based on terms of village Wajib-ul-arz is cognizable by Small Cause Court. 1920 All 16 (16) [AIR V 7]: 42 All 448.

3. Cess. — [1] A claim for jodi, russums and road cess is similar to a claim for rent, which is not of the nature of the cesses mentioned in Cl. 13, and no second appeal lies if the value of the claim is less than Rs. 500. 1925 Mad 1196 (1197) [AIR V 12].

[2] A suit for poruppu and cesses by the zamindar against the tenants is cognizable by the Small Cause Court; poruppu not being a class of allowance or fee contemplated by Art. 13. 1932 Mad 224 (225) [AIR V 19].

[3] In view of the provisions of S. 41, Bengal Cess Act, the cesses being payable to the proprietor by reason of his interest in immovable property by tenure-holder or raiyats, a suit for cesses is excepted from the cognizance of the Small Cause Courts by virtue of Art. 13. 1945 Pat 417 (419) [AIR V 32] : 24 Pat 307 (DB).

4. Other dues. — [1] The intention of Art. 13 is to exclude claims to the somewhat arbitrary dues designated as meras and resums from the cognizance of the Small Cause Court. 1935 Mad 554 (555) [AIR V 22].

[2] The dues contemplated by Art. 13 are dues arising directly from the interest in immoveable property and do not include dues which are indirectly connected with something arising out of an interest in immoveable property. 1948 Nag 145 (146) [AIR V 35 C 54] : I L R (1947) Nag 776.

[3] Article covers case when dues are claimed as customary dues. 1923 All 378 (380) [AIR V 10].

[4] A suit by a zamindar against the agraharamdars of a village for recovery of jodi or meras which is really not rent but a cash payment fixed in lieu of certain customary dues payable to a zamindar in consideration of certain things done by him or certain expenses borne by the zamindari, e. g., performing ubhayams in a temple, visiting the village, employing a diwan, employing a karnam, etc., falls within Art. 13 and is not cognizable by a Small Cause Court. 1935 Mad 554 (555) [AIR V 22].

[5] A suit on a promissory note which recites that it is executed on account of rusum of Deshpande-ship for two years, is not barred by Art. 13 from cognizance by the Court of Small Causes, for the suit is not to recover the dues but to recover money on a negotiable instrument. 1941 Nag 271 (272) [AIR V 28] : I L R (1942) Nag 298.

[6] A suit to recover choutarji dues which are in the nature of a jodi is a suit of a small cause nature. There is no difference in principle between inam jodi paid to a zamindar and sub-inam jodi paid to an inamdar as would make Art. 13 applicable to the latter while not applicable to the former. 1927 Mad 670 (671) [AIR V 14].

[7] Money payable annually to plaintiff— Payment is not of nature described in Art. 13 — Suit in respect of same is of small cause nature. ('12) 1912 Mad W N 537 (538) (DB).

5. "By reason of his interest in immovable property". — [1] Article 13 bars a claim for cesses and other dues payable to a person by reason of his interest in immovable property. Prima facie, it would appear that the other dues referred to in Art. 13 must be ejusdem generis with cesses referred to immediately before, that is to say, charges arising from the immovable property itself. 1938 Cal 320 (320) [AIR V 25] : I L R (1938) 2 Cal 60 (DB) ✠ 1932 Pat 220 (221) [AIR V 19].

[2] The words "by reason of his interest in immovable property" in Art. 13 contemplate payments which a person is entitled to, as representing his interest in immovable property and not because he possesses some interest in such property. 1928 Cal 709 (712)

Sch. II, Art. 13 — Note 5 *(contd.)*
[AIR V 15] (DB) ✣ 1915 Nag 106 (107) [AIR V 2] : 11 Nag L R 100 ✣ ('13) 36 Mad 18 (19) (DB).

[3] Article 13 relates only to payments of money due to a person in consideration of his interest in the property, and accordingly Swatantarams do not fall within its scope. 1928 Mad 21 (22) [AIR V 15] DB).

[4] A suit for a licence fee is not a suit "to enforce payment of dues when the dues are payable to a person by reason of his interest in immoveable property". 1955 N U C (All) 5810 [AIR V 42].

[5] Certain dues and cesses were being claimed in a suit only by reason of the interest in immovable property which plaintiffs, not withstanding the sale, claimed to have retained in a mouza and which in their view was still continuing in their favour — *Held*, notwithstanding the legal or juridical relation subsisting between the parties such a suit was covered by Art. 13. 1928 Cal 709 (712) [AIR V 15] (DB). (Per *Mukherji, J.—Cuming J.*, Contra.)

[6] A suit by the landlord of a village for the price of manure of defendant's cattle grazing on his banjar land on the ground that the defendant is a Thalwa, (i. e,) non-agriculturist resident of the village and according to the wajib-ul-arz of the village the landlord is entitled to the manure from the cattle of a Thalwa in the village, falls directly within Art. 13 of the Second Schedule to the Provincial Small Cause Courts Act, and is therefore excepted from the jurisdiction of the Court of Small Causes. The wajib-ul-arz of a village is a record not only of customs but of rights and customs, and the landlord's claim for manure under its terms is one for dues payable to him by reason of his interest in immovable property. 1948 Nag 145 (147) [AIR V 35 C 54] : ILR (1947) Nag 776.

[7] Suit by Zamindar to recover price of oil due by oil-man resident in village when under terms of a Wajib-ul-arz is within Art. 13. 1918 All 79 (79) [AIR V 5] : 40 All 663.

[8] A suit for recovery by an inamdar of sums payable by a Khatidar in respect of certain immovable property held by him under the inamdar as his superior holder is not cognizable by a Court of Small Causes. 1914 Bom 238 (238) [A I R V 1] : 39 Bom 131 (DB).

[9] Right to claim a share of the income of inam land by inamdars is a right to payment by reason of some interest in immovable property to which Art. 13 applies. 1935 Mad 41 (41) [AIR V 22].

[10] A suit to recover ferry toll is not cognizable by the Small Cause Court. ('13) 35 All 156 (157).

[11] Suit by lambardar against cobblers of the village for dues in return of skin of dead cattle is not triable by Small Cause Court. 1944 Nag 310 (310) [AIR V 31] : I L R (1944) Nag 825.

[12] The plaintiffs, malguzars of a certain mouza, sued to recover from the defendant a sum of Rs. 34 on account of the wrongful removal of manure to which they set up title under a clause in the wajib-ul-arz. *Held*, that even if the claim were regarded as a "due" that due was not payable to the plaintiffs by reason of their interest in immovable property. 1915 Nag 106 (107) [A I R V 2] : 11 Nag L R 100.

[13] Dues payable to farmer of market for occupation of portion of market site is neither rent nor dues which are payable to the farmer by reason of his interest in immovable property and therefore the Small Cause Court has jurisdiction to entertain a suit by the farmer for such dues. 1935 Pat 184 (185, 186) [AIR V 22].

[14] A Municipality has no interest in the holdings situated in the Municipal area as is contemplated by the use of that expression in Art. 13 and its taxes do not therefore come under the exceptions mentioned in that article. Suit to enforce payment of such taxes is therefore cognizable by a Court of Small Causes. 1932 Pat 220 (221) [AIR V 19] ✣ 1928 Oudh 99 (101) [AIR V 15] : 3 Luck 282.

[15] Suit for the recovery of land cess is of a small cause nature and no second appeal lies from a decree in such a suit. ('13) 36 Mad 18 (19) (DB).

[16] A suit to claim a cess 'sivunimera" which was shown to be a voluntary payment by a holder of the inam to his zamindar, and not one to which the zamindar was entitled by reason of his interest in immovable property, does not come within the purview of Art. 13. 1929 Mad 694 (695) [AIR V 16].

[17] A claim for arrears of interest due because of non-payment of rent cannot come under the definition of a claim for other dues "payable to a person by reason of interest in immovable property" within Art. 13. 1938 Cal 320 (320) [A I R V 25] : ILR (1938) 2 Cal 60 (DB).

[18] A suit to recover Kalavettu (i. e.) price paid for the plaintiff's water used for irrigation by the defendant is cognizable by a Small Cause Court. 1914 Mad 48 (48) [AIR V 1].

[19] Suit for local cess or village cess—Art. 13 does not apply. ('13) 36 Mad 126 (127, 128).

[20] A suit for the share of the plaintiff in respect of dharat collections against a stake holder, or a person who had wrongly received the plaintiff's share, is cognizable by a Small Cause Court. ('13) 1913 Pun L R No. 103 p. 384 (384) : 1912 Pun Re No. 120.

6. Interest in hereditary office. — [1] A suit for payment of the dues accruing to plaintiff by reason of his hereditary office as purveyor of ghee to a temple for a fixed annual allowance is not of a small cause nature. 1916 Mad 445 (445) [A I R V 3] (DB).

[2] A Court of small causes is debarred from taking cognizance of a suit by an archaka to receive the dues of his hereditary office under Art. 13. 1916 Mad 691 (691) [AIR V 3].

7. Interest in shrine. — [1] A claim for a certain amount though less than Rs. 500 on account of share as khadims out of income of a religious shrine falls under Art. 13 and is

(14) a suit to recover from a person to whom compensation has been paid under the [a]Land Acquisition Act, 1870, the whole or any part of the compensation ;

[a] *See* now the Land Acquisition Act, 1894 (I of 1894).

(15) a suit for the specific performance or rescission of a contract ;

Sch. II, Art. 13 — Note 7 *(contd.)*

excluded from the cognizance of a Court of Small Causes. 1933 Lah 606 [608) [AIR V 20].

[2] A suit for temple emoluments secured to the plaintiff by a takid is not cognizable by the Small Cause Court. ('11) 1911-2 Mad W N 589 (590) (DB).

[3] A suit for the recovery of a share of offerings at a temple is not barred from the cognizance of a Court of Small Causes by Art. 13 which relates to claims against a person who is primarily liable to pay the cesses or due. ('29) 113 Ind Cas 750 (750) (All)✠ ('13) 19 Ind Cas 628 (629) (DB) (All) ✠ ('11) 1911 Pun W R No. 92 p. 232 (233) (DB).

[4] Hissedars of village common entitled to share offerings in temple—Offerings at temple with many claimants farmed to highest bidder by Government. Thekadar to give surety—Mortgage by co-sharer of his share—Thekadar refusing to pay amount of share to mortgagee —Suit by mortgagee against thekadar held cognizable by Small Cause Court—Art. 13 or Art. 11 held did not apply. 1936 Lah 100 (100, 101) [AIR V 23].

Sch. II, Art. 15 — Note 1

[1] Where a suit is for specific performance of contract or in the alternative for damages, the suit is not of a small cause nature. 1924 Mad 844 (844) [AIR V 11].

[2] Article 15 comtemplates cases where rescission of a contract is the relief asked for and does not apply where what the plaintiff desires to obtain from the Court is not so much of the rescission of the contract as the recovery of the money advanced. 1936 Pat 429 (430) [AIR V 23].

[3] A patnidar sued darpatnidar for recovery of certain account papers relating to the Mahal on the basis of an executory contract contained in a registered kabuliyat and failing such recovery, plaintiff claimed Rs. 100 as compensation. There was no evidence to show that the particular papers which plaintiff wanted were already in the defendant's possession—*Held*, that it was a suit for specific performance of contract and was not cognizable by a Court of small causes and consequently second appeal was not barred. 1932 Cal 481 (481) [AIR V 19] : 59 Cal 352.

[4] A suit for the return of an article lent by the plaintiff to the defendant and for compensation in the alternative is not cognizable by a Small Cause Court. 1919 Oudh 73 (74) [AIR V 6].

[5] Suit for recovery of balance of mortgage consideration is not cognizable by a Small Cause Court. 1916 Cal 530 (531) [AIR V 3] : 43 Cal 59 (DB).

[6] Defendant agreed to pay a certain amount to plaintiff on plaintiff agreeing to transfer patta of his land to defendant. On defendant's refusal to pay plaintiff sued the defendant for that amount — *Held* that the Small Cause Court had no jurisdiction to entertain the suit as it was for specific performance. ('09) 19 Mad L Jour 220 (221) (DB).

[7] Suit by vendor for unpaid purchase-money expressing readiness to perform his part of contract and execute conveyance. Such suit is for specific performance and not cognizable by Small Cause Court. 1919 Mad 304 (304) [AIR V 6] (DB) ✠ 1929 All 62 (62) [AIR V 16].

[But see 1924 Lah 314 (315) [AIR V 11].]

[8] Generally speaking, a suit by a vendor to recover the purchase money or any balance alleged to be due on a sale of immovable property falls within the category of a suit for specific performance. Where therefore a suit is not even one to recover a specific unpaid amount but raises generally the question of how a specific contract of sale has been performed it is one which is not of a small cause nature and the decree passed by the Small Cause Court is accordingly without jurisdiction. 1953 Mad 559 (560) [AIR V 40 C 214].

[9] Where the plaintiff is not claiming the performance of a specific act or the delivery of particular articles or of particular coins but is merely claiming money payable to him under a contract the suit can in no sense be treated as a suit for the specific performance of a contract. ('54) ILR (1954) Madh B 52(54).

[10] Suit by vendee for recovery of purchase-money on the failure of a contract by vendor to convey land is of small cause nature. 1924 Mad 903 (903) [AIR V 11].

[11] A suit to recover money on the fulfilment of a condition on which it was stipulated to be paid is not a suit for the specific performance of a contract so as to except it from the jurisdiction of a Small Cause Court. ('12) 15 Ind Cas 352 (352) (DB) (Mad).

[12] A suit for redemption of certain articles pawned by the plaintiff with defendant, and, in the alternative, for recovery of their value, is not suit for specific performance and thus is not exempted under Art. 15. 1927 Oudh 476 (478) [AIR V 14] (DB) ✠ 1961 Andh Pra 312 (313) [AIR V 48 C 81] ✠ 1959 Madh Pra 97 (99) [AIR V 46 C 32] (DB).

[But see 1921 Oudh 124 (124) [AIR V 8].]

[13] A suit to enforce an award is in essence a suit for specific performance of a contract and is not therefore cognizable by a Small Cause Court. 1918 Cal 899 (900) [AIR V 5] (DB) ✠ 1924 Mad 485 (485) [AIR V 11]. (DB).

[But see 1919 Upp Bur 25 (25) [AIR V 6]:3 Upp Bur Rul 109.]

[14] A suit for recovery of money due on an award is not a suit for the specific performance of a contract and is cognizable by a Small Cause Court. 1924 Mad 485 (485) [AIR V 11] (DB)✠1950 Pat 48 (49) [AIR V 37 C 18]: 28 Pat 569 (DB) ✠ 1929 Sind 43 (43) [AIR

(16) a suit for the rectification or cancellation of an instrument ;

(17) a suit to obtain an injunction ;

(18) a suit relating to a trust, including a suit to make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust, and a suit by a co-trustee to enforce against the estate of a deceased trustee a claim for contribution ;

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in cl. (18) of Sch. II for the words "relating to a trust" *substitute* the words "to enforce a trust." —Bom. Act VI of 1930, S. 3 (2) [9-5-1930] read with LXXXVII of 1958, S. 2 [15 10-1958].

Sch. II, Art. 15 — Note 1 *(contd.)*

V 16] : 23 Sind L R 411=1926 Rang 198 (200) [AIR V 13] : 4 Rang 227 (DB).

[15] Suit for balance of premium collected by agent — Relief prayed for against agent and lessee in the alternative — *Held* that the suit being for money due under a complete transaction of lease which had been given effect to and not for specific performance, it was cognizable by a Small Cause Court. 1933 All 147 (148, 149) [AIR V 20].

[16] An action for the delivery of a specific chattel if the right to delivery flowed from contract, differs from an action for specific performance, since it is based on an allegation not that a contract to deliver has not been performed, but that the chattel is the property of the plaintiff and is being wrongfully detained by the defendant, and, therefore, such an action is not excepted from the jurisdiction of a Small Cause Court by virtue of Cl. 15. 1928 Lah 535 (536) [AIR V 15].

[17] A suit for the recovery of a certain weight of silver and of gold which the plaintiff alleged that he had given to the defendant goldsmith to make ornaments out of, is one for recovery of money and is cognizable by Small Cause Court. 1926 Oudh 272 (273) [AIR V 13].

[18] Suit for recovery of money advanced which is neither a suit for contribution nor one in respect of payment made by the plaintiff of money to the defendant as a co-sharer does not fall within Art. 41 or Art. 15. 1936 Pat 429 (430) [AIR V 23].

[19] After giving notice to the vendor that the house which was the subject-matter of the contract was likely to be acquired by the Municipality and having received no reply to it the vendee filed a suit in the Court of Small Causes to recover back the earnest money paid by him. It was held that the plaintiff did not come to Court with a clear and unambiguous allegation that the contract became void. Alternatively he alleged that the contract became voidable. Thus he wanted the Court to decide that the contract had become void and on that basis he wanted a decree for the refund of the earnest money in terms of the contract itself. Such a claim would inevitably attract the provisions of Art 15. Being a suit for specific performance and for rescission of the contract it was outside the jurisdiction of the Court of Small Causes. 1956 Bom 254 (255) [AIR V 43 C 107].

[20] Compromise decree declaring rights of parties — Plaintiff getting right to recover amount of money from defendant in accordance with rights specified in the decree—Suit to recover such amount is not one for specific performance of any agreement — Suit lies in Small Cause Court. 1961 Bom 221 (223) [AIR V 48 C 52].

Sch. II, Art. 17 — Note 1

[1] A suit to recover tax levied under Madras Local Boards Act and for a declaration that it was illegally levied and for an injunction restraining the Board from levying it in future is not of small cause nature. 1938 Mad 941 (942) [AIR V 25] (DB).

Sch. II, Art. 18 — Note 1

[1] The word "trust" in Art. 18 bears the meaning it has under the Trusts Act. 1923 Rang 129 (130) [AIR V 10] : 4 Upp Bur Rul 154.

[2] Provision in favour of daughter not party to partition deed is trust for her benefit which she can sue to enforce— Such suit will not lie in Small Cause Court as it relates to trust within article 18. 1914 Mad 95 (96) [AIR V 1] : 38 Mad 788.

[3] Where a composition is effected between a debtor and his creditors, and a trustee is appointed to collect the outstandings and the trustee fails to carry out the terms of the deed, the only remedy of the creditors against the trustee is to file a suit against him for enforcing the trust. But such a suit is barred by Art. 18 from the cognizance of a Small Cause Court. 1929 Sind 49 (49) [AIR V 16] (DB).

[4] A Small Cause Court cannot entertain a suit for pension by a school-master who was subscribing to school-master's Provident Fund as its jurisdiction is barred by article 18. 1915 Mad 404 (405) [AIR V 2].

[5] A suit to recover offerings for a shrine from a person wrongfully appropriating them falls under Art. 18 as it relates to a trust. 1926 Lah 228 (228) [AIR V 13].

[6] A suit for recovery of property entrusted by the owner to a goldsmith, for work to be done on it, is not a suit relating to a trust within Art. 18. 1923 Rang 129 (130) [AIR V 10] : 4 Upp Bur Rul 154.

[7] Suit for recovery of money from trustees personally and from temple funds is not one

(19) a suit for a declaratory decree, not being a suit instituted under section 283 or section 332 of the Code of Civil Procedure[a];

[a] Of Act XIV of 1882, *See* now the Code of Civil Procedure, 1908 (V of 1908), Sch. I, Order XXI, Rules 63 and 100, respectively.

(20) a suit instituted under section 283 or section 332 of the Code of Civil Procedure[a];

[a] *See* foot-note (a) under cl. (19).

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in cl. (20) of Sch. II, after the words "Code of Civil Procedure" *add* the words "in respect of any immovable property."

—Bom. Act VI of 1930, S. 3 (3) [9-5-1930] read with LXXXVII of 1958, S. 2 [15-10-1958].

Sch. II, Art. 18 — Note 1 *(contd.)*

relating to trust and is one of small cause nature. 1925 Mad 374 (375) [AIR V 12].

[8] Suit for subscription by company against members—Members described as trustees — Suit is not one relating to trust within Article 18. ('10) 33 Mad 494 (498) (DB).

[9] Suit by trustee— Claim based on agreement by defendant to pay specified sum to plaintiff— Suit does not relate to trust within Article 18. ('12) 15 Ind Cas 273 (275) (DB) (Mad).

[10] Suit for recovery of amount deposited with arbitrator on ground that arbitrator had wrongfully given it to other party is not barred from the jurisdiction of a Small Cause Court under Art. 18. 1933 All 902 (903) [AIR V 20].

Sch. II, Art. 19 — Note 1

[1] Suits of declaratory nature are not small cause suits. 1925 All 40 (41) [AIR V 12].

[2] If it appears from the nature of the suit as evidenced by the prayer that the main relief asked for is one for a declaration, then Art. 19 would come into operation and preclude the suit from being tried by the Small Cause Court. 1938 Nag 398 (399) [AIR V 25].

[3] Plaintiff instituted a suit for a declaration that the assessment in respect of his holding in excess of Rs. 18-9-0 per quarter was ultra vires and for the recovery of Rs. 54 which had been realized from him by the Municipality which was not entitled to recover anything more than Rs. 18-9-0 per quarter — *Held*, that the suit was of a declaratory nature and was covered by Art. 19. 1937 Pat 25 (27) [AIR V 24].

[4] *L* died leaving certain ornaments of the value of Rs. 280 claimed by plaintiffs as heirs. Owing to disputes, the ornaments were handed over by the police to the defendant No. 3 as stake-holder. When the plaintiffs claimed jewels from the defendant No. 3 the latter replied that he would hand over the jewels to them if they satisfied him as to their title thereto. The plaintiffs filed a suit for the recovery of the jewels. Defendants 1, 2 and 4 were included as pro forma defendants. *Held*, that the suit was of a declaratory nature and cognizable by a Civil Court on the regular side. 1925 All 40 (41) [AIR V 12].

[5] Suit for declaration of right to Insurance policy is not cognizable by a Small Cause Court. 1917 Mad 20 (25) [AIR V 4] (DB).

[6] When a plaintiff cannot obtain all the reliefs he seeks without asking for declaration, the prayer for declaration takes the suit away from the province of a Small Cause Court. ('10) 8 Mad L Tim 199 (199) (DB).

[7] The mere addition of a prayer for a declaration cannot prevent a suit from being of the nature cognizable by a Court of Small Causes provided it is a suit of that nature. 1927 All 760 (761) [AIR V 14].

[8] An incidental declaration prefatory to the return of money does not except a suit from the cognizance of a Court of Small Causes. Consequently, a suit for a sum of money below Rs. 500 alleged to have been unlawfully collected from the plaintiff as tax is of a small cause nature and no second appeal lies for such a suit. 1932 Mad 226 (226) [AIR V 19]✠ 1938 Nag 398 (399) [AIR V 25].

[9] Suit under S. 149, Bengal Tenancy Act, for declaration that plaintiff is entitled to rent deposited in Court and for money as consequential relief — Suit is not cognizable by Small Cause Court under Art. 19, Sch. II. 1949 Dacca 16 (17) [AIR V 36 C 10].

[10] To a suit claiming refund of license fee for sale of liquor, wrongly realized under a demand by Customs and Excise Department, article 19 is not per se applicable as the plaintiff has not asked for any declaratory relief. The main relief is the recovery of the money wrongly realised, and in such cases the addition of the prayer for declaration even if made does not prevent the suit from being of a nature cognizable by a Small Cause Court. 1957 Raj 396 (397) [AIR V 44 C 152] : ILR (1957) 7 Raj 139.

Sch. II, Art. 20 — Note 1

[1] Where an objection to attachment has been disallowed without adjudication, Art. 20 does not apply to bar a suit for recovery of the price of the property attached. ('11) 8 All L Jour 187 (189).

[2] Crops wrongfully attached in execution —Objection by owner of crops — Objection struck off without adjudication — Objector filing suit for recovery of crops in Small Cause Court — *Held*, that the Small Cause

(21) a suit to set aside an attachment by a Court or a revenue-authority, or a sale, mortgage, lease or other transfer by a Court or a revenue-authority or by a guardian ;

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in clause *(21)* of Schedule II—

(a) after the word 'attachment' *add* the words "of any immovable property" ;

(b) after the word 'transfer' *add* the words "of any such property".

—Bom. Act VI of 1930, S. 3 (4) [9-5-1930] read with LXXXVII of 1958, S. 2 [15-10-1958].

(22) a suit for property which the plaintiff has conveyed while insane ;

(23) a suit to alter or set aside a decision, decree or order of a Court or of a person acting in a judicial capacity ;

(24) a suit to contest an award ;

(25) a suit upon a foreign judgment as defined in the Code of Civil Procedure or upon a judgment obtained in [a][India] ;

[a] *Substituted* for the words and letters "a Part A State or a Part C State" by 2 A. L. O., 1956 [1-11-1956].

(26) a suit to compel a refund of assets improperly distributed under section 295 of the Code of Civil Procedure[a] ;

[a] Of Act XIV of 1882. *See* now the Code of Civil Procedure, 1908 (V of 1908), S. 73.

STATE AMENDMENT

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in Schedule II *omit* Art. (26).

—U. P. Act XXIV of 1954, S. 2 and Schedule, Item 3 (1) [30-11-1954].

Sch. II, Art. 20 — Note 1 *(contd.)*

Court had no jurisdiction to entertain the suit. ('11) 8 All L Jour 187 (189).

Sch. II, Art. 23 — Note 1

[1] Where in execution of a decree certain property is sold subject to a mortgage and out of the sale proceeds the claims of the mortgagee are satisfied first and the surplus is paid to the attaching decree-holder who is left short by certain amount, he is at liberty to file a suit against the mortgagee for the recovery of the sum on the basis that it is money had and received without necessarily getting the order refusing payment to him set aside. The suit is triable by Court of Small Causes. Article 23 does not apply. 1931 Rang 56 (58) [AIR V 18] : 8 Rang 485.

[2] Small Cause Court decree—Suit to reopen decree for obtaining relief under S. 36 Bengal Money-Lenders Act, 1940, does not fall under Art. 23 and is cognizable by Small Cause Court, and should be brought in that Court alone. 1947 Cal 97 (97, 98) [AIR V 34] C 28] (DB).

Sch. II, Art. 24 — Note 1

[1] A Judge has jurisdiction to adjudicate on the validity of an award when that question arises incidentally in a suit that was within his cognizance. ('12) 6 Sind L R 85 (85).

[2] Where the award was admitted and the plaintiff only sought to recover what was awarded to him — *Held*, that it was not a suit to contest an award and the Small Cause Court had jurisdiction. 1925 Bom 519 (519) [AIR V 12] : 49 Bom 693 (DB).

[3] A suit to recover money payable under an award is cognizable by a Court of Small Causes. 1919 All 12 (13) [AIR V 6] : 42 All 169 ✠ 1919 Upp Bur 25 (26) [A I R V 6] : 3 Upp Bur Rul 109.

[4] A suit to recover money deposited under an agreement of reference to arbitration, is not a suit to contest an award. 1952 Assam 158 (158) [AIR V 39].

[5] A suit to enforce an award is not the same as a suit to enforce a contract and the Small Cause Court has jurisdiction to take cognizance of such a suit. 1915 Cal 129 (130) [AIR V 2] (DB).

Sch. II, Art. 26 — Note 1

[1] After *A* brought a property to sale, *B* applied for rateable distribution and it was granted. *A* then was allowed to bid on satisfying *B*'s decree. When he had bought the property, the sale was set aside at the instance of a third party. *A* sued *B* to recover from him Rs. 270 paid in satisfaction of his decree. *Held*, that the suit does not fall either under Art. 2 or 26. 1923 All 310 (311) [AIR V 10] : 45 All 359 (DB).

[2] Property sold in execution of decree subject to mortgage—Mortgage satisfied out of sale proceeds first and surplus paid to attaching decree-holder, who was left short by Rs. 208 — He can sue for recovery of amount on basis of "money had and received." Art. 26 cannot apply to such a suit. 1931 Rang 56 (58) [AIR V 18] : 8 Rang 485.

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(27) a suit under the [a]Indian Succession Act, 1865, section 320 or section 321, or under the [a]Probate and Administration Act, 1881, section 139 or section 140, to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets ;

[a] *See* now the Indian Succession Act, 1925 (XXXIX of 1925), Ss. 360 and 361.

(28) a suit for a legacy or for the whole or a share of a residue bequeathed by a testator, or for the whole or a share of the property of an intestate ;

(29) a suit—

(a) for a dissolution of partnership or for the winding up of the business of a partnership after its dissolution ;

(b) for an account of partnership-transactions ; or

(c) for a balance of partnership-account, unless the balance has been struck by the parties or their agents ;

Sch. II, Art. 28 — Note 1

[1] Clause 28, Sch. II contemplates a suit between rival claimants when the relief claimed is to recover a share of the estate and not only an item of the estate as against a third party. Where plaintiffs claimed as heirs certain jewels worth Rs. 280 left by a deceased person—*Held*, that Cl. 28, second schedule, did not apply. 1925 All 40 (41) [AIR V 12] ✣ 1915 Cal 740 (740) [AIR V 2] (DB) ✣ 1938 Mad 864 (864) [A I R V 25] : I L R (1939) Mad 78 (DB). (A I R 1933 Mad 346 and A I R 1926 Mad 37, *Overruled*.) ✣ 1925 Mad 1110 (1110) [AIR V 12].

[**But see** 1938 Pesh 79 (80) [AIR V 25].]

[2] A suit by an executor or administrator for possession of movable property belonging to the estate of the deceased is cognizable by a Court of Small Causes. 1917 Low Bur 61 (61) [AIR V 4].

[3] Article 28 applies only to claims preferred on the ground of inheritance as heirs to the property of another. A suit for ornaments given to daughter and her husband on the occasion of their marriage filed on their death is one on termination of gift and is cognizable by Court of Small Causes. 1914 Mad 501 (502) [AIR V 1] : 37 Mad 538 (DB).

[4] Father dying intestate—Representatives of father entitled to rent till date of his death—Suit for share in rent by some representatives against others—*Held*, that the suit being clearly one for a share in property of the father who died intestate, it was excepted from cognizance of Small Cause Courts by Art. 28, Sch. II. 1934 All 453 (454) [A I R V 21].

[5] Where the property claimed belonged to a deceased woman and the claim was with regard to her heirship—*Held*, that having regard to Art. 28, it is not a case triable by a Small Cause Court. 1924 Cal 536 (536) [AIR V 11] (DB).

Sch. II, Art. 29 — Note 1

[1] A suit for partnership accounts with an allegation that the partnership has been dissolved and containing also an alternative prayer for the dissolution of the partnership if it has not been dissolved is not triable by Small Cause Court. 1915 All 60 (61) [AIR V 2].

[2] Where a joint decree was passed against the plaintiff and his partner and after the death of the latter, the plaintiff instituted a suit in the Small Cause Court for contribution to the extent of Rs. 200 against the legal representatives of his deceased partner in respect of the amount paid by the plaintiff to satisfy the joint decree, but the plaint was returned to be re-presented to the proper Court on the ground that no suit for contribution but only a suit for accounts lay—*Held*, that a suit for contribution on the small cause side was maintainable as the partnership had ceased to exist and the order returning the plaint was erroneous. 1934 Mad 699 (700) [AIR V 21].

[3] Where partnership has been already dissolved and accounts have already been taken, the suit for the ascertained sum of money is cognizable by Small Cause Court. ('11) 1911 Pun L R No. 195 p. 747 (750).

[4] Suit for accounts is a suit for an indeterminate amount which can only be arrived at by taking the regular account between the parties. Where the plaintiff sues for a definite sum and shows clearly how it is to be ascertained, it is not a suit for accounts. 1933 Nag 82 (83) [AIR V 20] : 29 Nag L R 115.

[5] A suit for recovery of specific sum of money does not assume the character of a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. 1928 Cal 127 (128) [AIR V 15] (DB).

[6] A suit based on a pro-note executed by the defendant, promising to pay amount found due to plaintiff on settlement of partnership accounts is cognizable by a Small Cause Court. 1925 Oudh 560 (560) [AIR V 12].

[7] Suit for recovery of money advanced for purposes of partnership business with approximate profits — *Held* suit was not one for the balance of partnership accounts. 1919 Cal 328 (328) [AIR V 6].

[8] Proviso to Art. 29 (c) contemplates that where balance has been struck by parties or their agents, suit can lie on such balance in Court of Small Causes. Where, there is definite agreement by the defendant to pay sum found due, this agreement affords fresh cause of action to plaintiff and suit based on it for recovery of money agreed to be paid is not a suit within the meaning of Cl. (a), (b) or (c) of Art. 29. 1933 Sind 324 (325) [AIR V 20] : 27 Sind L R 308 (DB).

(30) a suit for an account of property and for its due administration under decree ;

(31) any other suit for an account, including a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, and a suit for the profits on immovable property belonging to the plaintiff which have been wrongfully received by the defendant ;

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, in clause *(31)* of Schedule II, for the words "and a suit for the profits on immovable property belonging to the plaintiff which have been wrongfully received by the defendant" *substitute* the words "but not including a suit for mesne profits". —Bom. Act VI of 1930, S. 3 (5) [9-5-1930] read with LXXXVII of 1958, S. 2 [15-10-1958].

Sch II, Art. 29 — Note 1 *(contd.)*

[9] Suit by plaintiff to recover amounts advanced to defendant for purchase of partnership property—*Held* parties not being partners suit was cognizable by Small Cause Court. 1937 Nag 68 (69) [AIR V 24].

Sch. II, Art. 30 — Note 1

[1] Suit for accounts is suit for indeterminate amount which can only be arrived at by taking the regular account between the parties. Where plaintiff sues for definite sum and shows clearly how it is to be ascertained, it is not suit for accounts. 1933 Nag 82 (83) [AIR V 20]: 29 Nag L R 115.

[2] A suit under S. 69, Contract Act, by the widow of a deceased coparcener of a joint Hindu family against the karta for reimbursement of the expenses incurred by her for her daughter's marriage which the karta was bound to meet out of the income of the family property but refused or failed to do so does not come under Art. 30 or Art. 31 and is not excluded from the jurisdiction of a Small Cause Court. 1947 Mad 438 (438, 439) [AIR V 34 C 237].

SCHEDULE II, ARTICLE 31 — SYNOPSIS

1. Scope.
2. Suit for accounts.
3. "Suit by a mortgagor . . . . . to recover surplus collections"
4. "Suit for the profits on immovable property . . . wrongfully received by the defendant."
5. Suit for damages for use and occupation.

1. Scope. — [1] The forms of suit described in Art. 31 are included as being of the nature of suits for an account. 1927 Rang 262 (262) [AIR V 14]: 5 Rang 388. (*Overruled* by AIR 1928 Rang 102 (FB) on another point.)

[2] Article 31 relates to suit for accounts as also to suits in which the Court can pass a decree only upon taking some accounts. 1957 Pat 713 (714, 715) [AIR V 44 C 212]: 36 Pat 624 (DB).

[3] Types of cases mentioned in article 31 involve the taking of accounts from the mortgagee who has been in possession and from the defendant who has received the profits of immovable property. 1947 Pat 202 (205) [AIR V 34 C 74]: 25 Pat 480 (DB).

[4] A suit upon an agreement between plaintiff and defendant that the latter would pay plaintiff half of what he realized from a tenancy granted to him by Government is cognizable by Small Cause Court. Art. 31 does not apply. 1921 Lah 173 (173) [A I R V 8].

[5] 'Profits' within the meaning of Art. 31 does not include mesne profits. Hence, a suit for mesne profits is not excepted from the cognizance of Small Cause Court by Art. 31 of Schedule II. ('61) 65 Cal W C 1067 (1068). (The expression "mesne profits" refers to wrongful possession and not dispossession.)

2. Suit for accounts. — [1] Suit for account — Nature is to be determined by prayer in plaint — A suit is not a suit for an account unless the plaint asks for the taking of accounts. 1937 Nag 172 (172, 173) [AIR V 24]: ILR (1937) Nag 85.

[2] It is difficult to lay down a general rule whether a suit comes within Art. 31 or lies outside the scope of that article and therefore whether a suit is for an account within Art. 31, must be considered on its own merits. A suit is not necessarily a suit for an account simply because a claim with regard to certain specified items omitted from an account must be examined. 1928 Sind 66 (67) [AIR V 15] (DB).

[3] Where the plaintiff prays in the plaint that the defendant be asked to render accounts and brings a suit for an indeterminate amount then the suit is clearly one falling under Art. 31. If on the other hand the plaintiff sues for a specific sum of money and it is the defendant who alleges that the suit falls under Art. 31 then before the Court can hold that it does so, the defendant must prove to its satisfaction firstly that other transactions besides those in suit have taken place between the parties, secondly that the plaintiff is liable to render account to the defendant and thirdly that the suit cannot be disposed of satisfactorily without taking accounts. 1958 Raj 286 (287) [AIR V 45 C 95]: ILR (1958) 8 Raj 837.

[4] A suit for an account is a special form of suit, and does not mean every form of suit in which accounts have to be looked into in

Sch. II, Art. 31 — Note 2 *(contd.)*

order to ascertain the correctness or otherwise of the amount claimed by the plaintiff. Where a plaintiff claims a definite sum of money, the mere fact that the accounts have to be looked into to verify the figure claimed would not make the suit one for account and such a suit would be cognizable by the Court of Small Causes. 1948 Oudh 80 (81) [AIR V 35 C 27]✠ 1940 Mad 504 (505) [AIR V 27]: ILR (1940) Mad 296 (DB) ✠ 1938 Mad 799 (800) [AIR V 25] ✠ 1938 Mad 707 (707) [AIR V 25] ✠ 1919 Mad 778 (778, 779) [AIR V 6].

[5] The question whether suit for recovery of specific sum is a "suit for an account" within the meaning of Art. 31 depends upon the nature of the investigation which is required in order to afford relief to the plaintiff; if in order to grant relief to the plaintiff it is necessary to take accounts, the suit will be one for an account within the meaning of Art. 31. 1937 All 23 (24) [AIR V 24] ✠ 1952 Cal 736 (737) [A I R V 39] (DB) ✠ 1915 Cal 365 (366) [AIR V 2] (DB).

[But see ('09) 19 Mad L Jour 113 (115) (DB).]

[6] There is a clear distinction between suits for accounts and suits in which decrees are passed after taking some accounts. A suit for accounts means a suit by a person who is entitled to accounts from a person who is liable to render accounts either on the basis of a contract or because of fiduciary relationship. A suit for money where the amount is to be determined on accounting is not a suit for accounts. ('61) 65 Cal W N 1067 (1069).

[7] A suit not for accounts but for recovery of a sum of money the precise amount of which cannot be ascertained unless the accounts of the parties have been examined is cognizable by a Small Cause Court. 1914 All 108 (108) [AIR V 1] (DB).

[8] A suit for a specific sum of money cannot be regarded as a suit for an account, within the meaning of Art. 31, because accounts have to be taken incidentally to arrive at the finding whether amount claimed by plaintiff is really due to him. ('31) 1931 All L Jour 5 (6) (DB). (Plaintiff suing for specific sum of money—Allegation that defendants as commission agents sold certain cattle belonging to plaintiff withheld sale proceeds *Held* suit was not one for accounts).

[9] Where in a suit for money the claim was for a specific amount in respect of one transaction as the result of the purchase and sale of goods under one agreement —*Held*, that the suit was not an account suit so as to take it out of the cognizance of a Court of Small Causes. 1928 All 626 (627) [AIR V 15]: 50 All 862.

[10] A suit for a specific amount which has wrongly been credited in the defendant's account with the firm of the plaintiffs, where it is not at all necessary to investigate the various items in the accounts is not barred by Art. 31. Nor does such a suit amount to a rectification of account by re-opening it. 1953 Ajmer 9 (9) [AIR V 40 C 11].

[11] A suit for an account implies that the plaintiff is entitled under the substantive law to demand an account from the defendant. 1940 Mad 504 (505) [AIR V 27]: I L R (1940) Mad 296 (DB) ✠1920 Cal 742 (742) [AIR V 7] (DB) ✠ 1917 Lah 27 (27) [AIR V 4]: 1917 Pun Re No. 34. (Plaintiff advancing money to defendant on security of yarn — Defendant acting as commission agent for sale —Plaintiff selling yarn and for balance due suing defendant —Suit is not covered by Art. 31.) ✠1916 Mad 990 (990) [AIR V 3] ✠ ('13) 24 Mad L Jour 693 (696) (DB) ✠ ('12) 11 Mad L Tim 13 (13) (DB). (Art. 31 of Sch. II applies only to cases where relationship is such that one of parties is bound to render account to the other.)

[12] A suit for accounts will be one where a preliminary decree for accounts will be necessary, and it will be necessary for the Court to call upon the defendant to render accounts. 1928 All 332 (332) [AIR V 15].

[13] Suit for money acknowledged by defendant is not one for accounts and is cognizable by Small Cause Court. ('22) 67 Ind Cas 851 (852) (DB) (Cal).

[14] In a suit for a fixed sum of money, the plaintiff alleged that there was a settlement between the parties in February, 1924, under which the 1st defendant acknowledged a certain amount due in paddy, cash and hay. Subsequently, the dealings continued between the parties and the actual amount claimed in the plaint was something different from that shown in the settlement, the paddy being less and the cash being slightly more. The defendant, in his written statement, entirely denied the truth of the transactions that he executed any settlement, or that any balance whatever was due from him — *Held*, that the suit was not one for an account within the meaning of Art. 31. 1931 Mad 789 (790) [AIR V 18] (DB).

[15] Suits for the recovery of specific quantities of paddy or their value from the appellant on the ground that this amount of paddy belonging to the respondent firm had, in each case, been wrongfully seized by the defendant are suits in tort for conversion, i.e., for the recovery of property which had been wrongfully seized or for the value thereof. Such suits are cognizable by the Small Cause Court and consequently, no second appeal lies. Such suits are not in any way similar to suits for accounts. 1934 Rang 218 (219) [AIR V 21].

[16] A suit for the produce which defendant "had taken from the land which he had entered and forcibly worked, or its value," is not one for accounts and is of a small cause nature. 1927 Rang 262(262) [AIR V 14]: 5 Rang 388.

[17] Claim for crops harvested and removed before delivery of possession is one for account — Claim for subsequent cutting and carrying away of crops is claim for damages and cognizable by Small Cause Court. 1917 Mad 128 (129) [AIR V 4] (DB).

[18] A suit by purchaser of arrears of payments under a kabulyat entered into by a usufructuary mortgagee who released part of his zarpeshgi lease and stipulated to pay a fixed sum as profit on account of raiyati right

Sch. II, Art. 31 — Note 2 (*contd.*)

is not a suit for accounts and does not come under Art. 31. 1936 Pat 406 (407) [AIR V 23].

[19] Firm sued another firm for recovery of sum of money being the price of goods supplied. There had been no previous dealings between the firms and thus there were no credit and debit entries in their accounts which had to be mutually adjusted against each other—*Held*, that it was not a suit for account within the meaning of Art. 31 and no second appeal lay when the subject-matter of suit did not exceed Rs. 500. 1937 All 23 (24, 25) [AIR V 24].

[20] A suit based on an agreement between the plaintiff company and the defendant whereby "the plaintiff company was to supply raw materials and the defendant was to execute moulding and casting work to be paid for at certain stipulated rates, subject to deduction for bad workmanship and subject also to the return at the end of each month of all such materials or metals as the defendant did not use for the work he had to perform" is not a suit for account and is not exempted from the cognizance of a Small Cause Court. ('22) 64 Ind Cas 327 (327) (Cal).

[21] The plaintiff's father purchased certain property and entrusted the management of the same to the defendant, the maternal uncle of the plaintiffs. The father advanced certain sums of money from time to time to the defendant in order that the same might be lent to the tenants. The father died in September 1918. The defendant refused to render account of the monies that he received and realised some time in 1921. Plaintiffs then filed the suit. *Held*, the suit was one for accounts and was, therefore, exempted from the cognizance of the Small Cause Court by Art. 31. 1925 All 682 (682) [AIR V 12].

[22] A suit was brought by a plaintiff to recover a fixed amount in excess of the value of the goods supplied by the defendant to him, and for which he had made payments in advance. Every transaction between the parties was separately dealt with, and the defendant became liable to repay the sum which he had received in excess of the price ultimately fetched by any one consignment delivered by the defendant to the plaintiff. *Held*, that the suit was cognizable by a Small Cause Court. 1928 All 332 (332) [AIR V 15].

[23] A suit for recovery of balance due out of the consideration of the completed sale is cognizable by Small Cause Court. The mere fact that the plaintiff had given defendant a notice to go into account cannot convert this suit into one for account. 1936 Lah 557 (558) [AIR V 23].

Suits between principals and agent

[24] A suit by principal against his agent for money collected by the agent on principal's behalf is excluded from the cognizance of a Small Cause Court if the payment to the plaintiff requires adjustment of the agent's commission. Such a suit is also not covered by Art. 8 of Sch. 1 of Mysore Small Cause Court's Act 1911. ('51) 29 Mys L J 41 (47).

[25] Suit against agent for value of goods received and not accounted for by him is cognizable by Small Cause Court. 1931 Lah 271 (271) [AIR V 18] ✣ ('54) ILR (1954) Cut 277 (282) ✣ 1914 Mad 100 (100) [AIR V 1].

[26] Where an account between the principal and agent has yet to be settled a suit for recovery though of a specific sum is a suit for an account. 1917 Mad 476 (477) [AIR V 4].

[27] Where a commission agent does not ask for any accounts to be taken, and sues for a definite sum of money to be paid by the defendant, the suit is a suit for money; and the fact that the record of the suit transactions in the form of a written account which is not a settled or stated account, may have to be gone into, does not turn it into a suit for an account. 1928 Bom 476 (479) [AIR V 15] : 52 Bom 904 (DB).

[28] Where agent files suit against principal for specific sum of money alleged to be due to him in regard to certain dealings suit is not one for accounts. It is only in exceptional cases where his remuneration depends on the extent of dealings which are not known to him or where he cannot be aware of the extent of the amount due to him unless the accounts of his principal are gone into that a suit by an agent for accounts against his principal might be competent. But where the exact sum of money which the agent claims from his principal is known to him, the only form in which a suit can be filed is the one for specific amount. 1938 Mad 707 (707) [AIR V 25].

[29] Agent appointed to collect rent to meet all proper expenses in connection with the estate was dismissed. He instituted suit against the principal to recover certain amount. His case was that after taking into account what he had collected by way of rent and what he had expended, and the salary due to him during his period of suspension together with the peon's salary which he had himself met, the principal was liable in the sum mentioned. *Held* that agent was, in effect, suing for an indemnity against his principal. It was not, therefore, excluded. 1940 Mad 504 (505) [AIR V 27] : ILR (1940) Mad 296 (DB).

3. "Suit by a mortgagor ... to recover surplus collections."—[1] A suit by a mortgagor, after redemption to recover from the mortgagee the profits of the mortgaged property and the value of certain trees alleged to have been cut down by the defendant is exempted from the cognizance of Small Cause Court by article 31. 1919 All 94 (94) [AIR V 6].

[2] Suit for mesne profits for period between date fixed for redemption and date for delivery of possession—Suit is not one of account by mortgagor to recover surplus collection received by mortgagee — Article 31 not applicable. ('10) 12 Cal L Jour 620 (623) (DB).

4. "Suit for the profits on immovable .....wrongfully received by the defendant."—[1] Unless a decree for accounts is asked for, a suit for money against a person who is alleged to have wrongfully realized moneys due to the plaintiff does not come

Sch. II, Art. 31 — Note 4 *(contd.)*

within the article. 1928 Cal 424 (424) [AIR V 15]✣1920 Mad 783 (783) [AIR V 7] (DB). (Suit for specific sum as profits of land without asking for an account.)

[2] The defendant who had taken the lease of pasture lands from the government on certain conditions cultivated the lands in breach of conditions. A penalty was imposed by the collector taking into account the income the defendant might have derived by unauthorised use of the land. In a suit for recovery of amount from the defendant it was held the suit was one for damages for breach of contract and was cognizable by Small Cause Court. 1951 Mad 710 (710) [AIR v 38 C 225].

[3] A suit for mesne profits is not of a nature cognizable by a Small Cause Court under the Provincial Small Cause Courts Act. 1928 Rang 102 (106, 108) [AIR V 15] : 6 Rang 60 (FB)✣1938 Lah 219 (219, 220) [AIR V 25]: ILR (1938) Lah 341 (DB)✣('10) 8 Ind Cas 270 (271) (All)✣1918 All 222 (223) [AIR V 5] : 40 All 142✣1933 Lah 509 (510) [AIR V 20] (DB). (Second appeal lies and not revision.) ✣ ('11) 34 Mad 502 (503) (DB)✣1921 Upp Bur 8 (10) [AIR V 8] : 4 Upp Bur Rul 83.

[But see ('96) 23 Cal 884 (889) (FB). (18 Cal 316, *Overruled*.)]

[4] A suit for mesne profits is not cognizable by a Court of Small Causes, if the plaintiff, by alleging that the defendant has actually received profits, asks for an account of the profits received. 1933 Nag 87 (88) [AIR V 20]: 29 Nag L R 61 (DB)✣1936 Nag 42 (44) [AIR V 23] : 31 Nag L R 180.

[5] Although suits for mesne profits are in the nature of suits for damages, as such suits often involve the taking of very complicated accounts, it was not the intention of the Legislature that such suits should be cognizable by a Court of Small Causes. The defendant had agreed to sell some fields to the plaintiff but having failed to execute a sale deed, a suit was filed in which a decree was passed and in pursuance of it and in compliance with the original agreement of August 17, 1928, the defendant, on October 24, 1931, executed a sale-deed and the plaintiff was put in possession in December, 1931; early in 1932, the plaintiff brought a suit for mesne profits for the years 1929-30, 1930-31 and 1931-32 — *Held*, that the plaintiff did not sue for damages but did sue for mesne profits and that the suit was one falling under Art. 31. A second appeal, therefore, was maintainable. ('35) 18 Nag L Jour 76 (78, 79).

[6] The possession of one co-sharer is deemed to be on behalf of all in law and neither such possession nor receipt of profits can be considered wrongful. Failure of the co-sharers to give other co-sharers their share of the profits is, however, wrongful. Article 31, therefore, does not apply to suits by certain co-sharers for recovery of the value of their share of the produce realized by other co-sharers in possession of their joint land, there being no "wrongful" receipt of profits. 1930 Lah 613 (613) [AIR V 17] ✣ 1918 All 355 (356) [AIR V 5] : 40 All 666. (Suit to recover half the rent of a house by a co-owner against another co-owner and the tenant where the whole rent has been realized by the co-owner.) ✣ 1935 Lah 50 (50) [AIR V 22]. (A suit by a joint tenant to recover his proportionate share of the rent of a tenancy.) ✣ ('10) 8 Mad L Tim 281 (282) ✣ ('40) 1940 Nag L Jour 22 (23). (Suit by co-owner of khudkast field against other co-owner for his share of profit refused by the other.) ✣ 1947 Pat 202 (205) [AIR V 34 C 74] : 25 Pat 480 (DB).

[*See also* 1936 Lah 377 (378) [AIR V 23].]

[But see 1917 Cal 367 (368) [AIR V 4] (DB) ✣1934 Pat 2 (3) [AIR V 21].]

[7] Article 31 does not apply to a suit for mesne profits by persons in respect of their share of an occupancy holding held in common by the parties. 1931 All 551 (552) [AIR V 18] ✣ 1934 All 404 (405) [AIR V 21].

[8] Where a plaintiff claims a definite and ascertained sum representing in money his share of the profits of land jointly owned by him with the defendant the suit is cognizable by a Small Cause Court. 1917 Pat 121 (122) [AIR V 4] : 3 Pat L Jour 423.

[9] A simple suit for mesne profits is not excluded from the jurisdiction of the Small Cause Court unless a decree for accounts is expressly asked for. 1957 Pat 713 (714, 715) [AIR V 44 C 212] : 36 Pat 624 (DB). (Relief sought is a decree for Rs. 400 against defendants for mesne profits and other ancillary relief in the shape of cost without any prayer for accounts — Suit held triable by Small Cause Court.) ✣ 1952 Cal 736 (737) [AIR V 39] (DB). (A suit simpliciter for recovery of profits of immovable property wrongfully received by a co-sharer defendant — Does not fall under Art. 31.)

[10] Suit for damages on allegation that plaintiff was kept out of possession after deposit of mortgage money under decree for redemption—Suit is one for profits of immovable property belonging to plaintiff wrongfully received by defendant — Article 31 applies. ('13) 11 All L Jour 238 (240).

[11] The usufruct of growing trees is profit on immovable property and a suit to recover the mesne profits from such usufruct is not a suit of small cause nature. 1932 Mad 554 (555) [AIR V 19].

[12] A suit for recovery of money due to the plaintiff under the terms of a conveyance of immovable property executed in his favour by the defendant is not a suit for recovery of profits of immovable property wrongfully received by the defendant within the meaning of Art. 31. ('10) 12 Cal L J 599 (601) (DB).

[13] Suit for damages for trespass by defendant on plaintiff's land and removal of crop — Damages assessed as profits wrongfully obtained — Suit is not barred under Art. 31. ('12) 35 Mad 726 (727).

[14] The mere fact of a question of title arising does not prevent a suit being cognizable by a Court of Small Causes. Where the plaintiff alleged that he bought the defendant's share of certain fruit produced in a jungle and sued to recover damages for wrongful removal of the same fruit — *Held* that the suit was not one for mesne profits and was

(32) a suit for a general average loss or for salvage ;

(33) a suit for compensation in respect of collision between ships ;

(34) a suit on a policy of insurance or for the recovery of any premium paid under any such policy ;

STATE AMENDMENT

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in Schedule II, *omit* Art. (34).
—U. P. Act XXIV of 1954, S. 2 and Schedule, Item 3 (1) [30-11-1954].

(35) a suit for compensation—

(a) for loss occasioned by the death of a person caused by actionable wrong ;

(b) for wrongful arrest, restraint or confinement ;

Sch. II, Art. 31 — Note 4 *(contd.)*

triable by Small Cause Court. 1915 Nag 43 (44) [AIR V 2] : 11 Nag L R 160.

[15] A suit to recover the loss caused to plaintiff by a wrongful act of defendant in respect of immovable property is not a suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant. 1925 Nag 327 (327) [AIR V 12] : 21 Nag L R 18.

[16] Effect of annulment of sale under S. 53, Provincial Insolvency Act, is to hold that no transaction had taken place at all, and this being so, any sum that vendee receives by virtue of that transaction, is received by him wrongfully within the meaning of Art. 31, Sch. II, Provincial Small Cause Courts Act. 1938 Lah 219 (220) [AIR V 25] : ILR (1938) Lah 341 (DB).

[17] Article 31 contemplates that a suit in order to be exempted must be a suit for account, which will include a suit for the profits of immovable properties belonging to the plaintiffs but which have been wrongfully received by the defendant. Where the suit is not for an account but for a specified sum representing the price of fruits wrongfully retained by the defendant Art. 31 cannot be held to apply. 1927 Cal 375 (375) [AIR V 14].

[18] Expression "belonging to the plaintiff," applies to immovable property and not to profits. 1936 Lah 377 (378) [AIR V 23].

5. Suit for damages for use and occupation. — [1] A suit by the landlord against the tenant who took the land on lease for one year, but on the expiry of the period continued to be in possession for another year, refusing to surrender it, claiming damages for use and occupation, is not excluded from the jurisdiction of the Small Cause Court by Art. 31. 1935 Mad 307 (308) [AIR V 22].

[2] A suit by a municipality for damages for the use and occupation of certain land is not one which can properly be described as a suit for profits derived from immovable property but is a suit against a trespasser for damages for the use and occupation of land and as such is not excluded from the jurisdiction of the Small Cause Court. 1928 Nag 118 (119) [AIR V 15].

[3] The Small Cause Court in a rent suit has jurisdiction to award damages for use and occupation for breach of contract of tenancy. 1942 Pat 269 (270) [AIR V 29].

[4] A claim founded on an allegation of permissive occupation is a claim for damages for use and occupation and is a suit of a small cause nature. 1926 Mad 622 (622) [AIR V 13] (DB).

[5] The plaintiff had leased the land to the defendant's son. After expiration of the term of the lease the defendant's son continued as a tenant holding over. After him (the defendant) his mother continued to cultivate without any notice to quit or any protest from the plaintiff. The plaintiff sued for damages for use and occupation. In her written statement the defendant definitely challenged the plaintiff's title and set up title in herself — *Held*, the case was one in which the defendant had received mesne profits under a claim of title and one who claimed to be the rightful owner was seeking to recover the same after having an account taken of the mesne profits. Hence the suit was not cognizable by the Small Cause Court. 1925 Mad 884 (884, 885) [AIR V 12] (DB).

[6] Where plaintiff sued for declaration of title to certain articles hired and also claimed damages for use and occupation — *Held*, that suit cannot be tried by the Small Cause Court. ('30) 1930 Mad W N 654 (655, 656).

Sch. II, Art. 32 — Note 1

[1] Saving cargo from leaky boats is not salvage — Small Cause Court can try suit for such services. 1917 Low Bur 163 (163) [AIR V 4].

Sch. II, Art. 34 — Note 1

[1] A suit on a contract of Insurance is not maintainable in a Small Cause Court under Art. 34. ('13) 20 Ind Cas 155 (156) (DB) (Cal).

[2] Mutual Insurance Company insuring to its members money for ceremonies under articles of association — Suit by Company for refund of amount overpaid is not triable by Small Cause Court. 1939 Lah 220 (221) [AIR V 26].

[3] Suit against vendor for breach of warranty of article found damaged on receipt —Secretary of State joined as defendant in the alternative on supposition of damage during transit—Article 34 inapplicable. 1926 Cal 100 (100, 101) [AIR V 13].

SCHEDULE II, ARTICLE 35 — SYNOPSIS

1. Scope and object.
2. Clause (b) — Wrongful arrest, restraint or confinement.
3. Clause (f)—Adultery and seduction.

(c) for malicious prosecution ;
(d) for libel ;
(e) for slander ;
(f) for adultery or seduction ;
(g) for breach of contract of betrothal or promise of marriage ;
(h) for inducing a person to break a contract made with the plaintiff ;
(i) for obstruction of an easement or diversion of a water-course ;
[a][(ii) for an act which is, or, save for the provisions of Chapter IV of the Indian Penal Code, would be, an offence punishable under Chapter XVII of the said Code ;]
[b][(j) for illegal, improper or excessive distress, attachment or search, or for trespass committed in, or damage caused by, the illegal or improper execution of any distress, search or legal process ;]
(k) for improper arrest under Chapter XXXIV of the Code of Civil Procedure[c] or in respect of the issue of an injunction wrongfully obtained under Chapter XXXV of that Code[c] ; or
(l) for injury to the person in any case not specified in the foregoing sub-clauses of this clause ;

[a] *Inserted* by the Provincial Small Cause Courts (Amendment) Act, 1914 (VI of 1914), S. 2 (1). [b] *Substituted* for the original Item (j), *ibid*, S. 2 (2). [c] Of Act XIV of 1882. *See* now the Code of Civil Procedure, 1908 (V of 1908), Sch. I, Orders XXXVIII and XXXIX, respectively, and S. 95.

STATE AMENDMENT

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in Sch. II *omit* sub-clause *(ii)* of Art. (35). —U. P. Act XXIV of 1954, S. 2 and Schedule, Item 3 (1) [30-11-1954].

Sch. II, Art. 35 — Synopsis *(contd.)*

4. Clause (g) — Breach of contract of marriage.
5. Clause (h)—Inducing breach of contract.
6. Clause (i)—Obstruction of easement and diversion of water-course.
7. Clause (ii) — Offences against property.
8. Clause (j)—Illegal, improper, or excessive distress, attachment etc.
9. Clause (k) — Improper arrest under Chapter XXXIV, Civil P. C. or injunction wrongfully obtained under Chapter XXXV, Civil P. C.
10. Clause (l)—Injury to person in cases not specified.
11. Objection to jurisdiction.

1. Scope and object.—[1] The object of enacting Article 35 is that all suits where serious allegations of commissions of offence are made, should be taken away from the jurisdiction of the Small Cause Courts which try suits summarily. 1956 Mad 610 (612) [AIR V 43 C 193].

[2] Where the suit is for recovery of price paid to defendant for purchase of property on the ground that plaintiff has been dispossessed by a claimant whose claim had been recognised by a decree of Court, it is a plain and simple suit for damages. Such a suit is not outside the jurisdiction of the Small Cause Court and does not come within the mischief of either Article 11 or Article 35. 1957 Mad 673 (674) [AIR V 44 C 207].

2. Clause (b)—Wrongful arrest, restraint or confinement. — [1] Article 35 (b) has no application to a case of wrongful seizure of cattle with their subsequent impounding — "Seizure" is not "arrest". ('41) 1941 Nag L Jour 328 (329, 330).

3. Clause (f) — Adultery and seduction. — [1] Suit for recovery of (rougha) money as compensation for losing wife is not cognizable. 1920 Lah 357 (358) [AIR V 7] : 1 Lah 574 (DB).

4. Clause (g) — Breach of contract of marriage. — [1] A suit for compensation for breach of contract of betrothal and loss of provisions etc., is not cognizable by a Small Cause Court under Art. 35 (g) of the Act. 1916 Mad 1138 (1138) [AIR V 3] : 38 Mad 274 (DB).

[2] Article does not apply to a suit for recovery of costs of ornaments and other presents given to the defendant for the bride when the claim includes claim for money paid to the defendant for expenses in connection with the proposed marriage. 1925 All 51 (52) [AIR V 12].

[3] A suit for the recovery of money advanced by one party to another in connection with marriage which subsequently fell through is not one for the mere recovery of a loan or refund of money advanced but is in essence one for damages in respect of the breach of contract of marriage and so is not cognizable in the Court of Small Causes. 1928 Nag 89 (90) [AIR V 15] : 24 Nag L R 66 ✠ 1933 Rang 198 (198) [AIR V 20] : 11 Rang 143 (DB). (Suit for return of bridal gifts on breach of promise of marriage is not Small Cause.) ✠ 1917 Oudh 63 (64) [AIR V 4].

Sch. II, Art 35 — Note 4 *(contd.)*

[But see 1929 Pat 744 (744) [AIR V 16]. (Article 35 (g) has very little to do with return on failure of marri ge of articles or sums of money advanced by one party to the other for use in connection with marriage celebrations.) ✣ 1927 All 160 (161) [AIR V 14] : 49 All 186. (Suit for recovery of specific ornaments presented to girl's father at time of betrothal on ground of breach of contract of promise of marriage is cognizable).]

5. Clause (h)—Inducing breach of contract. — [1] Where the plaintiff's allegation was merely that the defendants went on doing the work of weighing goods when they had no right to do so, article 35 (h) has no application. The suit is consequently a small cause and no second appeal lies. 1923 Lah 244 (244) [AIR V 10].

6. Clause (i) — Obstuction of easement and diversion of water-course. — [1] Where the plaintiffs do not allege that they had acquired an easement by prescription to the use of well for irrigation and do not in their plaint indicate any ground for their claim to be entitled to irrigate their land, article 35 (i) has no application. 1923 Lah 38 (38) [AIR V 10].

[2] A suit for damages for breach of a contract to allow plaintiff to drain the water from his field into defendant's land is not within Art. 35 (i) of the Act. 1915 Mad 35 (35) [AIR V 2].

[3] Where the plaintiff's suit is neither for specific performance of a contract nor for compensation for diversion of a water-course but is one for recovery of compensation which the defendant had agreed to pay for damage caused to plaintiff's wall due to percolation of water under the foundation of the wall, Article 35 (i) does not apply and the suit is not excluded from the coguisance of the Court of Small Causes. ('54) ILR (1954) Madh B 52 (54) ✣ 1950 All 519 (520) [AIR V 37 C 209]. (Suit for damages for injury caused to plaintiff's wall on account of the accumulation of rain water on defendant's land, does not fall within purview of Article 35(i) although this was the result of defendant's obstructing the channel through which water used to flow out.) ✣ 1918 Oudh 24 (25) [AIR V 5] : 21 Oudh Cas 138. (Claim for damages to plaintiff's wall by defendant's diversion of his own water-course does not fall under clause (i).)

7. Clause (ii) — Offences against property. — [1] Article 35 (ii) applies only to those acts which by the circumstances of the case are clearly alleged or clearly shown to be punishable by the Penal Code. When the case laid down in the plaint is clear that the defendant had committed an offence punishable under Chapter XVII, I. P C., the jurisdiction of the Small Cause Court is barred; but where upon the facts stated in the plaint the case against the defendant is that his act was wrongful or illegal but not necessarily penal, the jurisdiction of the Small Cause Court is not barred. 1959 Mys 162 (164) [AIR V 46 C 65] : ILR (1958) Mys 826 (A wrongful cr illegal act is not necessarily motivated by criminal intention.)

[2] The test employed to find out whether the allegations in the plaint make out a case of offence against property, is if in a criminal Court the evidence carried the case no further than what is stated in the plaint, would a conviction follow. 1956 Mad 610 (612) [AIR V 43 C 193]. (Suit for recovery of advance paid, under an agreement of sale of suit property on allegation that defendant had induced plaintiff to pay an advance to him on false representations of absolute title and had thus cheated the plaintiff and had committed an offence under S. 415, Penal Code. *Held*, that the suit was outside the category of suits of Small Cause nature as it fell under Art. 35 (ii) of Sch. 2.) ✣ 1927 All 381 (382) [AIR V 14] ✣ 1942 Cal 544 (544, 545) [AIR V 29] ✣ 1940 Lah 66 (66, 67) [AIR V 27]. (Suit for recovery of price of trees.) ✣ 1938 Pat 96 (96, 97) [AIR V 25] ✣ 1935 All 33 (34) [AIR V 22]. (If plaint avers that defendants were guilty of misappropriation.) ✣ 1927 Lah 399 (400) [AIR V 14] ✣ 1926 All 153 (154) [AIR V 13] ✣ 1926 Bom 362 (363) [AIR V 13] ✣ 1925 Lah 174 (174) [AIR V 12] ✣ 1924 All 537 (538) [AIR V 11] : 46 All 233 ✣ 1924 Lah 71 (71) [AIR V 11]. (Suit for price of timber sold to plaintiff as standing trees but removed by pre-emptor owing to sale by vendor of plaintiff, falls under Art. 35 (ii).) ✣ 1923 All 543 (543) [AIR V 10] ✣ 1921 Lah 72 (72) [AIR V 8]. (Fruits removed from trees — Removal amounting to theft.) ✣ 1918 Cal 946 (946) [AIR V 5] (DB) ✣ 1918 Cal 458 (459) [AIR V 5] (DB).

[3] Where the plaint alleges that the defendant removed trees with intent to cause wrongful loss to plaintiff, the suit is not cognizable by Small Cause Court. 1955 NUC (All) 2744 [AIR V 42].

[4] A suit for compensation on account of unlawful acts of defendants constituting an offence is not cognizable. 1922 Oudh 161 (161) [AIR V 9] ✣ 1927 All 288 (288) [AIR V 14] : 49 All 440 (DB) ✣ 1926 All 760 (763) [AIR V 13] : 49 All 85 (DB). (Allegations in plaint, held made out a case of theft and mischief and that therefore it was immaterial what the defence was.)

[5] Clause (ii) Art. 35, applies even though claim is restricted to value of property misappropriated or stolen and does not, in so many words, include claim for compensation. 1936 Lah 798 (798) [AIR V 23].

[6] Before Art. 35 (ii) can be applied, the pleadings must be looked into, and the language of the pleadings, especially that of the plaint must point to the disclosure of the commission of an offence against property under Chap. 17, Penal Code. A bare averment that certain trees had been wrongfully cut is not sufficient to import an offence of theft or mischief in the absence of any dishonest intention or knowledge on the part of the other party. In such a case, the jurisdiction of the Small Cause Court is not ousted. 1956 Pat 196 (199) [(S) AIR V 43 C 50]. (Court must see whether the admitted facts or

Sch. II, Art. 35 — Note 7 *(contd.)*

facts stated in the plaint constitute an offence under Chap. 17, Penal Code, before plaint is returned for want of jurisdiction.)

[7] Whether a claim falls within Art. 35 (ii), Sch. II of the Act is prima facie a matter dependent upon the pleadings and particularly upon the plaint, and where the facts stated in the plaint do not clearly fall within the article, the Small Cause Court has jurisdiction to try the suit. 1930 Bom 361 (361) [AIR V 17] (DB) ✣ 1955 NUC (Madh B) 2994 [A I R V 42] ✣ 1942 Bom 316 (317) [AIR V 29] : ILR (1942) Bom 755 (DB). (If a plaintiff inserts in his plaint irrelevant allegations merely in order to show that the act complained of amounts to crime, those irrelevant assertions might properly be struck out and the Court should pay no regard to them.) ✣ 1931 All 595 (595) [AIR V 18] (DB). (One single fact among the varying circumstances of particular cases may alter the whole effect of the allegations made in the plaint.) 1926 All 760 (762) [A I R V 13] : 49 All 85 (DB). (Defendant not estopped from questioning jurisdiction merely because he does not admit commission of any offence.)

[8] Suit to recover back money paid to defendant and misappropriated by him is not cognizable. 1923 Oudh 38 (38) [AIR V 10] : 26 Oudh Cas 200.

[9] Defendant convicted in criminal prosecution for criminal breach of trust — Suit for damages by plaintiff for mental and physical worry and cost of criminal trial is outside jurisdiction of Small Cause Court. 1920 Oudh 185 (185) [AIR V 7] : 23 Oudh Cas 352.

[10] Suit for damages for defrauding by substitution of base metal for silver given to defendant for making ornaments is not a small cause suit. 1925 Oudh 632 (632) [A I R V 12] : 29 Oudh Cas 24.

[11] Suit for compensation for loss due to negligent constitution of drain by municipal committee is not barred from cognizance of Small Cause Court, since such an act cannot be described as "mischief" within the meaning of Penal Code. 1933 Lah 363 (363) [A I R V 20].

[12] Where there has been misappropriation and the wrong-doer promises to make restitution, the cause of action for a suit for the money is the misappropriation and not the promise and the suit is not cognizable by a Small Cause Court. 1921 Cal 235 (235) [AIR V 8] : 48 Cal 879 (DB).

[13] Mere wrongful cutting of a tree or taking of fruits from a tree is not necessarily penal so as to bring the person who cuts the tree or takes the fruits, within the purview of the Penal Code and Art. 35 (ii) has no application to such a case, and the jurisdiction of the Small Cause Court is not barred. 1950 Pat 284 (288) [A I R V 37 C 70]. (Suit for share of fruits of mango trees held to be of small cause nature.)

[14] Suit to recover value of silver given for making ornaments and misappropriated by defendant and interest thereon but not damages — Small Cause Court has no jurisdiction. 1924 Lah 668 (669) [AIR V 11].

[15] Where the defendants prevented plaintiffs from irrigating their lands from a well by acts which constituted an offence of mischief, held, the suits for compensation for loss sustained by the defendants' act were not cognizable by a Court of Small Causes and the appeals from the decrees passed by the first Court lay to the District Judge and not to the Senior Subordinate Judge. 1923 Lah 38 (38, 39) [AIR V 10].

[16] Suit by judgment-debtor for article retained and lost by decree-holder after redelivery order by Court is based on allegation of misappropriation—Small Cause Court cannot try it. 1929 Lah 386 (387) [AIR V 16].

[17] Allegation that mother took away ornaments lying with her in trust for plaintiff to her second husband and that both disposed of them to prejudice of plaintiff amounts to criminal charge — Small Cause Court cannot entertain suit. 1928 Lah 887 (887) [A I R V 15].

[18] Where the act of the defendants in cutting the grass from the Khasra numbers amounts to trespass, suit for damages in respect thereof is excluded from cognizance of Small Cause Court. 1933 Lah 172 (172) [A I R V 20].

[19] Paddy wrongfully and maliciously cut and taken away — Suit for value does not lie. 1919 Cal 1035 (1035) [AIR V 6] (DB).

[20] Suit for recovery of money in respect of which an offence under S 379, I. P. C. had been committed is an unclassed one and is excepted from jurisdiction of Small Cause Court. 1936 Lah 798 (798) [AIR V 23].

[21] Small Cause Court cannot try suit by tenant for damages from landlord as compensation for trespass and mischief. 1930 Cal 240 (241) [AIR V 17] : 57 Cal 344 (DB).

[22] Suit by judgment-debtor for recovery of excess of decretal amount paid to decree-holder under fraud and cheating is not of small cause nature. 1928 Cal 776 (777) [A I R V 15] (DB).

[23] Tearing of plaintiff's fishnet and allowing fish to escape is offence against property under I. P. C., and suit for damages does not lie in Small Cause Court. 1917 Cal 632 (633) [AIR V 4] (DB).

[24] Plaint alleging that defendant by deceit reaped crops belonging to plaintiff cannot be tried by Small Cause Court. 1935 All 264 (264) [AIR V 22].

[25] Second appeal lies in a suit under Art. 35 (ii). 1923 Lah 39 (39) [AIR V 10].

Cases not falling under Cl. (ii)

[26] Where plaint does not disclose that the plaintiff claims any compensation, or that any offence of cheating or any other offence punishable under the I. P. C., was committed by defendants, the case does not fall under Art. 35. 1937 Oudh 244 (245) [AIR V 24] : 13 Luck 204 ✣ 1927 All 288 (288) [AIR V 14] : 49 All 440 (DB).

[27] Article 35 (ii) is not applicable to suits to which the provisions of Chap. XVII of the Penal Code are not attracted. A suit for damages on account of felling of trees by a tenant is cognizable by the Court of small causes. ('60) 64 Cal W N 172 (176) ✣ 1955

Sch. II, Art. 35 — Note 7 *(contd.)*

NUC (Ajmer) 1328 [A I R V 42]. (Suit for refund of purchase money — No allegation of fraud or dishonesty — Suit was not for compensation of act punishable by Penal Code — Article 35 (ii) did not apply.) ✠ 1936 Nag 276 (277) [A I R V 23] ✠ 1932 All 472 (473) [AIR V 19] (DB). (The question whether a case is determinable by a Small Cause Court Judge must rest upon an examination of the plaint and a decision by the Judge as to whether or not the language of the plaint on a reasonable construction imports the commission of an offence under Chap. XVII, I. P. C.)✠ 1940 Rang 100 (102) [A I R V 27] : 1940 Rang L R 1. (Removal of leaves — No mention of theft or trespass — Article 35 (ii) does not apply.) ✠ 1930 Pat 335 (335) [A I R V 17]. (Allegation held not enough to disclose criminal offence — Suit held triable by Small Cause Court.) ✠ 1921 Oudh 144 (144) [A I R V 8]. (Wrongful cutting of trees— Plaint not disclosing offence under Chap. 17, I. P. C.)

[28] Suit against bailee for return of articles — Dishonest conversion, etc., not alleged — Small Cause Court can try suit. 1929 Oudh 90 (90) [AIR V 16] : 4 Luck 235.

[29] Where the plaintiff alleges that the defendants took away the tamarind belonging to him after it was gathered by him and seeks to recover the value of the tamarind, the suit does not come under Art. 35 (ii) as the averments in the plaint do not disclose the commission of theft. 1947 Mad 404 (404) [AIR V 34 C 215]. (Whether a suit falls within the mischief of Art. 35 is prima facie a matter to be decided on the language of the plaint.)

[30] Suit for price of paddy alleged to be cut and misappropriated by the defendant not amounting to criminal offence is cognizable. 1926 Cal 1230 (1231) [AIR V 13] (DB).

[31] Allegation of negligence by Railway Company to fence the lines and driving the train without proper caution and in utter negligence whereby cow is killed does not amount to mischief as in S. 425, I. P. C. — Small Cause Court can try suit on such allegation. 1928 Cal 504 (505) [AIR V 15].

[32] Suit for mesne profits and damages for use and occupation against defendant for not giving up possession in pursuance of the delivery of possession obtained by the plaintiff, but continuing such possession and taking away standing paddy, is cognizable by Small Cause Court. In such a case damages that are claimed is not for any act amounting to criminal offence within the meaning of Chapter 17, I. P. C. 1928 Cal 405 (406) [AIR V 15].

[33] Money deposited by plaintiff with arbitrator to be paid to other party if plaintiff refused to abide by award — Money paid to other party — Suit to recover money from arbitrator—Absence of allegation as to breach of trust or criminal misappropriation in plaint — Suit, *held*, was cognizable in Small Cause Court. 1933 All 902 (903) [AIR V 20].

[34] A suit claiming damages incurred by the plaintiff by reason of the defendant having wrongfully taken fruit from the plaintiff's tree does not fall within the ambit of article 35 (ii). If the plaintiff inserts in plaint irrelevant allegations, merely to show that act complained of amounts to crime, those assertions might properly be struck out. 1942 Bom 316 (317) [AIR V 29] : I L R (1942) Bom 755 (DB).

[35] Suit for recovery of property or price thereof is not excluded under Art. 35. Thus a suit against borrower who merely detains property lent to him beyond the period within which he was expected to return it is not excluded, because he does not retain the property by committing the offence of criminal breach of trust. 1924 All 571 (571) [AIR V 11] : 46 All 688 (DB) ✠ ('42) 1942 All L W 594 (594). (Suit for the return of certain gold bangles lent or their value.) ✠ 1935 All 141 (142) [AIR V 22]. (Suit for return of gold and silver given for making ornaments — No allegation of dishonest misappropriation or conversion — Mere allegation of bad faith — Suit is cognizable.) ✠ 1929 All 208 (208) [AIR V 16]. (Suit for recovery of certain ornaments or their value from sons of a person who failed to return them — No allegation of a criminal charge — Criminal charge could not be presumed from application of Art. 48, Limitation Act.)✠ 1926 Oudh 49 (49) [AIR V 13] ✠ 1920 All 137 (137) [AIR V 7]. (Suit to recover pledged ornaments or in alternative their value — Neither Art. 35 nor Art. 43 (a) applies — Where identification of ornaments is impossible, Court should pass compensation decree.)

[36] Where in plaint there is no definite allegation that detendants had the intention requisite for commission of offences mentioned, the suit is not excepted. 1922 Lah 451 (452) [AIR V 9] : 3 Lah 369 (DB) ✠ 1930 Bom 361 (361) [AIR V 17] (DB). (Trees cut — No criminal intention alleged.)✠ ('30) 31 Pun L R 223 (223). (Suit to recover stolen property — Criminal intention or dishonesty not alleged.) ✠ 1929 Pat 722 (723) [AIR V 16] (Allegation of defauit in payment and withholding payment by taking advantage of plaintiff's minority, mismanagement of plaintiff's estate and plaintiff's mother being pardanashin—Allegation does not amount to criminal intention and Small Cause Court has jurisdiction.)

[37] Where upon the facts stated in the plaint the cause against the defendant was that his action was wrongful or illegal but was not necessarily penal, the suit was of small cause nature. 1954 Vindh Pra 49 (49) [AIR V 41 C 19] ✠ 1936 Pat 428 (429) [AIR V 23]

[38] Where the defendants are within their rights, as burtandars, in cutting grass or allowing their cattle to graze on the ghasni, prima facie, the mens rea to constitute a criminal offence under Ch. XVII, Penal Code is absent. Hence, a suit for recovery of a sum claimed as damages caused by the grazing of the defendant's cattle is not covered by Art. 35 (ii) of Sch. II. 1955 Him Pra 56 (56, 57) [AIR V 42].

[39] The right of a landlord and a tenant in respect of trees is very often a disputed

Sch. II, Art. 35 — Note 7 *(contd.)*

right depending in some cases upon statutory provisions and in others upon custom or otherwise. A criminal case, either for mischief or misappropriation or for theft, would easily be defeated by the defendant urging that he had a right to appropriate the trees, as also the timber after felling them. The tenant in such a case can very well plead that he *bona fide* believed that he was entitled to cut the trees and if under such *bona fide* belief he had felled the trees and removed the timber, the provisions contained in Chapter XVII, Penal Code, cannot at all be attracted. A suit by the landlord for damages for trees so cut and removed by the tenant, is one which is not excluded from the cognisance of the Court of Small Causes. 1950 Cal 109 (110) [AIR V 37 C 32] ✣ 1930 Pat 575 (578) [AIR V 17] : 9 Pat 569 (DB) ✣ 1933 Rang 261 /(261) [AIR V 20] ✣ 1930 Oudh 317 (318) [AIR V 17] : 5 Luck 739. (Trees cut and removed under belief of *bona fide* purchase — Suit for damages—Suit is cognizable by Small Cause Court even if the removal is alleged to be illegal.)✣('30) 1930 All L Jour 1247 (1248, 1249) (DB). (Defendant cutting trees and removing fruits under *bona fide* claim thereto.)✣ 1929 All 816 (816) [AIR V 16]. (Branches cut from joint tree.) ✣ 1928 Cal 153 (154) [AIR V 15]. (Trees cut under *bona fide* belief of right.)✣1923 All 428 (428). [AIR V 10] (Defendants claiming ownership in trees.)✣1923 Cal 568 (568) [AIR V 10] (DB). (Trees cut by defendants having right to portion of it.)

[40] Suit for price of timber removed by defendant from Court's custody under order of Court is of small cause nature. 1933 Mad 636 (637) [AIR V 20] (*Quaere* — Whether cutting of trees under mistake of fact does or does not fall under Article 35 *(ii)*.)

[41] Removal of property in assertion of a contested claim or right does not constitute theft and a suit for recovery of price of that property is not covered by Article 35 (ii). 1955 Him Pra 56 (57) [AIR V 42 C 29] ✣ 1938 Lah 759 (760) [AIR V 25] : ILR (1939) Lah 100✣1925 All 130 (131) [AIR V 12] (Ownership being doubtful, crops handed over to trustee — One party taking it away before ownership is decided is not theft.)

[42] Suit for a share in sale price of jointly owned trees is triable. 1925 Lah 479 (480) [AIR V 12].

[43] If, upon the plaint a question of *bona fide* claim on behalf of the defendant is obvious, Article 35 (ii) will have no application. 1954 Vindh Pra 49 (50) [AIR V 41 C 19].

[44] Suit to recover value of share of temple offerings and movables alleged to belong exclusively to plaintiff as mahant is cognizable. ('22) 69 Ind Cas 275 (276) (Lah).

[45] A suit for recovery of the price of a thela given on hire to the defendant and alleged to have been stolen from his custody is cognizable by the Small Cause Court. 1955 N U C (Madh B) 2994 [AIR V 42].

[46] Insertion of wrong figure in acknowledgment alleged to base suit for money on previous account and not on acknowledgment —Suit triable by Small Cause Court. 1929 Nag 144 (144) [AIR V 16].

[47] Right to collect toll at public ferry is not "property" within S. 425, I. P.C. — Suit for damages against defendant setting up rival ferry is not barred by Art. 35 (ii) and is cognizable. 1944 All 60 (61) [AIR V 31] : ILR (1944) All 189.

[48] Claim based on chit and not for damages for conversion or compensation for theft —Allegation of collusion and misappropriation—Suit is one for merely under chit and is triable by Small Cause Court. 1923 Cal 650 (651) [AIR V 10].

8. Clause (j) — Illegal, improper, or excessive distress, attachment etc.—[1] In a suit for recovery of money interest claimed as damages for detention of money and not as compensation—Small Cause Court can try claim. 1930 Bom 80 (81) [AIR V 17] (DB).

Illegal distraint

[2] A suit for refund of money paid under an illegal distress and interest thereon is not a suit for compensation under Cl. 35 (j) and is, therefore, cognizable by the Small Cause Court. 1945 Bom 197 (198, 199) [A I R V 32] : ILR (1945) Bom 382 (FB). (AIR 1925 Bom 419, *Overruled* ; AIR 1930 Bom 80, *Foll.*).

[3] Suit for declaration and refund of profession tax is of small cause nature notwithstanding prayer for declaration, though interest is claimed along with refund. ('31) 1931 Mad W N 1107 (1109, 1110).

[4] Suit to recover damages for the breach of promise to certify payment to Court which is not based on illegal or improper execution, is cognizable. 1923 Rang 88 (89) [AIR V 10] : 11 Low Bur Rul 429.

[5] A payment of new rates imposed by a Municipality though made under pressure of issue of a distress warrant is not made under distress and a suit for refund thereof is cognizable by a Small Cause Court. ('09) 3 Ind Cas 429 (429) (DB) (Cal).

[6] The concluding words in Cl. (j) of Art. 35 are "improper execution of any distress, search or legal process". It is clear from this that the clause is referring to the execution of legal processes as understood in India. Where the cattle are not taken "as a pledge" nor are they taken "for the recovery of rent", their seizure cannot amount to distress either within the meaning of the English Law or within Art. 35 (j). Hence, a suit for damages for wrongful seizure and impounding of cattle by servant is maintainable in Court of Small Causes. ('41) 1941 Nag L Jour 328 (329, 330).

Illegal attachment

[7] Suit for damages for wrongful attachment and negligence is not of small cause nature. 1936 Nag 257 (257) [AIR V 23] : ILR (1937) Nag 19✣1924 All 537 (538) [AIR V 11]: 46 All 233✣('13) 11 All L Jour 91 (92).

[8] Suit to recover money on ground that it was improperly attached and drawn out, and that it really belongs to plaintiffs by whom it was deposited can be brought in Small Cause Court. It is not a suit for com-

(36) a suit by a Muhammadan for exigible (*mu'ajjal*) or deferred (*mu'wajjal*) dower ;

(37) a suit for the restitution of conjugal rights, [a][* * *] for the custody of a minor, or for a divorce ;

[a] The words "for the recovery of a wife" were *repealed* by the Repealing and Amending Act, 1914 (X of 1914), S. 3 and Sch. II.

(38) a suit relating to maintenance ;

STATE AMENDMENT

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in Sch. II for Art. (38) substitute the following, namely,—

"(38) a suit relating to maintenance but not being a suit for recovery of arrears of maintenance based upon a decree or written agreement."—U. P. Act XXIV of 1954, S. 2 & Sch., item 3 (2) [30 11-1954].

Sch. II, Art. 35 — Note 8 *(contd.)*

pensation for illegal attachment but a suit to recover sum of money received by the defendant and which belongs to the plaintiff. 1926 All 326 (327) [AIR V 13].

[9] Suit to recover price of goods wrongfully attached and sold in execution is not within cognizance. 1926 Lah 150 (151) [AIR V 13] (DB). (If such a case is tried by Judge having both, small cause and regular powers, the trial should be held as one on regular side).

[10] Property wrongfully attached and subsequently released found damaged while in custody of supurdar—Suit by owner for price of property is really one for compensation for illegal and improper attachment and is as such excluded from cognizance of Small Cause Court. 1941 Oudh 412 (414) [AIR V 28].

[11] A suit for damages for not restoring crops, the attachment of which was successfully objected to, lies only on the regular side, not on the small cause side. 1917 Oudh 172 (172) [AIR V 4].

[12] Application under O. 21, R. 58, Civil P. C. for release of property from attachment dismissed — Subsequent suit and property released—Action in Small Cause Court, claim being for interest on amount of deposit made by plaintiff pending disposal of their suit under O. 21, R. 63 — *Held* (i) interest could not be recovered by way of damages (ii) It was action for trespass and jurisdiction of Small Cause Court was ousted. 1938 Pat 378 (378, 379) [AIR V 25].

9. Clause (k) — Improper arrest under Chapter XXXIV, Civil P. C., or injunction wrongfully obtained under Chapter XXXV, Civil P. C.—[1] Clause (k) contemplates that a suit for damages for wrongfully obtaining temporary injunction on insufficient grounds is maintainable and such suit is taken out of jurisdiction of Small Cause Court. 1927 Cal 247 (249) [AIR V 14]: 53 Cal 1008 (DB).

10. Clause (l)—Injury to person in cases not specified.—[1] A suit for damages for personal injury caused through an animal falls within Art. 35 (l). To such an act the maxim *qui facie per alium, facit per se* applies and the position is the same as if the defendants have touched the plaintiff with the substance. 1915 Nag 67 (68) [AIR V 2] : 12 Nag L R 7.

[2] Suit for compensation for maliciously causing one's house to be searched by police is therefore cognizable by Small Cause Court. ('10) 8 Ind Cas 1168 (1169) (Upp Bur).

[3] Suit to recover damages from defendant for running after plaintiff with shoe in his hand, threatening to beat him and using vulgar and abusive language, is a suit for "injury to the person". The act complained of amounts to an assault and to an offence affecting the human body. ('12) 36 Bom 443 (445) (DB).

[4] Suit to recover sum of money from defendant police officers on ground that it was bribe extorted by them from plaintiff is cognizable. ('12) 15 Cal L Jour 219 (219) (DB). (*Observation*—It is regrettable that such a suit should not have been excepted from jurisdiction of Small Cause Court).

11. Objection to jurisdiction.— [1] Once the plaintiff chooses the Small Cause Court as his forum, he cannot later on in revision question its jurisdiction. 1929 Pat 722 (723) [AIR V 16].

[2] The High Court will refuse to allow to be taken for the first time in revision before it an objection as to jurisdiction to try a suit for damages for wanton trespass especially where the defendant who raised such objection has been persistently defying the decree passed against him and was acting maliciously and in a high handed manner. 1935 Mad 699 (700) [A I R V 22].

[3] Where allegations contained in the plaint filed before the trial Court show clearly that the suit is not one of a small cause nature being excepted under Art. 35 (ii) and no objection is raised as to the jurisdiction of the trial Court at the time of trial, S. 102, Civil P. C. cannot apply to the case. 1931 Oudh 411 (411) [AIR V 18] (DB).

Sch. II, Art. 38 — Note 1

[1] Article applies to all suits relating to maintenance whether based on personal law or on contract, bond or decree ('28) 112 Ind Cas 256 (257) (Lah) ✤ 1931 Bom 286 (286) [AIR V 18]. (Suit for arrears of maintenance under a bond or agreement.) ✤ 1918 All 398 (399) [AIR V 5] : 40 All 52. (Suit for arrears

(39) a suit for arrears of land-revenue, village-expenses or other sums payable to the representative of a village-community or to his heir or other successor in title ;

(40) a suit for profits payable by the representative of a village-community or by his heir or other successor in title after payment of land-revenue, village-expenses and other sums ;

(41) a suit for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer, or by a manager of joint property, or a member of an undivided family in respect of a payment made by him on account of the property or family ;

Sch. II, Art. 38 — Note 1 *(contd.)*

of fixed maintenance against deceased husband's brother, because the defendant took property by his father's will, subject to charge of maintenance, is not cognizable.) ✣ 1917 Low Bur 78 (78) [A I R V 4] : 9 Low Bur Rul 51. (Suit to recover sum agreed upon for maintenance of child.) ✣ ('12) 10 All L Jour 185 (186). (Suit for arrears of maintenance.)

[2] A suit to be not cognizable by Small Causes Court under Art. 38 must be both in form and substance a suit for maintenance. 1928 Oudh 47 (48) [AIR 15].

[3] It is not necessary in order to take the case out of the cognizance of the Small Cause Court that the person bound in law to maintain should be one of the parties. 1926 Mad 932 (933) [AIR V 13].

[4] Suit for arrears of maintenance due to member of Aliyasantana family and assigned to plaintiff, is not cognizable. 1919 Mad 538 (538) [AIR V 6] DB).

[5] In view of the amendment of Art. 38 by the U. P. Act 24 of 1954 a suit for arrears of maintenance based on a written agreement is within the jurisdiction of the Small Cause Court. 1960 All 446 (448) [AIR V 47 C 113].

[6] When the testator has provided in his will that the monthly allowance was to be paid to his mother for the purpose of her maintaining herself, his intention was to provide maintenance for her and the fact that he was a separate member of his family and the property was a self-acquired property and there was no legal obligation for him for providing maintenance for his mother were entirely immaterial considerations. It was maintenance allowance and a suit to recover the arrears of allowance was not cognizable by a Small Cause Court. ('58) 1958 All L Jour 876 (879). (Case before amendment of Art. 38 by U. P. Act 24 of 1954.)

[7] Proceedings under S. 488, Criminal P. C. — Agreement between husband and wife — Husband agreeing to pay wife maintenance at certain rate—Suit for arrears of maintenance —Suit held was excluded from jurisdiction of Small Cause Court. 1935 Lah 101 (101) [AIR V 22].

[8] Suit by guardian of person of minor against guardian of property to recover money ordered by Court is not for maintenance. 1917 Mad 870 (870) [AIR V 4].

[9] Agreement to pay to brother for maintenance of mother — Suit for arrears of maintenance by brother—*Held* that suit not being by maintenance-holder nor for maintenance, but being based on contract was cognizable by the Small Cause Court. 1916 Mad 634 (634) [AIR V 3] (DB) ✣ 1937 Nag 236 (237) [AIR V 24] : ILR (1937) Nag 517.

[10] A suit for recovery of value of paddy deliverable for maintenance does not fall within Art. 38. 1914 Mad 16 (17) [AIR V 1] : 38 Mad 553.

SCHEDULE II, ARTICLE 41 — SYNOPSIS

1. Scope and applicability.
2. Suit for contribution.
3. Contribution and reimbursement.
4. "By a sharer in joint property."
5. Suit by judgment-debtor against co-judgment-debtor.
6. "Money due from a co-sharer."
7. Manager.

1. Scope and applicability.—[1] Suit for contribution is ordinarily cognizable by a Small Cause Court. The suits for contribution over which the Small Cause Court has no jurisdiction are those specified in Arts. 41 and 42, or possibly under Art. 44. 1928 Cal 593 (594) [AIR V 15] : 55 Cal 1193 (DB).

[*See* 1918 Oudh 435 (437) [AIR V 5] (DB). (Small Cause Court can try suits for contribution.)]

[2] It cannot be laid down broadly as a proposition of law that every claim for contribution founded upon a decree is not a claim of the nature specified in Art. 41. The fact that a decree may furnish the cause of action for a suit for contribution is itself no ground for holding that it cannot be a suit of the nature contemplated by Art. 41. The right test always is nature of the suit as brought and not circumstances which constitute cause of action. 1928 Oudh 237 (238) [A I R V 15] : 3 Luck 368 (DB).

[3] It is only suits for contribution of a peculiar and special character which are included in the exemption contained in Art. 41 and a litigant who wants to bring himself within the exemption must clearly establish that his suit in every respect complies with the very precise definition in the Article. 1918 All 167 (168) [AIR V 5] : 40 All 135 (DB).

[4] A suit for recovery of money advanced which is neither a suit for contribution nor one in respect of payment made by the plaintiff of money to the defendant as a co-sharer does not fall within Art. 41 or Art. 15. 1936 Pat 429 (430) [AIR V 23].

Sch. II, Art. 41 — Note 1 *(contd.)*

[5] Where each co-sharer of a certain property is liable for his share of the money payable to a contractor for certain repairs effected by him, a suit brught by one co-sharer against another co-sharer to recover money paid at his request to the contractor is not a suit for contribution in any sense of the word. It is a suit based on contract pure and simple and that being so, it is not covered by Art. 41 and is therefore not outside the jurisdiction of a Small Cause Court. 1948 Cal 35 (35, 36) [AIR V 35 C 15].

2. Suit for contribution.—[1] A common liability is the essence of a right of contribution, and an action for contribution is a suit brought by one of several parties who has discharged a liability common to all of them to compel the others to make good their shares. The words "sharer" and "joint property" are to be understood with reference to this common liability that has been discharged and not in the sense of an "undivided sharer in the property" and "property in which the sharers are undivided". 1928 Cal 593 (596) [AIR V 15] : 55 Cal 1193 (DB) ✠ ('38) 1938 Nag L Jour 125 (126].

[**But see** 1935 Mad 88 (89) [AIR V 22]. (Article 41 applies only to a suit where the plaintiff, at the time of filing his plaint, is a sharer in joint property.)]

[2] Hindu father and son joint until 29th July 1934 — After partition income-tax recovered from father alone in respect of income of joint family property during year 1933-34 — Suit by father to recover half of amount paid by way of contribution — Payment towards income-tax held was not common liability and therefore suit was triable by Small Cause Court. ('38) 1938 Nag L Jour 125 (126).

[3] "Contribution" signifies payment by each of the parties interested, of his share in any common liability. Mutuality, is thus the test of contribution. 1934 Cal 626 (626) [A I R V 21] (DB).

[*See* 1946 Nag 134 (134, 135) [A I R V 33 C 36] : ILR (1946) Nag 226. (Joint ownership of the property is of the essence of a right to contribution.)]

[4] A suit by the vendee against the vendors for recovery of the money paid by him for an encumbrance on the property sold represented to be free of all encumbrances is a suit for compensation and not for contribution and is cognizable by the Small Cause Court. 1914 All 406 (407) [AIR V 1].

[5] Where one of several heirs of a deceased Muhammadan pays off a debt due by the deceased and then sues his co-heirs to recover their share of the debt, the suit is not of the nature specified in Art. 41 and, therefore, is not excluded from cognizance of the Small Cause Court. 1918 All 9 (11) [AIR V 5] : 41 All 51 (DB).

[6] Decree for maintenance against one of three brothers making him liable for whole amount — Payment by defendant made liable — Suit to enforce contribution held not excepted by Art. 41 as it could not be treated as suit for contribution within the meaning of Article 41. 1918 All 167 (168) [AIR V 5] : 40 All 135 (DB).

[7] Where the plaintiffs deny that they were liable to satisfy the judgment-debt which they satisfied and which was recoverable only from the defendants, a suit for recovery of money paid by them is not a "suit for contribution" and is therefore cognizable by Small Cause Court. 1915 Cal 278 (279) [AIR V 2] (DB) ✠ 1934 Cal 626 (626) [AIR V 21] (DB).

[8] When a joint decree for costs is passed against more persons than one, and execution has been levied against one or some only, a suit by such persons for contribution against others does not come within the terms of article 41 as the peculiar kind of contribution claimed in the suit is not within the terms of that article. 1946 Cal 63 (64) [A I R V 33 C 18] ✠ ('55) Madh B L J 1955 H C R 1511 (1512) ✠ 1953 Mad 164 (165) [AIR V 40 C 51].

[9] Suit for contribution — Payment made by partner in respect of partnership business —Partnership dissolved — Suit for contribution by partner who is made to pay — Suit is not cognisable by Small Cause Court even when brought after partnership is dissolved. 1961 Punj 552 (553) [AIR V 48 C 166].

3. Contribution and reimbursement. — [1] Apart from a suit for contribution amongst co-sharers, a claim for reimbursement under sections 69 and 70, Contract Act, is not excluded under article 41. 1922 Pat 337 (338) [AIR V 9].

[2] Payment of land revenue of lambardar's patti made by Sadar Lambardar—Suit by sadar lambardar to recover same is not one for contribution under Art. 41, but for reimbursement. 1946 Nag 134 (134, 135) [AIR V 33 C 36] : ILR (1946) Nag 226.

[3] Suit against joint-debtor for reimbursement in respect of payment not being one for contribution made towards a joint debt is cognizable by a Small Cause Court. 1928 Oudh 239 (240) [AIR V 15] : 3 Luck 413.

[4] The parties were joint co-sharers of property in certain villages. Imperfect partition was effected and the liability for the payment of revenue was separately distributed to the co-sharers. The plaintiff was not certain what the exact amount due from him was for the year in suit, and to be on the safe side paid more than was necessary — *Held*, that a suit for reimbursement for excess paid by the plaintiff, which bad been credited to the defendants, was not a suit for contribution falling under Art. 41, but came within the purview of Contract Act, Ss. 70 and 72. 1925 Oudh 625 (626) [AIR V 12].

[5] A suit by the plaintiff co-sharer against other co-sharers to recover from them money paid by him in respect of their share of rent, due to the superior proprietor, on account of his joint liability with them being a suit for contribution and not for reimbursement falls under article 41. The fact that the plaintiff had already paid his share of the rent before he was obliged to pay the share of the rent due from his co-sharers makes no difference. 1941 Oudh 578 (579) [AIR V 28] : 17 Luck 67 (DB).

Sch. II, Art. 41 *(contd.)*

4. "By a sharer in joint property." — [1] Article 41 prohibits suits for contribution by a sharer in joint property. 1940 Mad 497 (497) [AIR V 27].

[2] The words "sharer" and "joint property" are to be understood with reference to the common liability that has been discharged and not in the sense of an "undivided sharer in the property," and "property in which the sharers are undivided." 1928 Cal 593 (596) [AIR V 15] : 55 Cal 1193 (DB).

[3] A suit by some of several persons bound by common liability, who have discharged joint obligation, to compel their co-sharers to make good their shares falls within Art. 41. 1915 Cal 310 (311) [AIR V 2] (DB).

[4] *A* and *B* having their shares divided but remaining jointly liable to pay Government revenue — Default by *B* in payment of his share of revenue—*A* paying entire amount of revenue—Suit by *A* for contribution is not cognizable by Small Cause Court. 1941 Pat 49 (50) [AIR V 28].

[5] Where the properties of the parties are separate and because apportionment has not been made, the owner of one separated portion of land is obliged to pay the whole of the peiskush a suit for contribution by him cannot be said to fall under article 41. 1940 Mad 497 (497) [AIR V 27].

[6] Suit for contribution by a co-owner as regards sum paid by him to proprietor on account of all co-owners is covered by Art. 41 and is not cognizable by Small Cause Court. 1925 Oudh 88 (89) [AIR V 12].

[7] A suit by plaintiff for contribution of money paid by plaintiff on defendant's behalf for taking joint lease is not cognizable by Small Cause Court. 1927 Nag 365 (365) [AIR V 14].

[8] Where a certain land is granted to a Hindu *A* and his nephew *B* and *A* alleging to have reclaimed the land at a certain cost sues *B* to recover *B*'s half share of the costs with interest, the suit cannot be said to fall within the first portion of article 41. 1943 All 21 (22) [AIR V 30].

[9] Suit for contribution for recovery of arrears of rent and water-cess collected from plaintiff in respect of defendant's land after partition is not covered by Art. 41. 1924 Mad 790 (790) [AIR V 11].

[10] A suit for contribution by one tort-feasor against his joinst tort-feasor where the sum claimed is below Rs. 500, is a small cause suit. 1920 Cal 995 (996) [AIR V 7] (DB).

5. Suit by jndgment-debtor against co-judgment-debtor. — [1] Where one co-sharer sues his other co-sharers for contribution in respect of payment made by him under a decree passed against all the co-sharers, the suit falls under article 41 and hence is not cognizable by Small Cause Court. 1939 Nag 64 (65) [AIR V 26] ✠ 1931 Lah 748 (749) [AIR V 18]. (Suit by decree-holder for contribution of expenses.)✠ ('20) 2 Lah L Jour 387 (389).

[**But see** 1926 All 456 (456) [AIR V 13] ✠ 1925 Oudh 539 (540) [AIR V 12] ✠ ('21) 62 Ind Cas 651 (652) (DB) (Cal).]

[2] Sale of joint share in process of execution of decree for arrears of rent—Sale set aside in respect of share of co-sharer on payment—Suit to recover amount from other co-sharers — Article 41 *held* excluded cognizance of suit from Small Cause Court. 1928 Oudh 237 (238) [AIR V 15] : 3 Luck 368 (DB).

[3] Where a decree for arrears of rent against several tenants occupying separate fields in one and the same khata has been realised from one of them, a suit for contribution as against others, at the instance of one who had paid the amount is barred by Art. 41 from the cognizance of a Small Cause Court. 1915 All 118 (118, 119) [AIR V 2] ✠ 1915 All 143 (144) [AIR V 2] ✠ ('09) 4 Ind Cas 59 (60) (DB) (All).

[**But see** 1937 Pat 382 (383, 384) [A I R V 24] ✠ 1914 Oudh 385 (385) [AIR V 1].

[4] Decree for rent against recorded tenant —Decretal amount paid by recorded tenant's co-sharer — Suit by latter for recovery for proportionate share of amount due by former —Recorded tenants having no interest in tenure at date of institution of suit — Suit *held* did not fall outside scope of article 41. ('13) 17 Cal L Jour 179 (181) (DB).

[**See however** ('12) 14 Ind Cas 735 (735) (DB) (Cal).]

[5] *A* mortgaged his holding to *B*, who agreed to pay portion of the rent to the landlord. *A* having paid the whole rent to the landlord to prevent the sale of the holding, sued *B* for contribution in the Court of Small Causes. The suit was *held* to be barred from its cognizance by Art. 41 as *A* and *B* were joint holders of the holding and the suit by *A* was to recover money due by another co-sharer. 1920 Pat 506 (509) [AIR V 7].

[6] Dissolved partnership—Suit for contribution by one partner against representatives of another partner for amount paid by him in respect of joint decree is maintainable on small cause side. 1934 Mad 699 (700) [A I R V 21] ✠ ('12) 11 Mad L Tim 188 (189).

6. "Money due from a co-sharer." — [1] The words "money due from a co-sharer" in Art. 41 mean money due from him as such. Where the money is due from the defendant by reason of his being one of the makers of a promissory note along with plaintiff the fact that the promissory note was itself executed by reason of a joint purchase by plaintiff and defendant does not make the amount one due from a co-sharer. 1925 Mad 970 (970) [A I R V 12].

7. Manager. — [1] The word "manager" in article 41 means a recognized manager, and not a manager ad hoc. Hence when the plaintiff nowhere states in his plaint that he was the manager of the property, the mere fact that he performed an act of management would not constitute him a manager within the meaning of article 41. 1943 All 21 (22) [AIR V 30].

[2] The ordinary presumption of Hindu law that the eldest member of an undivided Hindu family is the manager cannot be given effect to in the absence of any allegation by

(42) a suit by one of several joint mortgagors of immovable property for contribution in respect of money paid by him for the redemption of the mortgaged property ;

(43) a suit against the Government to recover money paid under protest in satisfaction of a claim made by a revenue-authority on account of an arrear of land-revenue or of a demand recoverable as an arrear of land-revenue ;

[a][*(43A)* a suit to recover property obtained by an act which is, or, save for the provisions of Chapter IV of the Indian Penal Code, would be, an offence punishable under Chapter XVII of the said Code ;]

[a] *Inserted* by the Provincial Small Cause Courts (Amendment) Act, 1914 (VI of 1914), S. 3.

STATE AMENDMENT

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in Sch. II omit Art. (43A)—U. P. Act XXIV of 1954, S. 2 & Sch., item 3 (1) [30-11-1954].

Sch. II, Art. 41 — Note 7 *(contd.)*

the plaintiff that he was the manager especially when the exact relationship of the parties to the suit is not known. 1943 All 21 (22) [AIR V 30].

Sch. II, Art. 42 — Note 1

[1] Mere signing mortgage deed as joint executant does not make one a joint-mortgagor. 1924 All 787 (788) [AIR V 11] (DB).

[2] A purchaser who redeems the mortgage is in the same position as if he were a joint mortgagor and the fact that a decree has been obtained on the mortgage is also immaterial because the decree on the mortgage does not extinguish the security though the security may be merged in the decree. 1928 Cal 593 (596) [AIR V 15] : 55 Cal 1193 (DB).

[3] Where a joint mortgagor sues other mortgagors for contribution towards the mortgaged debt cleared by him, the suit is not a suit of small cause nature. 1923 All 408 (409) [AIR V 10].

[4] One of the mortgagors paid up the entire amount of the decree for sale obtained on the mortgage. Subsequently he brought a suit for contribution against the co-mortgagor to the extent of his share in the property. The plaint was so worded as to bring the suit under S. 69, Contract Act and not under S. 95, T. P. Act—*Held* that the suit was not covered by Art. 42 as it was not a suit under S. 95, T. P. Act. 1928 All 298 (298) [AIR V 15] : 50 All 428.

[5] Suit by plaintiff to recover money from defendant for a wrong committed by him and another in mortgaging plaintiff's property for their own purposes which mortgage plaintiff had to pay off to secure his property is a suit for compensation and cognizable by the Small Cause Court. 1915 All 317 (317) [AIR V 2].

Sch. II, Art. 43 — Note 1

[1] A suit claiming refund of license fee for sale of liquor wrongly realized under a demand by Customs and Excise Department does not fall under Art. 43. 1957 Raj 396 (397) [AIR V 44 C 152] : ILR (1957) 7 Raj 139.

[2] There is nothing in the Indore Government Notification No. 1567, dated 28th July, 1948, which ousts the jurisdiction of the Court of Small Causes to try suits against Railway Companies for damages, when the amount claimed is within the pecuniary jurisdiction of the Court. 1950 Madh B 14 (14) [AIR V 37 C 6].

Sch. II, Art. 43-A — Note 1

[1] Where in a plaint in a suit triable by a Court of Small Causes the plaintiff accuses the defendant of conduct amounting to a criminal offence, e. g., criminal misappropriation, the jurisdiction of that Court to try the suit is barred by Art. 43-A. 1920 Nag 39 (40) [AIR V 7].

[2] Where the plaintiff sued the defendants for the recovery of certain property or its price on the allegation that the same was forcibly removed by the defendants from the cart in which it was being conveyed — *Held*, the allegations amounted to a criminal offence and the suit was not triable by Small Cause Court. 1928 Nag 288 (288) [AIR V 15] : 24 Nag L R 23.

[3] A suit to recover value of certain sovereigns delivered by plaintiff to one of the defendant and alleged to have been illegally, forcibly and fraudulently wrested from the latter by another defendant with knowledge of plaintiff's title in them, and without any legal title or valid claim thereto falls within Art. 43-A. 1926 Mad 320 (320) [AIR V 13].

[4] Where there is allegation of wrongful withholding but no allegation in the plaint that the suit amount was misappropriated by the defendant, or that any offence has been committed, nor is there any allegation that the defendant dishonestly kept the amount with himself, the cognizance of the suit in a Small Cause Court cannot be held to be barred. 1925 Mad 942 (942) [AIR V 12]* 1920 All 137 (137) [AIR V 7].

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(44) a suit the cognizance whereof by a Court of Small Causes is barred by any enactment for the time being in force.

STATE AMENDMENTS

GUJARAT

In its application to the State of Gujarat, same as that of Maharashtra.

MAHARASHTRA

In its application to the State of Bombay, after the Second Schedule insert the following Schedule, namely,—

"THE THIRD SCHEDULE.

FORM A.

(*See* Section 27B)

In the Court of Small Causes of .. ..
A.'B..... (Plaintiff) ;

Versus

C.D.....(Defendant).

A.B., of....., in the town of ....maketh oath (or affirms) and saith that C. D..... of .... is justly indebted to ....in the sum of Rs..... ..... . for arrears of rent of the house and premises No..... .. . situated at.....in the town of/village..... ..... due for ....months, to wit from .....to....., at the rate of Rs..... per mensem.

Sworn (or affirmed) before me the.....day of.....195 .

Judge of the Court of Small Causes of.....

FORM B.

(*See* Section 27-C.)

In the Court of Small Causes of.....

FORM OF WARRANT

I hereby direct you to distrain the moveable property of C. D., on the house and premises situated at No ...., in the town/village of ....for the sum of ..... Rupees, and the costs of the distress, according to the provisions of Chapter IV-A of the Provincial Small Cause Courts Act, 1887.

Dated day of 195 .

(Signed and sealed.)

To

E.F., Bailiff:

FORM C

(*See* Section 27-I)

In the Court of Small Causes of.....

FORM OF INVENTORY AND NOTICE

(State particulars of property seized.)

Take notice that I have this day seized the moveable property contained in the above inventory for the sum of ....Rupees. being the amount of ....months' rent due to A. B., at.....last, and that unless you pay the amount thereof, together with the costs of this distress, within fifteen days from the date hereof, or obtain an order from the Court of Small Causes to the contrary, the same will be appraised and sold pursuant to the provisions of Chapter IV-A of the Provincial Small Cause Courts Act, 1887.

Dated the day of 195 .

(Signed) E.F.,
Bailiff.

To

C. D.

Sch. II, Art. 44 — Note 1

[1] There is nothing in Delhi and Ajmer Rent Control Act (38 of 1952) which bars the cognizance of suits by the Court of Small Causes. A suit for the recovery of rent can therefore be brought and would be cognizable by Small Cause Court. 1960 Punj 11 (12) [AIR V 47 C 5] (DB).

FORM D

(*See* Section 27-N)

In the Court of Small Causes of.....

Take notice that I have appraised the moveable property seized on the..... day of....., under the provisions of Chapter IV-A of the Provincial Small Cause Courts Act, 1887, of which seizure and property a notice and inventory were duly served upon you (or upon..... ...on your behalf, as the case may be) under date the.....and that the said property will be sold on the ..... (two clear days at least after the date of the notice) at.....pursuant to the provisions of the said Act.

Dated the day of 195 .

(Signed) E. F.
Nazir and Appraiser.

To
C. D.

FORM E

(*See* Section 27-P)

In the Court of Small Causes of.....

SCALE OF FEES TO BE LEVIED IN DISTRAINTS FOR HOUSE RENT.

Sums sued for.	Affidavit and Warrant to distrain.	Order to sell.	Commission	Total.
Rs. Rs.	Rs. nP.	Rs. nP.	Rs. nP.	Rs. nP.
1 and under 5	0-25	0-50	0-50	1-25
5 " 10	0-50	0-50	1-00	2-00
10 " 15	0-50	0-50	1-50	2-50
15 " 20	0-50	1-00	2-00	3-50
20 " 25	0-75	1-00	2-50	4-25
25 " 30	1-00	1-00	3-00	5-00
30 " 35	1-00	1-00	3-50	5-50
35 " 40	1-00	1-50	4-00	6-50
40 " 45	1-25	2-00	4-50	7-75
45 " 50	1-50	2-00	5-00	8-50
50 " 60	2-00	2-00	6-00	10-00
60 " 80	2-50	2-50	6-50	11-50
80 " 100	3-00	3-00	7-00	13-00
Upwards of 100	3-00	3-00	7 per centum	.....

The above scale includes all expenses, except in suits where the tenant disputes the landlord's claim, and witnesses have to be summoned, in which case each summons must be paid for at twenty-five naye paise each for sums under rupees 40 and seventy-five naye paise each for sums above that amount ; and also where peons are kept in charge of property distrained such fee not exceeding seventy-five naye paise per day as may be fixed by the Registrar of the Small Cause Court must be paid per man.",

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[THE] PROVISIONAL COLLECTION OF TAXES ACT, 1931

(ACT XVI of 1931)

[The Act printed here is as on 1-3-1961.]

CONTENTS

SECTIONS

1. Short title.
2. Definition.
3. Power to make declarations under this Act.
4. Effect of declarations under this Act, and duration thereof.
5. Certain refunds to be made when declarations :cease to have effect.

STATEMENT OF OBJECTS AND REASONS

"The experience of the last three Delhi sessions has illustrated certain disadvantages in the present procedure as regards the Budget and the Finance Bill and, in particular, has brought out the fact that the period of thirty days prescribed under section 2 of the Provisional Collection of Taxes Act, 1918 (XVI of 1918), is not sufficiently long. It is, therefore, proposed to extend this period to sixty days, and also to rectify certain minor imperfections in the existing Act. Opportunity has also been taken to insert a provision in the Bill which will confine refunds of duty to the difference between the rate in force when the Bill was introduced and the rate proposed in that Bill, any further reduction imposed by the new Act taking effect only when that Act comes into operation."

—Gaz. of Ind., 1931, Part V, page 110.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937; A. C. A. O., 1948; A. L. O., 1950.
—Amended temporarily by Act XII of 1957.
—Extended by Acts IV of 1941; LIX of 1949; XXX of 1950.
—Repealed in part by Act I of 1938.

[THE] PROVISIONAL COLLECTION OF TAXES ACT, 1931
(ACT XVI OF 1931)[a]

[28th September, 1931.]

An Act to amend the law providing for the immediate effect for a limited period of provisions in Bills relating to the imposition or increase of duties of customs or excise.

WHEREAS it is expedient to amend the law providing for the immediate effect for a limited period of provisions in Bills relating to the imposition or increase of duties of customs or excise; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1931, Pt. V, p. 110.
This Act has been extended to Berar by the Berar Laws Act, 1941 (IV of 1941).
It has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (LIX of 1949), S. 3 [1-1-1950] and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (XXX of 1950), S. 3 [16-4-1950].

1. Short title.

This Act may be called THE PROVISIONAL COLLECTION OF TAXES ACT, 1931.

2. Definition.

In this Act, a "declared provision" means a provision in a Bill in respect of which a declaration has been made under section 3.

3. Power to make declarations under this Act.

Where a Bill to be introduced in [a][Parliament] on behalf of Government provides for the imposition or increase of a duty of customs or excise, the [A][Central Government] may cause to be inserted in the Bill a declaration that it is expedient in the public interest that any provision of the Bill relating to such imposition or increase shall have immediate effect under this Act.

[a] *Substituted* for "the Central Legislature" by A. L. O., 1950 [26-1-1950].

4. Effect of declarations under this Act, and duration thereof.

(1) A declared provision shall have the force of law immediately on the expiry of the day on which the Bill containing it is introduced.

(2) A declared provision shall cease to have the force of law under the provisions of this Act—

(a) when it comes into operation as an enactment, with or without amendment, or

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Section 4 — Note 1

[1] Where the Finance Bill (No. 13 of 1951) containing a declaration that it was expedient in the public interest that the provisions ot certain clauses thereof should have immediate effect, was introduced into the Parliament on 28-2-1951, the declared provisions acquired the force of law on 1-3-1951 by virtue of S. 4 (1) of the Provisional Collection of Taxes Act, 1931. 1957 All 84 (85) [AIR V 44 C 19] (DB).

(b) when the [A][Central Government], in pursuance of a motion passed by [a][* * *] [b][Parliament], directs, by notification in the [A][Official Gazette], that it shall cease to have the force of law, or

(c) if it has not already ceased to have the force of law under clause *(a)* or clause *(b)*, then on the expiry of the [c]sixtieth day after the day on which the Bill containing it was introduced.

[a] The words "either chamber of" were *omitted* by A. C. A. O., 1948 [23-3-1948]. [b] *Substituted* for "the Central Legislature" by A. L. O., 1950 [26-1-1950]. [c] As the duration of the session of Parliament in which the Finance Bill was introduced was expected to be too short and hence would not give Parliament sufficient time to examine the important taxation proposals made in the Finance Bill, the Provisional Collection of Taxes (Temporary Amendment) Act, 1957 (XII of 1957) was enacted to enable the Parliament to consider that Bill in its next session. Section 2 of the said Amendment Act is as follows—

"*Temporary amendment of sections 4 and 5, Act XVI of 1931.*—Where a Bill introduced in Parliament during the period commencing on the 15th day of May, 1957, and ending with the 31st day of December, 1957, contains a declared provision as defined in section 2 of the Provisional Collection of Taxes Act, 1931, sections 4 and 5 of that Act shall have effect in relation to such Bill as if for the words "sixtieth day" in clause (c) of sub-section (2) of section 4 and in sub-section (1) of section 5, the words "one hundred and twentieth day" had been substituted."

5. **Certain refunds to be made when declarations cease to have effect.**

(1) Where a declared provision comes into operation as an enactment in an amended form before the expiry of the sixtieth day[a] after the day on which the Bill containing it was introduced, refunds shall be made of all duties collected which would not have been collected if the provision adopted in the enactment had been the declared provision :

Provided that the rate at which refunds of any duty may be made under this sub-section shall not exceed the difference between the rate of such duty proposed in the declared provision and the rate of such duty in force when the Bill was introduced.

(2) Where a declared provision ceases to have the force of law under clause *(b)* or clause *(c)* of sub-section *(2)* of section 4, refunds shall be made of all duties collected which would not have been collected if the declaration in respect of it had not been made.

[a] *See* foot-note (c) under S. 4.

6. Repeal. *[Repealed by the Repealing Act, 1938 (I of 1938), S. 2 and Sch.]*

[THE] PUBLIC ACCOUNTANTS' DEFAULT ACT, 1850

(ACT XII of 1850)

[The Act printed here is as on 1-3-1961.]

CONTENTS

PREAMBLE

SECTIONS

1. Public accountants to give security.
2. Amount and kind of security, and with what sureties.
3. "Public accountant" defined.
4. Prosecution of accountants and sureties.
5. Enactments applied to proceedings by and against accountants.
6. *[Repealed.]*

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937 ; A. C. A. O., 1948; A. L. O., 1950 ; 2 A. L. O., 1956.
—Extended to Berar by Act IV of 1941.
—Extended in Madhya Pradesh by M. P. Act XII of 1950.
—Extended in Madras by Mad. Act XXII of 1957.
—Repealed in part by Act XIV of 1870.
—Repealed in Assam by Regn. I of 1886.
—Repealed in part locally in Bombay by Bom. Act V of 1879.

[THE] PUBLIC ACCOUNTANTS' DEFAULT ACT, 1850

(ACT XII OF 1850)[a]

[22nd March, 1850.]

For avoiding loss by the default of Public Accountants.

Preamble

For better avoidance of loss through the default of public accountants : It is enacted as follows :—

[a] Short title given by the Indian Short Titles Act, 1897 (XIV of 1897).

This Act has been partially extended to Berar by the Berar Laws Act, 1941 (IV of 1941) and has been declared to be in force in all the Provinces of India (now the Part A States), except the Scheduled Districts, by the Laws Local Extent Act, 1874 (XV of 1874), S. 3.

It has been declared to be in force in the Santhal Parganas by the Santhal Parganas Settlement Regulation (III of 1872), S. 3.

It has been declared, by notification under S. 3 *(a)* of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the following other Scheduled Districts, namely :—

West Jalpaiguri, the Western Hills of Darjiling, the Darjiling Tarai and the Damson Sub-Division of the Darjiling District . . .	*See* Gaz. of Ind.,	1881, Pt. I, p. 74.
The Districts of Hazaribagh, Lohardaga (now the Ranchi District, *see* Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum	Ditto	1881, Pt. I, p. 504.
Kumaon and Garhwal	Ditto	1876, Pt. I, p. 605.
The Scheduled portion of the Mirzapur District	Ditto	1879, Pt. I, p. 383.
Jaunsar Bawar	Ditto	1879, Pt. I, p. 382.
The Scheduled Districts of the C. P. (now Madhya Pradesh)	Ditto	1879, Pt. I, p. 771.
The Scheduled Districts in Ganjam and Vizagapatam	Ditto and Fort St. Geo. Gaz.,	1898, Pt. I, p. 870. 1898, Pt. I, p. 666.

It has been extended, by notification under S. 5 of the last-mentioned Act, to the following Scheduled Districts, namely :—

The Tarai of the Province of Agra . . .	*See* Gaz. of Ind.,	1876, Pt. I, p. 505.
Ajmer and Merwara	Ditto	1878, Pt. I, p. 380.
Coorg	Ditto	1911, Pt. I, p. 1477.

The Act has been partially extended to the States merged in the State of Madhya Pradesh, by M. P. Act XII of 1950, S. 3 and Sch. II [3-4-1950] and has been extended to the transferred territories in the State of Madras by Mad. Act XXII of 1957, S. 3 and Schedule [18-12-1957].

The Act has been partially repealed in the Bombay State, *see* the Bombay Land-Revenue Code, 1879 (Bom. Act V of 1879). S. 2 and Schedule A ; and in Assam, in which it was declared to be in force by notifications under S. 3 *(a)* of the Scheduled Districts Act, 1874 (XIV of 1874), Gazette of India, 1878 and 1879, Pt. I, pages 523 and 631, respectively, *see* the Assam Land and Revenue Regulation, 1886 (I of 1886).

1. Public accountants to give security.

Every public accountant shall give security for the due discharge of the trusts of his office, and for the due account of all moneys which shall come into his possession or control, by reason of his office.

Note.—As to who is "a public accountant" *see* section 3.

2. Amount and kind of security, and with what sureties.

In default of any Act having special reference to the office of any public accountant, the security given shall be of such amount and kind, real or personal, or both, and with such sureties (regard being had to the nature of the office), as shall be required by any rules made or to be made from time to time, by the authority by which each public accountant is appointed to his office, [a][* * * *].

[a] The words "subject to the approval of the Governor or Governor in Council of the Presidency or place" were *omitted* by A. O., 1937 [1-4-1937].

[a][**3.** "Public accountant" defined.

For the purposes of sections 1 and 2 of this Act, the expression "public accountant" means any person who as Official Assignee or Trustee, or as sarbarahkar, is entrusted with the receipt, custody or control of any moneys or securities for money, or the management of any lands belonging to any other person or persons,[aa] and for the purposes of sections 4 and 5 of this Act the expression shall also include any person who, by reason of any office held by him in the service of [b][the Central Government or the Government of a [c][* *] State], is entrusted with the receipt, custody or control of any moneys or securities for money, or the management of any lands belonging [d][to such Government].]

[a] *Substituted* for the original section 3, by A. O., 1937 [1-4-1937]. [aa] Managers and other servants of the Court of Wards to be deemed to be public accountants : *see* U. P. Act IV of 1912, S. 34. [b] *Substituted* for "the Crown in India" by A. L. O., 1950 [26-1-1950]. [c] The words "Part A" were *omitted* by 2 A. L. O., 1956 [1-11-1956]. [d] *Substituted* for "to the Crown", *ibid.*

4. Prosecution of accountants and sureties.

The person or persons at the head of the office to which any public accountant belongs may proceed against any such public accountant and his sureties for any loss or defalcation in his accounts, as if the amount thereof were an arrear of land-revenue due to Government.

5. Enactments applied to proceedings by and against accountants.

All Regulations and Acts now or hereafter to be in force for the recovery of arrears of land-revenue due to Government, and for recovery of damages by any person wrongfully proceeded against for any such arrears shall apply, with such changes in the forms of procedure as are necessary to make them applicable to the case, to the proceedings against and by such public accountant.[a]

[a] For the law relating to the recovery of revenue-arrears, *see* the Revenue Recovery Act, 1890 (I of 1890).

6. Validation of former rules. *[Repealed by the Repealing Act, 1870 (XIV of 1870).]*

[THE] PUBLIC DEBT ACT, 1944

(Act XVIII of 1944)

[The Act printed here is as on 1-3-1961.]

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STATEMENT OF OBJECTS AND REASONS

"The great bulk of Government obligations in India have till very recently been expressed in the form of promissory notes which pass from hand to hand by endorsement and delivery. Stock certificates, i.e., certificates which are not negotiable themselves but merely record title, the actual transfers requiring registration in the books of the Public Debt Office, are of comparatively recent introduction. Not unnaturally, therefore, the law of Government securities in India started as an appendage to the law of Negotiable Instruments, modifying it where necessary to meet the peculiar circumstances of Government promissory notes such as (1) their validity for a period much longer than that of the ordinary negotiable instrument of commerce and the concomitant necessity of issuing separate instruments to replace the originals for the record of interest payments, and (2) their being held more widely than ordinary negotiable commercial instruments by various classes of investors in addition to the financial and business community. The fact that Government loans were almost entirely in the form of promissory notes meant that the special modifications of the law, effected from time to time to meet practical difficulties, only related to Government obligations held in this form, with the result that when the previous legislation was revised in the Act of 1920, a clear distinction was not always drawn between those parts of the law which ought to relate to Government securities as a whole and those which merely related to promissory notes. A striking instance of this is provided by section 13 (of Act X of 1920) providing for the summary provisional settlement of disputes, which is confined only to promissory notes. Although logically imperfect, this position did not in the past lead to any practical difficulties as the holders of Government loans in the form of stock certificates were comparatively few. As a result of war conditions, however, and the efforts of the Reserve Bank as agent of Government in the management of public debt to popularise stock certificates in the interest of safety and administrative convenience the proportion of Government loans held in the form of stock certificates or in special subsidiary ledger accounts, which the Bank has undertaken to maintain for large institutional holders, has substantially increased, and the time appears to be opportune for recasting the provisions of the Indian Securities Act, 1920, so as to provide more satisfactorily for the management of Central public debt.

Apart from the fact that section 13 of the 1920 Act fails to provide for the summary provisional settlement of disputes regarding Government loans held otherwise than as promissory notes, the machinery which it provides is in itself incomplete and there have been numerous cases where on account of a disputant contenting himself with the mere issue of a notice of dispute to the Public Debt Office and abstaining from prosecuting his claim in a Court of law, or on account of vague stop orders emanating from Courts, the periodical payment of interest has been held up for unconscionably long periods, much to the annoyance and prejudice of the actual holder. There have also been numerous instances in which, where the matter has been taken to Court, Government and the Reserve Bank have been made parties to what was essentially a dispute between two private parties in the decision of which Government or the Bank had no interest. It is, therefore,

considered desirable to recast this part of the law so as to provide for a summary adjudication by the Reserve Bank of disputes as to the title to be the holder of a security, with a necessary safeguard by way of a guarantee of indemnity to ensure that the interests of the party who may ultimately succeed in establishing in a Court of law his right to hold the security are not prejudiced.

The legislative competence of the Central Legislature extends, however, only to legislation affecting public debt of the Central Government, while the public debt of a Province is subject to legislation in the Provincial Legislature only. The Act of 1920, which regulates public debt of both kinds, is amenable to amendment by the Central Legislature only in so far as it deals with public debt of the Central Government. The present legislation, therefore, takes the form of a Bill to be enacted as a separate Act, applicable only to securities of the Central Government, which will reproduce the provisions of the 1920 Act with amendments designed to remedy the defects already referred to, and with certain other amendments the necessity or desirability of which is suggested by experience in the administration of the Act during the last two decades. In this reproduction of the provisions of the 1920 Act, those provisions have been rearranged so as to group together sections dealing with the incidents common to the different forms in which loans of the Central Government are held, and to relegate to separate sections the incidents peculiar to negotiable instruments."

— Gaz. of Ind., 1943, Part V, page 162.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts VI of 1949; LVII of 1956; XLIV of 1959.

—Adapted by A.C.A O., 1948; A.L.O., 1950; 3 A. L. O., 1956.

—Extended by Acts LIX of 1949; XXX of 1950.

—Extended in Madras by Mad Act XXXV of 1949.

—Extended in Travancore-Cochin by T. C. Ord. 5 of 1953.

—Extended in Rajasthan by Raj. Ord. 5 of 1956.

[THE] PUBLIC DEBT ACT, 1944
(ACT XVIII OF 1944)[a]

[22nd November, 1944.]

An Act to consolidate and amend the law relating to Government securities [b][* * *] *and to the management by the Reserve Bank of India of the public debt of* [c][*the Government*].

WHEREAS it is expedient to consolidate and amend the law relating to Government securities [b][* * *] and to the management by the Reserve Bank of India of the public debt of [c][the Government] ;

It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1943, Pt. V, p. 162.

This Act has been extended to the new Provinces and merged States by the Merged States (Laws) Act, 1949 (LIX of 1949), S. 3 [1-1-1950] and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (XXX of 1950), S. 3 [16-4-1950].

It has also been extended to the States merged in the State of —

Madras : *See* Mad. Act XXXV of 1949, S. 3 [1-1-1950].

This Act and the Rules made thereunder have been made applicable to the Government securities of the State of Rajasthan issued before or after 11th September 1956 : *see* Raj. Ordi. V of 1956, S. 2 [11-9-1956];

This Act and the rules made thereunder are made applicable to the Government securities of the State of Travancore-Cochin issued on or after the 13th July, 1953 as they apply to Government securities of a Part A State—*see* Trav. Co. Ordi. V of 1953, S. 2 [31-10-1953].

[b] The words "issued by the Central Government" were *omitted* by the Public Debt (Central Government) Amendment Act, 1949 (VI of 1949), S. 2 [1-4-1949]. [c] *Substituted* for "the Union and the Part A States" by the Public Debt (Amendment) Act, 1956 (LVII of 1956), S. 2 [15-10-1956].

OBJECTS AND REASONS

Amendments made by Act VI of 1949.— "Until 1946 the Indian Securities Act, 1920, governed the securities issued by both the Central and the Provincial Governments. The working of this Act disclosed certain defects and it was considered necessary to amend it, particularly in the context of the very large increase of the public debt during the war years. Under the Government of India Act, 1935, the Central Legislature was competent to change only the law in respect of Central securities and the provisions of the Indian Securities Act, were accordingly replaced, so far as the Central public debt was concerned, by a comprehensive new Act, the Public Debt (Central Government) Act, 1944, which was

brought into effect from the 1st May, 1946 leaving the Provincial securities to be regulated by the Indian Securities Act, 1920. As the money market is common to the whole country and the public debt of the Central and Provincial Governments is administered by a single agency, namely, the Reserve Bank, it is obviously desirable to have uniform legislation for regulating the public debt of both. The Provincial Governments concur in this view and the Chambers of the Legislatures of all the Provinces in India have passed resolutions recommending that the securities issued by their respective Governments and their public debt should be regulated by an Act of the Dominion Legislature. It is accordingly proposed to amend the Public Debt (Central Government) Act so as to extend it to cover the public debt of all the Provincial Governments."

—S. O. R. Gaz. Ind., 1949, Pt. V, p. 37.

1. Short title and commencement.

(1) This Act may be called THE PUBLIC DEBT [a][* * *] Act, 1944.

[b][* * * * * *]

(3) It shall come into force on such [c]date as the Central Government may, by notification in the official Gazettee, appoint in this behalf.

[a] The words and brackets "(Central Government)" were *omitted* by the Public Debt (Central Government) Amendment Act, 1949 (VI of 1949), S. 3 [1-4-1949]. [b] Sub-s. (2) was *omitted* by the Public Debt (Amendment) Act, 1956 (LVII of 1956), S. 3 [15-10-1956]. [c] The Act came into force on 1-5-1946, *see* Notfn. F. I. (1)—B/46 D/-20-4-1946, Gaz. of Ind., 1946, Pt. I, p. 575.

[a][1A. Securities to which this Act applies.

This Act applies to Government securities created and issued whether before or after the commencement of this Act by the Central Government or a State Government other than the Government of Jammu and Kashmir.]

[a] *Inserted* by the Public Debt (Amendment) Act, 1956 (LVII of 1956), S. 4 [15-10-1956]. By S. 15 of this Amendment Act the following enactments are, subject to a saving clause, repealed, namely, (1) the Madhya Bharat Public Debt Act, 1953; (2) the Mysore Public Debt Act. 1953; (3) the Saurashtra Public Debt Act, 1953; and (4) the Travancore-Cochin Public Debt Act, 1954.

OBJECTS AND REASONS

Amendments made by Act LVII of 1956.— "The public debt and securities of the Union and Part A States are at present administered by the Reserve Bank of India in accordance with the Public Debt Act, 1944, and the rules made thereunder. The Act at present does not extend to securities created and issued by the Governments of Part B States. Some of these States have their own Public Debt laws while others have acquired public debt only recently and have no regular law on the subject. Securities issued by the Governments of Part B States are circulating in all parts of the country and the public debt of Part B States is also being administered by the Reserve Bank of India. It is, therefore, desirable that there should be uniformity of procedure in respect of the public debt of the Union and all Part A and Part B States and that the Public Debt Act, 1944 should apply to securities issued by the Government of Part B States as it applies to securities issued by the Central Government or a Part A State. The Legislatures of Part B States other than that of the State of Jammu and Kashmir have passed resolutions in pursuance of Art. 252 of the Constitution empowering Parliament to pass the necessary legislation on the subject. The Bill, accordingly amends the Public Debt Act, 1944, so as to make it applicable to securities issued by the Governments of Part B States other than the Government of Jammu and Kashmir and makes certain other minor and incidental amendments in that Act."

— S. O. R., Gaz. Ind., 1956, Extra.; Pt. II-Sec. 2, page 772.

2. Definitions.

In this Act, unless there is anything repugnant in the subject or context,—

(1) "the Bank" means the Reserve Bank of India ;

[a][*(1A)* "the Government" in relation to any Government security means the Central or State Government issuing the security ;]

(2) "Government security" means—

(a) a security, created and issued, [b][by the Government] for the pur-

Section 2 — Note 1

[1] Compensation bonds issued in the form of promissory notes to intermediaries of estates which have vested in Government under U. P. Zamindari Abolition and Land Reforms Act, 1951, are fully covered by the definition of Government securities given in S. 2 (2) of the Public Debt Act though they cannot be held to be Government securities within the meaning of Indian Securities Act. 1961 All 574 (580) [AIR V 48 C 153 (FB).

pose of raising a public loan, and having one of the following forms, namely :—

(i) stock transferable by registration in the books of the Bank ; or

(ii) a promissory note payable to order ; or

(iii) a bearer bond payable to bearer ; or

(iv) a form prescribed in this behalf ;

(b) any other security created and issued by [c][the Government] in such form and for such of the purposes of this Act as may be prescribed ;

(3) "prescribed" means prescribed by rules made under this Act ;

(4) "promissory note" includes a treasury bill.

[a] *Inserted* by the Public Debt (Central Government) Amendment Act, 1949 (VI of 1949), S. 4 [1-4-1949]. [b] *Substituted* for the words "whether before or after the commencement of this Act, by the Central Government or a State Government" by the Public Debt (Amendment) Act, 1956 (LVII of 1956), S. 5 [15-10-1956]. [c] *Substituted* for the words "the Central Government or a State Government", *ibid.*

3. Transfer of Government securities.

(1) [a][Subject to the provisions of section 5, a transfer of a Government security shall be made only in the manner prescribed for the making of transfers of securities of the class to which it belongs, and no transfer of a Government security which—

(i) is made after the 30th April, 1946, in the case of a security issued by the Central Government.

(ii) is made after the 31st March, 1949, in the case of a security issued by the Government of a Part A State,[b]

(iii) is made after the 14th October, 1956, in the case of a security issued by the Government of a Part B State[c] other than Jammu and Kashmir, and

(iv) is made on or after the 1st day of November, 1956, in the case of a security issued on or after that day by the Government of any State other than Jammu and Kashmir, shall be valid if—]

(a) it does not purport to convey the full title to the security, or

(b) it is of such a nature as to affect the manner in which the security was expressed by [d][the Government] to be held.

(2) Nothing in this section shall affect any order made by the Bank under this Act, or any order made by a Court upon the Bank.

[a] *Substituted* for the opening paragraph of sub-section *(1)*, by 3 A. L. O., 1956 [w. r. e. f. 1-11-1956]. [b] Immediately before 1st November, 1956 the following were Part A States : Andhra, Assam, Bihar, Bombay, Madhya Pradesh, Madras, Orissa, Punjab, Uttar Pradesh and West Bengal. [c] Immediately before 1st November, 1956, the following were Part B States other than Jammu and Kashmir : Hyderabad, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin. [d] *Substituted* for "the Central Government" by the Public Debt (Central Government) Amendment Act, 1949 (VI of 1949), S. 6 [1-4-1949].

4. Transferor of Government securities not liable for amount thereof.

Notwithstanding anything contained in the Negotiable Instruments Act, 1881, a person shall not, by reason only of his having transferred a Government security, be liable to pay any money due either as principal or as interest thereunder.

5. Holding of Government securities by holders of public offices.

(1) In the case of any public office to which [a][the Government] may, by notification in the Official Gazette, declare this sub-section to apply, a Government security in the form of stock or of a promissory note may be held in the name of the office.

(2) When a Government security is so held, it shall be deemed to be transferred without any or further endorsement or transfer deed from each holder of the office to the succeeding holder of the office on and from the date on which the latter takes charge of the office.

(3) When the holder of the office transfers to a party not being his successor in office a Government security so held, the transfer shall be made by the signature of the holder of the office and the name of the office in the manner and subject to the conditions laid down in section 3.

(4) This section applies as well to an office of which there are two or more joint holders as to an office of which there is a single holder.

[a] *Substituted* for "the Central Government" by the Public Debt (Central Government) Amendment Act, 1949 (VI of 1949), S. 6 [1-4-1949].

6. Notice of trust not receivable.

(1) No notice of any trust in respect of any Government security shall be receivable by [a][the Government], nor shall [a][the Government] be bound by any such notice even though expressly given, nor shall [a][the Government] be regarded as a trustee in respect of any Government security.

(2) Without prejudice to the provisions of sub-section *(1)*, the Bank may, as an act of grace and without any liability to the Bank or to [a][the Government], record in its books such directions by the holder of stock for the payment of interest on, or of the maturity value of, or the transfer of, or such other matters relating to, the stock as the Bank thinks fit.

[a] *Substituted* for "the Central Government" by the Public Debt (Central Government) Amendment Act, 1949 (VI of 1949), S. 6 [1-4-1949].

7. Persons whose title to a Government security of a deceased sole holder may be recognised by the Bank.

Subject to the provisions of section 9 the executors or administrators of a deceased sole holder of a Government security and the holder of a succession certificate issued under Part X of the Indian Succession Act, 1925, shall be the only persons who may be recognised by the Bank as having any title to the Government security :

Provided that nothing in this section shall bar the recognition by the Bank of the manager or the sole surviving male member of a Hindu undivided family governed by the *Mitakshara* Law as having a title to a Government security, when the security appears to the Bank to stand in the name of a deceased member of the family and an application is made by such manager or sole surviving member for recognition of his title and is supported by a certificate signed by such authority and after such inquiry as may be prescribed to the effect that the deceased belonged to a Hindu undivided family governed by the *Mitakshara* Law, that the Government security formed part of the joint property of the family, and that the applicant is the managing or sole surviving male member of the family.

Explanation.— The expression "Hindu undivided family governed by the *Mitakshara* Law" shall, for the purposes of this section, be deemed to include a Malabar *tarwad*.

8. Right of survivors of joint holders or several payees.

Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872,—

(a) when a Government security is held by two or more persons jointly and either or any of them dies, the title to the security shall vest in the survivor or survivors of those persons, and

(b) when a Government security is payable to two or more persons severally and either or any of them dies, the security shall be payable to the survivor or survivors of those persons or to the representative of the deceased or to any of them :

Provided that nothing contained in this section shall affect any claim which any representative of a deceased person may have against the survivor or survivors under or in respect of any security to which this section applies.

Explanation. — For the purposes of this section [a][a body incorporated or deemed to be incorporated under the Companies Act, 1956] or the Co-operative Societies Act, 1912, or any other enactment for the time being in force whether within or without [b][India], relating to the incorporation of associations of individuals, shall be deemed to die when it is dissolved.

[a] *Substituted* for "a body incorporated under the Indian Companies Act, 1913," by the Public Debt (Amendment) Act, 1956 (LVII of 1956), S. 7 [15-10-1956]. [b] *Substituted* for "the Provinces" by A. L. O., 1950 [26-1-1950].

OBJECTS AND REASONS

In clause (b) "we have restored the wording employed in clause (b) of sub-section (1) of section 4 of the Act of 1920, which speaks of a security 'payable to two or more persons severally' and provides merely for that security 'becoming payable' to the survivor. The proviso which is intended to govern the whole clause has been clarified by the substitution of the words 'in this section' for the word 'herein' and has now been printed separately as an addendum to the clause as a whole instead of being included in sub-clause (b)."
—S.C.R. Gaz. of Ind., 1944, Part V. page 85..

9. Summary procedure on death of holder of Government securities not exceeding five thousand rupees face value.

Notwithstanding anything contained in section 7, if within six months of the death of a person who was the holder of a Government security or securities the face value of which does not in the aggregate exceed five thousand rupees, probate of his will or letters of administration of his estate or a succession certificate issued under Part X of the Indian Succession Act, 1925, is not produced to the Bank, or proof to the satisfaction of the Bank that proceedings have been instituted to obtain one of these is not furnished, the Bank may determine who is the person entitled to the security or securities, or to administer the estate of the deceased and may make an order vesting the security or securities in the person so determined.

[a][**9A.** Application of sections 9B, 9C, etc.

Notwithstanding anything contained in section 1A, the provisions of sections 9B and 9C and the power to make rules in relation to any of the matters referred to in sections 9B and 9C shall apply only to such classes of Government securities created and issued by the Central Government, whether before or after the commencement[b] of the Public Debt (Amendment) Act, 1959, as that Government may, by notification in the Official Gazette, specify, and in relation to such classes of securities the provisions of sections 7 and 9 shall have effect subject to the provisions contained in sections 9B and 9C.]

[a] Sections 9-A, 9-B and 9-C were *inserted* by the Public Debt (Amendment) Act, 1959 (XLIV of 1959), S. 2 [w. e. f. 1-8-1960]. [b] That is, 1st August, 1960.

[a][**9B.** Nominations by holders of Government securities.

(1) Notwithstanding anything contained in any law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of a Government security, where a nomination made in the prescribed manner purports to confer on any person the right to receive payment of the amount for the time being due on the security on the death of the holder thereof the nominee shall, on the death of the holder of the security, become entitled to the security and to payment thereon to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

(2) Any nomination referred to in sub-section *(1)* shall become void if the nominee predeceases, or where there are two or more nominees all the nominees predecease, the holder of the security making the nomination.

(3) A transfer of a Government security made in the prescribed manner shall automatically cancel a nomination previously made :

Provided that where a Government security is held by or on behalf of any person as a pledgee or by way of security for any purpose, such holding shall not have the effect of cancelling a nomination, but the right of the nominee shall be subject to the right of the person so holding it.

(4) Where the nominee is a minor it shall be lawful for the holder of a security to appoint in the prescribed manner any person to receive the amount for the time being due on the security in the event of his death during the minority of the nominee, and, where any such appointment has been made, the Government security shall after the death of the holder and during the minority of the nominee, be deemed to be vested in that person as representing the minor.]

[a] *Inserted* by Act XLIV of 1959, S. 2 [w. e. f. 1-8-1960].

OBJECTS AND REASONS

"Ten-Year Treasury Savings Deposit Certificates and 15-Years Annuity Certificates which are sold and discharged through the Reserve Bank of India, are governed by the provisions of the Public Debt Act, 1944. Section 7 of that Act provides that if the face value of the Government securities belonging to a deceased holder exceeds Rs. 5,000 the executors or administrators of the deceased holder and the holder of a succession certificate shall be the only persons who may be recognised by the Reserve Bank as having any title to these securities.

2. Suggestions have been made from time to time that as the production of legal proof of succession involves considerable delay and expense, the holders of Ten-Year Treasury Savings Deposit Certificates and 15-Year Annuity Certificates may be allowed the right to nominate a person or persons to whom the amount due on the certificate could be paid in the event of the death of the holders without the production of succession certificate or other proof of title. [Sections 9A to 9C] accordingly seek to allow the facility of nomination to holders of the aforementioned certificates."—S.O.R., Gaz. of Ind., 1959, Extra., Pt. II—sec. 2, page 878.

[a][**9-C. Payment on death of holder.**

(1) If a person dies and he is at the time of his death the holder of a Government security and there is in force at the time of his death a nomination in favour of any person, the amount for the time being due on the security shall be paid to the nominee.

(2) Where the nominee is a minor, the amount for the time being due on the Government security shall be paid—

(a) in any case where a person has been appointed to receive it under sub-section *(4)* of section 9B, to that person; and

(b) where there is no such person, to the guardian of the minor for the use of the minor.

(3) Where the amount due for the time being on a Government security is payable to two or more nominees and either or any of them is dead, the title to the security shall vest in the survivor or survivors of those nominees and the amount for the time being due thereon shall be paid accordingly.

(4) Nothing contained in this section shall be deemed to require any person to accept payment of the amount due on a Government security before it has reached maturity or otherwise than in accordance with the terms of the security.

(5) Any payment made in accordance with the provisions of this section of the amount due for the time being on a Government security shall be a full discharge in respect of the security :

Provided that nothing contained in this section or in section 9B shall affect any right or claim which any person may have against the person to whom any payment is made under this section.]

[a] *Inserted* by Act XLIV of 1959 [w. e. f. 1-8-1960].

10. Government securities not exceeding five thousand rupees face value belonging to minor or insane person.

When a Government security or securities belong to a minor or a person who is insane and incapable of managing his affairs and the face value of the

security or securities does not in the aggregate exceed five thousand rupees, the Bank may make such order as it thinks fit for the vesting of such security or securities in such person as it considers represents the minor or insane person.

11. Issue of duplicate securities and of new securities on conversion, consolidation, sub-division or renewal.

(1) If the person entitled to a Government security applies to the Bank alleging that the security has been lost, stolen or destroyed, or has been defaced or mutilated, the Bank may, on proof to its satisfaction of the loss, theft, destruction, defacement or mutilation of the security, subject to such conditions and on payment of such fees as may be prescribed, order the issue of a duplicate security payable to the applicant.

(2) If the person entitled to a Government security applies to the Bank to have the security converted into a security of another form, or into a security issued in connection with another loan or to have it consolidated with other like securities, or to have it sub-divided, or to have it renewed, the Bank may, subject to such conditions and on payment of such fees as may be prescribed, cancel the security and order the issue of a new security or securities.

(3) The person to whom a duplicate security or a new security is issued under this section shall be deemed for the purposes of section 19 to have been recognised by the Bank as the holder of the security; and a duplicate security or new security so issued to any person shall be deemed to constitute a new contract between [a][the Government] and such person and all persons deriving title thereafter through him.

[a] *Substituted* for "the Central Government" by the Public Debt (Central Government) Amendment Act, 1949 (VI of 1949), S. 6 [1-4-1949].

12. Summary determination by the Bank of title to Government security in case of dispute.

(1) If the Bank is of opinion that a doubt exists as to the title to a Government security, it may proceed to determine the person who shall for the purposes of the Bank be deemed to be the person entitled thereto.

(2) The Bank shall give notice in writing to each claimant of whom it has knowledge, stating the names of all other claimants and the time when and the officer of the Bank by whom the determination of the Bank will be made.

(3) The Bank shall give notice in writing to each claimant of the result of the determination so made.

(4) On the expiry of six months from the issue of the notices referred to in sub-section *(3)*, the Bank may make an order vesting in the person, found by the Bank to be entitled to the security, the security and any unpaid interest thereon.

13. Law applicable in regard to Government securities.

Notwithstanding that as a matter of convenience [a][the Government] may have arranged for payments on a Government security to be made elsewhere than in [b][India], the rights of all persons in relation to Government securities

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Section 11 — Note 1

[1] An order by the Reserve Bank under S. 11 (2) cancelling an old security note and issuing a new note cannot be called in question before the Civil Court by any person claiming an interest in the security on the ground of forged endorsement on the cancelled note. 1953 Bom 209 (211) [AIR V 40 C 66].

[2] Though, where a Government Promissory note is negotiated under a forged endorsement, no title passes to the subsequent endorsees, if such a note is renewed by the Reserve Bank in favour of any such endorsees, such a renewal constitutes a new contract between the Central Government and the endorsee under S. 11 (3) and the original real owner is not entitled to obtain delivery of the renewed note. 1953 Bom 209 (211) [A I R V 40 C 66].

shall be determined in connection with all such questions as are dealt with by this Act by the law and in the Courts of [c][India].

[a] *Substituted* for "the Central Government" by the Public Debt (Central Government) Amendment Act, 1949 (VI of 1949), S. 6 [1-4-1949]. [b] *Substituted* for "Part A States and Part C States" by the Public Debt (Amendment) Act, 1956 (LVII of 1956), S. 8 [15-10-1956]. [c] *Substituted* for "those States", *ibid.*

14. Recording of evidence.

(1) For the purpose of making any order which it is empowered to make under this Act, the Bank may request a District Magistrate [a][* * *] to record or to have recorded the whole or any part of such evidence as any person whose evidence the Bank requires may produce. A District Magistrate so requested may himself record, or may direct any Magistrate of the first class subordinate to him or any Magistrate of the second class subordinate to him and empowered in this behalf by general or special order of the [A][State Government] to record the evidence, and shall forward a copy thereof to the Bank.

(2) For the purpose of making a vesting order under this Act the Bank may direct one of its officers to record the evidence of any person whose evidence the Bank requires or may receive evidence upon affidavit.

(3) A Magistrate or an officer of the Bank acting in pursuance of this section may administer an oath to any witness examined by him.

[a] The words "or in a Part B State the Political Agent" were *omitted* by the Public Debt (Amendment) Act, 1956 (LVII of 1956), S. 9 [15-10-1956].

OBJECTS AND REASONS

"We have not considered it necessary to introduce a reference to an affirmation in sub-clause (3) since the word 'oath' as defined in the General Clauses Act includes an affirmation."— S. C. R., Gaz. of Ind., 1944, Pt. V, page 86.

15. Postponement of payments and registration of transfers pending the making of a vesting order.

Where the Bank contemplates making an order under this Act to vest a Government security in any person, the Bank may suspend payment of interest on or the maturity value of the security or postpone the making of any order under section 11 or the registration of any transfer of the security until the vesting order has been made.

16. Power of Bank to require bonds.

(1) Before making any order which it is empowered to make under this Act, the Bank may require the person in whose favour the order is to be made to execute a bond with one or more sureties in such form as may be prescribed or to furnish security not exceeding twice the value of the subject-matter of the order, to be held at the disposal of the Bank, to pay to the Bank or any person to whom the Bank may assign the bond or security in furtherance of sub-section *(2)* the amount thereof.

(2) A Court before which a claim in respect of the subject-matter of any such order is established may order the bond or security to be assigned to the successful claimant who shall thereupon be entitled to enforce the bond or realise the security to the extent of such claim.

17. Publication of notices in Official Gazette.

Any notice required to be given by the Bank under this Act may be served by post, but every such notice shall also be published by the Bank in [a][the Gazette of India or the Official Gazette of the State, according as the notice relates to a security, issued by the Central Government or a State Government], and on such publication shall be deemed to have been delivered to all persons for whom it is intended.

[a] *Substituted* for "the Official Gazette" by the Public Debt (Central Government) Amendment Act, 1949 (VI of 1949), S. 7 [1-4-1949].

18. Scope of vesting order.

An order made by the Bank under this Act may confer the full title to a Government security or may confer a title only to the accrued and accruing interest on the security pending a further order vesting the full title.

19. Legal effect of orders made by the Bank.

No recognition by the Bank of a person as the holder of a Government security, and no order made by the Bank under this Act shall be called in question by any Court so far as such recognition or order affects the relations of [a][the Government] or the Bank with the person recognised by the Bank as the holder of a Government security or with any person claiming an interest in such security : and any such recognition by the Bank of any person or any order by the Bank vesting a Government security in any person shall operate to confer on that person a title to the security subject only to a personal liability to the rightful owner of the security for money had and received on his account.

[a] *Substituted* for "the Central Government" by the Public Debt (Central Government) Amendment Act, 1949 (VI of 1949), S. 6 [1-4-1949].

20. Stay of proceedings on order of Court.

Where the Bank contemplates making with reference to any Government security any order which it is empowered to make under this Act, and before the order is made the Bank receives from a Court in [a][India] an order to stay the making of such order, the Bank shall either—

(a) hold the security together with any interest unpaid or accruing thereon until the further orders of the Court are received, or

(b) apply to the Court to have the security transferred to the official Trustees appointed for the [A][State] in which such Court is situated, pending the disposal of the proceedings before the Court.

[a] *Substituted* for "a Part A State or a Part C State" by the Public Debt (Amendment) Act, 1956 (LVII of 1956), S. 10 [15-10-1956].

21. Cancellation by the Bank of vesting proceedings.

Where the Bank contemplates making an order under this Act vesting a Government security in any person the Bank may, at any time before the order is made, cancel any proceedings already taken for that purpose and may, on such cancellation, proceed anew to the making of such order.

Section 19 — Note 1

[1] An order by the Reserve Bank under S. 11 (2) cancelling an old security note and issuing a new one being an order made under the Act, it cannot be challenged in Civil Court by any person claiming an interest in the security on the ground of forged endorsement on the cancelled note. 1953 Bom 209 (211) [AIR V 40] C 66].

[2] What S. 19 aims at is that when once a bank has recognised, or has conferred or has vested a Government security, in any person, the rightful owner of the security shall have only a civil claim which is enforceable against the holder of the security as for money had and received on account of the rightful owner by the holder of the security. If the holder of the Government Promissory notes has dealt with promissory notes, by way of raising a loan on their security the rightful owner will have to proceed against him only in a Court of law to enforce his claim for money had and received and not proceed in a criminal Court to prosecute him for any offence of alleged criminal breach of trust or misappropriation. 1953 Mad 787 (790, 791) [AIR V 40 C 301] : 1953 Cri L Jour 1441.

[3] The words "subject only to a personal liability to the rightful owner of the security for money had and received on his account" qualify the words "title to the security" and affect only the person who has obtained title to the security by virtue of the order of the Reserve Bank and nobody else — The only remedy of the true owner, therefore, that has been saved by S. 19 is a remedy against the person who has a title to the security as a result of the order of the bank. There is no remedy available under the Act to the real owner of a Government security which has been renewed in favour of an endorsee after forged endorsement against the Government or the Reserve Bank. 1953 Bom 209 (211, 212) [AIR V 40 C 66].

22. Discharge in respect of interest on Government securities.

Save as otherwise expressly provided in the terms of a Government security, no person shall be entitled to claim interest on such security in respect of any period which has elapsed after the earliest date on which demand could have been made for the payment of the amount due on such security.

23. Discharge in respect of bearer bonds.

[a][The Government] shall be discharged from all liability on a bearer bond or on any interest coupon of such a bond on payment to the holder of such bond or coupon on presentation on or after the date when it becomes due of the amount expressed therein, unless before such payment an order of a Court in [b][India] has been served on [a][the Government] restraining it from making payment.

[a] *Substituted* for "The Central Government" by the Public Debt (Central Government) Amendment Act, 1949 (VI of 1949), S. 6 [1-4-1949]. [b] *Substituted* for "the States" by the Public Debt (Amendment) Act, 1956 (LVII of 1956), S. 11 [15-10-1956].

24. Period of limitation of Central Government's liability in respect of interest.

Where no shorter period of limitation is fixed by any law for the time being in force, the liability of [a][the Government] in respect of any interest payment due on a Government security shall terminate on the expiry of six years from the date on which the amount due by way of interest became payable.

[a] *Substituted* for "the Central Government" by the Public Debt (Central Government) Amendment Act, 1949 (VI of 1949), S. 6 [1-4-1949].

25. Inspection of documents.

No person shall be entitled to inspect, or to receive information derived from any Government security in the possession or custody of [a][the Government] or from any book, register, or other document kept or maintained by or on behalf of [a][the Government] in relation to Government securities or any Government security, save in such circumstances and manner and subject to such conditions as may be prescribed.

[a] *Substituted* for "the Central Government" by the Public Debt (Central Government) Amendment Act, 1949 (VI of 1949), S. 6 [1-4-1949].

26. The bank and its officers to be deemed public officers.

For the purposes of section 124 of the Indian Evidence Act, 1872, the provisions of Part IV of the Code of Civil Procedure, 1908, relating to suits by or against public officers in their official capacity, and the provisions of rule 27 of Order V, and rule 52 of Order XXI of the said Code, the Bank and any officer of the Bank acting in his capacity as such shall be deemed to be a public officer.

27. Penalty.

(1) If any person, for the purpose of obtaining for himself or for any other person any title to a Government security, makes to any authority under this Act in any application made under this Act or in the course of any inquiry undertaken in pursuance of this Act any statement which is false and which he either knows to be false or does not believe to be true, he shall be punishable with imprisonment for a term which may extend to six months, or with fine or with both.

(2) No Court shall take cognisance of any offence under sub-section *(1)* except on the complaint of the Bank.

28. Power to make rules.

(1) The Central Government may, subject to the condition of previous publication, by notification in the Official Gazette, make rules[a] to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters, namely:—

(a) the forms in which Government securities may be issued;

(b) the form of the obligations referred to in clause *(iv)* of sub-clause *(a)* of clause *(2)* of scction 2;

(c) the conditions subject to which Government securities may be issued to the [b][Rulers of former Indian States];

(d) the manner in which different forms of Government securities may be transferred;

(e) the holding of Government securities in the form of stock by the holders of offices other than public offices, and the manner in which and the conditions subject to which Government securities so held may be transferred;

(f) the manner in which payment of interest in respect of Government securities is to be made and acknowledged;

(g) the conditions governing the grant of duplicate, renewed, converted, consolidated and sub-divided Government securities;

(h) the fees to be paid in respect of the issue of duplicate Government securities and of the renewal, conversion, consolidation and sub-division of Government securities;

(i) the form in which receipt of a Government security delivered for discharge, renewal, conversion, consolidation or sub-division is to be acknowledged;

(j) the manner of attestation of documents relating to Government securities in the form of stock;

(k) the manner in which any document relating to a Government security or any endorsement on a promissory note issued by [c][the Government] may, on the demand of a person who from any cause is unable to write, be executed on his behalf;

(l) the form of the bonds referred to in sub-section *(1)* of section 16;

(m) the circumstance and the manner in which and the conditions subject to which inspection of Government securities, books, registers and other documents may be allowed or information therefrom may be given under section 25;

(n) the procedure to be followed in making vesting orders;

(o) the authority by whom the certificate referred to in the proviso to section 7 is to be granted and the manner of making the inquiry therein mentioned;

[d][*(p)* the form in which and the persons in whose favour nominations may be made under section 9B, the manner in which and the conditions and restrictions subject to which such nominations may be made, the registration, variation or cancellation of such nominations and the fees that may be levied for such registration, variation or cancellation;

(q) the manner in which any person may be appointed for the purposes of sub-section (4) of section 9B.]

(3) A copy of all rules under this section shall be laid on the table of [e][both Houses of Parliament] as soon as may be after they are made.

[a] For the Public Debt (Central Government) Rules, 1946, *See* Gazette of India, 1946, Pt. I, p. 575.

For the Public Debt (Compensation Bonds) Rules, 1954, *See* S. R. O. 2754 dated 18-8-1954 published in Gazette of India, 1954, Pt. II, S. 3, p. 2060.

For the Public Debt (Annuity Certificates) Rules, 1954, *See* S. R. O. 2840 dated 25-8-1954 published in *ibid*, p. 2148.

[b] *Substituted* for "Rulers of Part B-States" by the Public Debt (Amendment) Act, 1956 (LVII of 1956), S. 12 [15-10-1956]. [c] *Substituted* for "the Central Government" by the Public Debt (Central Government) Amendment Act, 1949 (VI of 1949), S. 6 [1-4-1949]. [d] *Inserted* by the Public Debt (Amendment) Act, 1959 (XLIV of 1959, S. 3 [w. e. f. 1-8-1960]. [e] *Substituted* for "Parliament" by Act LVII of 1956, S. 12 [15-10-1956].

[a][**29. Certain laws not to apply to Government securities.**

The Indian Securities Act, 1920 and any law corresponding to that law in force in any Part B State[b] immediately before the commencement[c] of the Public Debt (Amendment) Act, 1956, shall cease to apply to Government securities to which this Act applies[d] and to all matters for which provision is made by this Act:

Provided that any such corresponding law shall continue to apply to or in relation to any securities created and issued by the Government of Hyderabad, Saurashtra or Travancore-Cochin on or before the 31st day of March, 1953, for such period not exceeding one year from the commencement[c] of the Public Debt (Amendment) Act, 1956, as the Central Government may, by notification in the Official Gazette, specify.]

[a] *Substituted* for the original section, by the Public Debt (Amendment) Act, 1956 (LVII of 1956), S. 13 [15-10-1956]. [b] Immediately before 1-11-1956, the following were Part B States, namely, Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin. [c] That is, 15th October, 1956. [d] *See* section 1 A.

[a][**30. Construction of reference to laws not in force before 1st April, 1951 in Part B States.**

Any reference in this Act to any law which did not extend to any Part B State or any part of such State before the commencement[b] of the Part B States (Laws) Act, 1951, shall wherever necessary, be construed as including a reference to the corresponding law, if any, in force in that State, or, as the case may be, any part thereof, before the said date.]

[a] *Inserted* by the Public Debt (Amendment) Act, 1956 (LVII of 1956), S. 14 [15-10-1956]. [b] That is, 1st April, 1951.

[THE] PUBLIC EMPLOYMENT (REQUIREMENT AS TO RESIDENCE) ACT, 1957

(ACT XLIV of 1957)

[The Act printed here is as on 1-3-1961.]

CONTENTS

SECTIONS

1. Short title and commencement.
2. Repeal of existing laws prescribing requirements as to residence.
3. Power to make rules in respect of certain classes of public employment in certain areas.
4. Parliamentary scrutiny of rules.
5. Duration of section 3 and rules.

STATEMENT OF OBJECTS AND REASONS

"Clause (2) of Article 16 of the Constitution provides, *inter alia* that no citizen shall, on grounds only of residence be ineligible for, or discriminated against in respect of, any employment or office under the State. Parliament is, however, competent under clause (3) of the said article to regulate the extent to which it would be permissible for a State to depart from the above principle. In considering this aspect of the question, the States Reorganisation Commission recommended that if any departure from the principle of non-discrimination on the ground of residence is to be authorised at all, it should be such as to cause minimum hardship and that necessary legislation in this regard should be undertaken.

2. On the basis of these recommendations, provision was made in this behalf in paragraphs 14, 15 and 16 of the memorandum on safeguards for linguistic minorities which was laid before Parliament in September, 1956. It was stated in the memorandum that the Government of India did not consider it necessary or desirable to impose any restrictions for any public employment and that it was proposed to repeal all the laws in force prescribing any requirement as to residence

for any public employment. It was, further, stated in the memorandum that certain exceptions might have to be made for a transitional period to the general rule of non-discrimination in the Telengana area of the former Hyderabad State and in certain backward areas. In pursuance of this decision, it is now proposed to repeal all the laws in force prescribing any requirement as to residence within a State or Union territory for any public employment in the State or Union territory. Exception, however, is being made in the case of Himachal Pradesh, Manipur and Tripura and the area transferred from the State of Hyderabad to Andhra Pradesh. In respect of these areas, it is proposed to prescribe residential qualifications for a limited period not exceeding five years in regard to non-gazetted services including the service of tehsildars. It is proposed to empower the Central Government to make rules for the purpose. * * *"

—Gaz. of Ind., 1957, Extra., Pt. II-Sec. 2, p. 811.

[THE] PUBLIC EMPLOYMENT (REQUIREMENT AS TO RESIDENCE) ACT, 1957

(ACT XLIV OF 1957)[a]

[7th December, 1957.]

An Act to make in pursuance of clause (3) of article 16 of the Constitution special provisions for requirement as to residence in regard to certain classes of public employment in certain areas and to repeal existing laws prescribing any such requirement.

BE it enacted by Parliament in the Eighth Year of the Republic of India as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1957, Extra., Pt. II-Sec. 2, p. 811.

1. Short title and commencement.

(1) This Act may be called THE PUBLIC EMPLOYMENT (REQUIREMENT AS TO RESIDENCE) ACT, 1957.

(2) It shall come into force on such date[a] as the Central Government may, by notification in the Official Gazette, appoint.

[a] The Act came into force on 21-3-1959 : *see* G. S. R. 323, D/- 21-3-1959, Gaz. of Ind., 1959, Pt. II-Sec. 3 (i), p. 392.

2. Repeal of existing laws prescribing requirements as to residence.

Upon the commencement[a] of this Act, any law then in force in any State or Union territory by virtue of clause *(b)* of Article 35 of the Constitution prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, that State or Union territory, any requirement as to residence therein prior to such employment or appointment shall cease to have effect and is hereby repealed.

[a] This Act came into force on 21-3-1959.

Note. — Exception is made by section 3, in the case of Himachal Pradesh, Manipur and Tripura and the area transferred from the State of Hyderabad to Andhra Pradesh. But even in respect of these areas, the residential qualification is prescribed for a limited period of five years, *see* S. 5.

3. Power to make rules in respect of certain classes of public employment in certain areas.

(1) The Central Government may, by notification in the Official Gazette, make rules[a] prescribing, in regard to appointments to—

(a) any subordinate service or post under the State Government of Andhra Pradesh, or

(b) any subordinate service or post under the control of the Administrator of Himachal Pradesh, Manipur or Tripura, or

(c) any service or post under a local authority (other than a cantonment board) within the Telangana area of Andhra Pradesh or within the Union territory of Himachal Pradesh, Manipur or Tripura,

any requirement as to residence within the Telangana area or the said Union territory, as the case may be, prior to such appointment.

(2) In this section,—

(a) "subordinate service or post" means any service or post appointments to which are not notified in the Official Gazette but includes any service of tehsildars ;

(b) "Telangana area" comprises all the territories specified in sub-section *(1)* of section 3 of the States Reorganisation Act, 1956.

[a] For Andhra Pradesh Public Employment (Requirement as to Residence), Rules, 1959, *see* G. S. R. 324, Gaz. of Ind., 1959, Pt. II-Sec. 3 (i), p. 392.

For Himachal Pradesh, Manipur and Tripura Public Employment (Requirement as to Residence), Rules, 1959, *see* G. S. R. 325, *ibid*, p. 394.

4. Parliamentary scrutiny of rules.

All rules made under section 3 shall, as soon as may be after they are made, be laid for not less than thirty days before each House of Parliament and shall be subject to such modifications as Parliament may make during the session in which they are so laid, or in the session immediately following.

5. Duration of section 3 and rules.

Section 3 and all rules made thereunder shall cease to have effect on the expiration of five years from the commencement[a] of this Act, but such cesser shall not affect the validity of any appointment previously made in pursuance of the said rules.

[a] This Act came into force on 21-3-1959.

[THE] PUBLIC GAMBLING ACT, 1867
(ACT III of 1867)

[The Act printed here is as on 1-3-1961.]

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PREAMBLE

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STATEMENT OF OBJECTS AND REASONS

"The primary object of this Bill, which has been prepared at the desire of the Lieutenant Governor of the North-Western Provinces and of the Chief Commissioner of British Burmah, is to repress public gambling in large towns situate in the territories respectively under their governments, without, at the same time, giving rise to oppression and other malpractices on the part of the Police.

In those territories, as the law stands, persons cannot be prosecuted for gambling or keeping gaming-houses, and can only be punished under the Indian Penal Code, S. 290, if it can be shown that their acts cause

"common injury, danger and annoyance to the public". This of course is a matter of such difficulty that such persons practically enjoy an immunity from punishment.

The present Bill is founded on Ss. 56-66 of the Towns' Police Act, No. XIII of 1856, which correspond with Ss. 10-15 of Act No. XXI of 1857. (The Calcutta and Howrah Police and Conservancy Act, [now entitled "The Howrah Offences Act, 1857"]). These Ss. 10-15, have, in the form of rules, been for some years in force in Oudh, the Central Provinces and the Punjab, and they have been found to work satisfactorily. It is obviously desirable to convert these rules into express legislative enactments, and this Bill, if it become law, will effect that object. A similar Act has recently been passed by the Governor of Bombay in Council.* Under the present Bill, houses will only be searched by an Officer of Police not below the rank of Inspector, and under the authority of a warrant from a Magistrate with full powers."

* *See* Bombay Act III of 1866 which is repealed by the Bombay Prevention of Gambling Act, 1887 (Bom. Act IV of 1887).

—Gazette of India, 1866, page 976.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937 ; A. C. A. O., 1948.
—Adapted in Bombay by Bom. (V.) A. L. O., 1956.
—Adapted in Madhya Pradesh by M. P. A. L. O., 1956.
—Amended by Acts XII of 1891 ; I of 1903.
—Amended in its application to—
(a) Madhya Pradesh by C. P. Act III of 1927 ; M. P. Acts XXV of 1950 ; XII of 1954 ; XXIII of 1958 ;
(b) Punjab by Punj. Acts I of 1929 ; IX of 1960 ;
(c) Uttar Pradesh by U. P. Acts I of 1917 ; V of 1919 ; I of 1925 ; X of 1938 ; XXXIV of 1952.
—Extended in Madhya Pradesh by M. P. Acts XII of 1950 ; XXIII of 1958.
—Extended in Punjab by Punj. Acts V of 1950 ; XVIII of 1958.
—Repealed in part by Acts XVI of 1874 ; XVII of 1914.
—Repealed in Orissa by Ori. Act XVII of 1955.
—Repealed in Vidarbha Region of Bombay by Bom. Act XIV of 1959.

[THE] PUBLIC GAMBLING ACT, 1867
(ACT III OF 1867)[a]

[25th January, 1867.]

An Act to provide for the punishment of public gambling and the keeping of common gaming-houses in the [b]*[United Provinces, East Punjab, Delhi]* [c]*[and the Central Provinces].*

Preamble

WHEREAS it is expedient to make provision for the punishment of public gambling and the keeping of common gaming-houses [d][in the United Provinces, East Punjab, Delhi and the Central Provinces] ;

It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1866, p. 976. For Report of the Select Committee, *see ibid*, 1867, Supl. pages 44, 48 and 52.

Short title to the Act was given by the Amending Act, 1897 (V of 1897).

The Act was declared to be in force in the tract of land lying between the railway station at Satna and the Eastern Boundary of the Jubbulpore District in the Central Provinces (now Madhya Pradesh) by the Scheduled Districts Act, 1874 (XIV of 1874), S. 10 and in Panth Piploda by the Panth Piploda Laws Regulation, 1929 (I of 1929), S. 2.

It has been declared by notification under the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in—

Coorg	*See* Gaz. of Ind., 1878, Pt. I, p. 373.
The Tarai Parganas	Ditto 1876, Pt. I, p. 505.

Preamble — Note 1

[1] The Act is an extremely severe Act and in several instances throws the onus probandi as to innocence upon accused thereby departing from the maxim 'a man is to be assumed innocent until he is proved guilty'. The provisions of such an Act must be construed strictly. ('90) 1890 All W N 226 (227).

[2] The Public Gambling Act contains no provisions regulating the investigating, inquiring into, or trying of offences under that Act. The ordinary provisions of the Criminal P. C. will, therefore, regulate the investigation and trial of such offences. 1941 Nag 338 (339) [A I R V 28] : ILR (1942) Nag 426 : 43 Cri L Jour 89.

[3] In order that an offence may be a cognisable offence it is not necessary that every police officer should have the power to arrest without warrant. As the District Superintendent of Police has such power under S. 5, the offence is a cognisable offence. 1941 Nag 338 (339) [A I R V 28] : I L R (1942) Nag 426 : 43 Cri L Jour 89.

This Act has been extended to the following Districts in the State of Uttar Pradesh, namely, Rampur from 27-2-1951 by Rampur (Application of Laws) Act, 1950 ; Banaras from 28-4-1951 by Banaras (Application of Laws) Order, 1949 ; and Tehri-Garhwal from 1-5-1950 by Tehri-Garhwal (Application of Laws) Order, 1949.

The Act has been extended to the States merged in the State of—

Madhya Pradesh, by M. P. Act XII of 1950, S. 3 [3-4-1950] ;

Punjab, by Punj. Act V of 1950, S. 3 [15-4-1950].

The Act, as amended by Punj. Act I of 1929, has been extended to the transferred territories in Punjab by Punj. Act XVIII of 1958, S. 4 and Schedule II [15-5-1958].

The Act, in its application to the State of Orissa, has been *repealed* by the Orissa Prevention of Gambling Act, XVII of 1955, S. 15 [10-12-1955].

The Act in its extension to the Vidarbha region of the State of Bombay has been *repealed* on and from 14-3-1959 by S. 14 of the Bombay Prevention of Gambling Act, IV of 1887, as *inserted* by Bombay Act XIV of 1959.

[b] *Substituted* for "North-Western Provinces of the Presidency of Fort William and in the Punjab, Oudh" by A. C. A. O., 1948 [23-3-1948]. [c] *Substituted* for "the C. P. and British Burma" by the Amending Act, 1903 (I of 1903). [d] *Substituted* for "in the territories, respectively, subject to the Governments of the Lieutenant-Governor of the North-Western Provinces of the Presidency of Fort William and of the Lieutenant-Governor of the Punjab, and to the administrations of the Chief Commissioner of Oudh, and of the Chief Commissioner of the Central Provinces", by A. C. A. O., 1948 [23-3-1948].

1. Interpretation-clause.

In this Act—

[a][* * * * *]

"Common gaming-house."

"Common gaming-house" means any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room or place, whether by way of charge for the use of the instruments of gaming or of the house, enclosure, room or place, or otherwise howsoever :

[b][* * * * *]

[a] Definitions of "Lieutenant-Governor" and "Chief Commissioner" were *omitted* by A. O. 1937 [1-4-1937]. [b] The clauses relating to "Number" and "Gender" were *omitted* by the Second Repealing and Amending Act, 1914 (XVII of 1914), S. 3 and Sch. II.

SECTION 1 — SYNOPSIS

1. Common gaming house.
2. Instruments of gaming.

1. Common gaming house. — [1] A Government Office cannot escape the definition of a common gaming-house when the persons gambling there and receiving profit out of the gambling used the place for such purpose. 1928 All 215 (215) [A I R V 15] : 29 Cri L Jour 448.

[2] A bullock-run surrounded by low wall of loose bricks is a "place" within the meaning of the Act. 1915 All 424 (424) [AIR V 2] : 38 All 47 : 16 Cri L Jour 826 (DB).

[3] The words "common gaming house" cannot be interpreted to mean a house in which articles used as a means or appurtenance of, or for the purpose of carrying on, or facilitating gaming are kept or used for the purpose of carrying on or facilitating a gaming. 1922 All 61 (62) [A I R V 9] : 23 Cri L Jour 196 (DB).

[4] A house in which gaming with cards is carried on by collecting nal (commission) money is a common gaming house within S. 1 (ii) even if only a single user of the house is established. It is not necessary to prove that the house is habitually used for such purpose. 1949 Nag 58 (59) [AIR V 36 C 24] : ILR (1948) Nag 838 : 50 Cri L Jour 174 (DB).

[5] Mere expectation of profit is sufficient to bring a case under the Act--Certain profit not necessary. 1927 All 480 (481) [A I R V 14] : 28 Cri L Jour 442 : 49 All 562.

[6] The words "for the profit or gain of" do not mean for the purpose of carrying on the gaming. 1922 All 61 (62) [A I R V 9] : 23 Cri L Jour 196.

U. P. and C. P. amendments

[7] The definition of "common gaming house" as amended by C. P. Act III of 1927 falls under two heads according to the nature of the gaming. The first head includes gaming on the market price of cotton and other commodities, stocks or shares and on the occurrence or non-occurrence of rain, etc. In these cases, any place in which such gaming takes place or where instruments of gaming are kept or used is termed a 'common gaming house'. But in the case of any other form of gaming, the definition requires that the place should be one in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or

STATE AMENDMENTS

MADHYA PRADESH

In its application to the State of Madhya Pradesh, in section 1—

(1) before the definition of "common gaming-house" the following definitions shall be *inserted* :—

" 'Gaming' includes wagering or betting but does not include a lottery.

Any transaction by which a person in any capacity whatever employs another in any capacity whatever or engages for another in any capacity whatever to wager or bet with another person shall be deemed to be 'gaming'.

Section 1 — Note 1 *(contd.)*

keeping such house or place. 1936 Nag 138 (138) [AIR V 23] : 37 Cri L Jour 586.

[8] Definition of 'common gaming house' (as amended in C. P.) is wide enough to include a public road. 1936 Nag 78 (79) [A I R V 23] : I L R (1936) Nag 89 : 37 Cri L Jour 588.

[9] Under S. 1 (as amended in C. P.) 'gaming' includes wagering or betting, and 'common gaming house' includes in the case of gaming an occurrence or non-occurrence of rain or other natural event, space etc., in which such gaming takes place. It is not possible to interpret gaming on the occurrence or non-occurrence of rain or other natural event as including betting on the number of cotton carts that would arrive the following day as the event must be dependent on natural and not on human causes. ('39) 1939 Nag L Jour 401 (401).

[10] It is not all gaming of digits which constitutes a common gaming house. If the winning number is to be ascertained, in some manner other than mentioned in Para. 1 of the definition (as amended in U. P.) then the place where the gaming was taking place would not be a common gaming house unless the occupier was obtaining some profit from the use of the place. 1940 All 412 (413) [A I R V 27] : I L R (1940) All 559 : 41 Cri L Jour 879.

[11] "Dara" gambling is a well-known, and specified form of "satta" gambling. "Dara" gambling has no connection whatever with the price of any commodity. The failure on the part of the prosecution to prove by definite evidence, the commodity in respect of which the gambling was going on is not a fatal defect for sustaining a conviction under S. 3. 1941 All 330 (332) [A I R V 28] : I L R (1941) All 576 : 42 Cri L Jour 864 (DB).

Punjab amendment

[12] According to the definition as amended by Punjab Public Gambling Act 1 of 1929 the premises used for collecting satta wagers are a "common gaming house" whether or not the prosecution establishes that their collection is for the purpose of making a profit. ('61) 1961 (2) Cri L Jour 399 (400) (DB) (Punj).

2. Instruments of gaming. — [1] Money and cards can be instruments of gaming provided it is proved that the same were used or intended to be used as a means of gaming. 1955 N U C (Madh B) 3005 [AIR V 42].

U. P. and C. P. Amendment

[2] Under the Public Gambling Act, anything which assists gaming or which is used for the furtherance of gaming would be instruments of gaming and, it is not possible to give an exhaustive list of such articles. It will be necessary in a given case to consider the article in question with reference to the game that is played. 1933 All 554 (555) [AIR V 20] : 34 Cri L Jour 1244 (DB).

[3] "Instruments of gaming" include articles used as a means or appurtenance of or for the purpose of carrying on, or facilitating gaming. 1922 All 61 (62) [AIR V 9] : 23 Cri L Jour 196 (DB) ✠ ('82) 6 Bom 19 (20) (DB).

[4] Telegrams and documents enabling gamblers to settle differences but which could not be deciphered are not implements of gaming. 1923 All 386 (387) [A I R V 10] : 25 Cri L Jour 92 (DB).

[5] Satta papers and advertisement and accounts of satta gambling are 'instruments of gaming'. 1927 All 480 (481) [A I R V 14] : 28 Cri L Jour 442 : 49 All 562.

[6] Evidence that gambling with cowries was going on — Cowries are 'instruments of gaming'. 1936 Nag 138 (138) [AIR V 23] : 37 Cri L Jour 586 ✠ 1925 Oudh 674 (674) [A I R V 12] : 26 Cri L Jour 1609.

[7] Balls of paper used in satta betting being so manipulated as to leave no chance of loss to the owner are instruments of gaming. 1924 All 338 (340) [A I R V 11] : 46 All 447 (F B).

[8] In the case of 'Dara' gambling slips of paper with numbers upon them constitute instruments of gaming. 1941 All 330 (333) [AIR V 28] : ILR (1941) All 576 : 42 Cri L Jour 864 (DB).

[9] The evidence of the eye-witnesses was that they saw satta gambling being indulged in by the applicant with *B*, that *B* wrote something on a slip of paper at the dictation of the applicant and that three slips of paper were recovered from the possession of *B*. The slips contained nothing but figures; some figures were mere numbers and others were of amounts of money ; no name was written anywhere : *Held*, that the slips could not be said to be the instruments of gaming even if they were proved to have been used in connection with betting, i. e., to record the bets or for any other purpose. 1959 All 799 (800) [AIR V 46 C 244] : 1959 Cri L Jour 1397.

Punjab amendment

[10] Under the definition as it stands amended by the Punjab Public Gambling Act (1 of 1929) satta wagers amount to instruments of gambling. ('61) 1961 (2) Cri L J 399 (400) (DB) (Punj).

The collection or soliciting of bets receipt or distribution of winnings or prizes in money or otherwise in respect of wagering or betting or any act which is intended to aid or facilitate wagering or betting or such collection, soliciting, receipt or distribution shall also be deemed to be 'gaming'.

"*Instruments of gaming*". — The expression 'instruments of gaming' includes any article used or intended to be used as a subject or means of gaming, any document used or intended to be used as a register or record or evidence of any gaming, the proceeds of any gaming and any winnings or prizes in money or otherwise distributed or intended to be distributed in respect of any gaming.

(*2*) for the definition of 'common gaming-house', the following shall be *substituted*, namely :—

"Common gaming-house means—

(i) in the case of gaming—

(a) on the market price of cotton, opium or other commodity or on the digits of the number used in stating such price, or

(b) on the amount of variation in the market price of any such commodity or on the digits of the number used in stating the amount of such variation, or

(c) on the market price of any stock or share or on the digits of the number used in stating such price, or

(d) on the occurrence or non-occurrence of rain or other natural event, or

(e) on the quantity of rainfall or on the digits of the number used in stating such quantity, any house, room, tent, enclosure, space, vehicle, vessel or any place whatsoever in which such gaming takes place or in which instruments of gaming are kept or used for such gaming ;

(ii) in the case of any other form of gaming, any house, room, tent, enclosure, space, vehicle, vessel or any place whatsoever in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room, tent, enclosure, space, vehicle, vessel, place or instrument or otherwise howsoever."—C. P. Act III of 1927, S. 2, and M. P. Act XII of 1954, S. 2 [26-3-1954].

PUNJAB

In its application to the State of Punjab, for the definition of 'common gaming-house' in section 1, the following definitions shall be deemed to be *substituted*, namely :—

" 'Gaming' includes wagering or betting on any figures or numbers or dates to be subsequently ascertained or disclosed, or on the occurrence or non-occurrence of any natural event, or in any other manner whatsoever except wagering or betting upon a horse-race when such wagering or betting upon a horse-race takes place—

(a) on the day on which such race is to be run, and

(b) in any enclosure which the stewards controlling such race have with the sanction of the Provincial Government set apart for the purpose,

but does not include a lottery.

'Instrument of gaming' includes any article used as a means of appurtenance of, or for the purpose of carrying on or facilitating gaming, and any document used as a register or record or evidence of any gaming.

'Common gaming-house' means any house or room or tent or enclosure or vehicle or vessel or any place whatsoever in which any instruments of gaming are kept or used for gaming purposes—

(a) with a view to the profit or gain of any person owning, occupying or keeping such house, room, tent, enclosure, vehicle, vessel, place whether by way of charge for the use of such house, room, tent, enclosure, vehicle, vessel, place or instrument or otherwise howsoever ;

(b) with or without a view to such profit or gain if the gaming for the purpose of which such instruments are so kept or used in gaming on any figures or numbers or dates to be subsequently ascertained or disclosed, or on the occurrence or non-occurrence of any natural event."—Punj. Acts 1 of 1929, S. 3 and IX of 1960, S. 2 [28-1-1960].

UTTAR PRADESH

(i) The definition of 'gaming' is same as that of Punjab. The definition of 'instruments of gaming' is same as that of Punjab, except the last words in that definition, namely, 'and any document .....of any gaming' which do not occur.—U. P. Act I of 1917, S. 2.

(*ii*) In section 1, for the definition of 'common gaming-house' *substitute* the following, namely :—

"Common gaming-house means—

(1) in the case of gaming on the digits of the sale price of any commodity, for example, opium or cotton, or on the digits of papers or bales manipulated from

within jars or other receptacles, or on the occurrence or non-occurrence of any natural event, for example, rainfall or the quantity of rainfall, any house, room, tent, walled enclosure, space, vehicle, vessel or any place whatsoever in which instruments of gaming are kept or used for such gaming ;

(2) in the case of any other form of gaming, any house, room, tent, walled enclosure, space, vehicle, vessel or any place whatsoever in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room, tent, enclosure, space, vehicle, vessel or place whether by way of charge for the use of such house, room, tent, enclosure, space, vehicle, vessel, place or instrument, or otherwise howsoever."—U. P. Act I of 1917, S. 2 and later by U. P. Act I of 1925, S. 2.

2. Power to extend Act.

[a][Sections 13 and 17] of this Act shall extend to the whole of the said [A][States] and it shall be competent to the [A][State Government] whenever [b][it] may think fit, to extend, by a notification to be published in three successive numbers of the Official Gazette, all or any of the remaining sections of this Act to any city, town, suburb, railway-station, house and place being not more than three miles distant from any part of such station-house within the [A][States], and in such notification to define, for the purposes of this Act, the limits of such city, town, suburb or station-house, and from time to time to alter the limits so defined.

From the date of any such extension, so much of any rule having the force of law which shall be in operation in the territories to which such extension shall have been made, as shall be inconsistent with or repugnant to any section so extended, shall cease to have effect in such territories.

[a] *Substituted* for "sections 13, 17 and 18" by the Amending Act, 1891 (XII of 1891).
[b] *Substituted* for "he" by A.O., 1937 [1-4-1937].

STATE AMENDMENTS

MADHYA PRADESH

In its application to the whole of the State of Madhya Pradesh, in section 2—

(a) omit the words "three successive numbers of" ;

— M. P. Act XXV of 1950, S. 2 [3-11-1950].

(b) for the words "and place being not more than three miles distant from any part of such station-house" *substitute* the words "or local area";

— C. P. Act III of 1927, S. 3.

Section 2 — Note 1

[1] Publication of notification in only one issue of the Gazette is not a valid exercise of power given by S. 2. ('85) 1885 Pun Re (Cr) No. 3, p. 6 (6, 7) (DB).

[2] The fact whether or not portions of the Act had been extended to a particular locality, and whether the steps taken with this view were sufficient in law to effect it, are questions of fact and law, which the Court has to decide for itself before convicting the accused. ('85) 1885 Pun Re (Cr) No. 41, p. 87 (88) (DB).

[3] Provisions as to defining the limit of the town being permissive and not obligatory, notification extending the whole of the provisions of the Act to a particular town is not ineffectual merely because it does not define the limits of the town. ('86) 1886 Pun Re (Cr) No. 12, p. 21 (21) (DB).

[4] Notification extending provisions of the Act to the town of Peshawar cannot include an extension of the Act to the Cantonment of Peshawar as the Cantonment is not within the limits of the town. ('87) 1887 Pun Re (Cr) No. 23, p. 46 (47) (DB).

[5] Act is not applicable to Saddar Bazar, Ambala Cantonment. ('36) 38 Pun L R 432 (433).

[6] By a Government notification the Gambling Act was extended to the North Bank of the Ganges. The gambling took place in a boat which was on the Benares side of the mid-stream of the Ganges—*Held* no offence was committed because the gambling took place outside the area to which the Act applies. 1925 All 518 (519) [AIR V 12] : 26 Cri L Jour 1061.

[7] Where the Lieutenant-Governor under the powers conferred by the Act declared by notification that the Act should be in force within the bondaries of the municipality of Mirzapur and those boundaries were subsequently revised and an offence was committed within the boundaries as existing at the time of notification under the Act, but without the boundaries as revised—*Held* that the boundaries for the purpose of the Act must be taken to be those as existing at the time of the notification under that Act. ('06) 3 Cri L Jour 439 (441).

[8] Gambling on a *kachcha* public road outside the limits of a municipality, to which the provisions of the Gambling Act have been extended, is an offence under S. 13 of the Act as the words 'limits aforesaid' in that section refer to the whole of the territories under the administration of a Lieutenant-Governor. ('11) 12 Cri L Jour 107 (108) (All).

(c) for the words "within the State" *substitute* the words "within the Mahakoshal region";
—M. P., A. L. O., 1956.

(d) for the words "within the Mahakoshal region" *substitute* the words "within the State";
— M. P. Act XXIII of 1958, S. 3 (1), Sch., Part A, item 3.

(e) for the words "or station-house" *substitute* a comma and the words "station-house or local area".
—C. P. Act III of 1927, S. 3.

PUNJAB

In its application to the State of Punjab, for the first paragraph of section 2, the following paragraph shall be *substituted*, namely :—

"Sections 13 and 17 of this Act shall extend to the whole of the said territories, and it shall be competent to the State Government whenever it may think fit, to extend by notification, all or any of the remaining sections of this Act to any area within the territories administered by the State Government." —Punj. Act I of 1929, S. 3.

UTTAR PRADESH

In its application to the State of Uttar Pradesh, for the first paragraph of section 2, the following paragraph shall be *substituted*, namely :—

"Sections 13 and 17 of this Act shall extend to the whole of the said territories; and it shall be competent to the State Government whenever it may think fit, to extend, by a notification to be published in the official Gazette, all or any of the remaining sections of this Act or any area within the Uttar Pradesh." — U. P. Act V of 1919, S. 2.

3. Penalty for owning or keeping, or having charge of a gaming-house.

Whoever, being the owner or occupier, or having the use, of any house, walled enclosure, room or place situate within the limits to which this Act applies, opens, keeps or uses the same as a common gaming-house ; and

whoever, being the owner or occupier of any such house, walled enclosure, room or place as aforesaid, knowingly or wilfully permits the same to be opened, occupied, used or kept by any other person as a common gaming-house ; and

whoever has the care or management of, or in any manner assists in conducting, the business of any house, walled enclosure, room or place as aforesaid, opened, occupied, used or kept for the purpose aforesaid ; and

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SECTION 3 — SYNOPSIS

1. Scope.
2. Place.
3. Profit or gain.
4. Diwali gambling.
5. Joint trial of keeper and persons found.
6. Sentence.

1. Scope.—[1] For the purpose of conviction it is not sufficient to say that an accused used a house for the purpose of gaming. It should be proved that the accused is the owner or occupier or a person having the use of the place alleged to be kept as a gaming house. The person having the use must be of the same genus as the owner, occupier or keeper of the house and of course a different person from those who resort to the house. 1929 Oudh 151 (152) [A I R V 16] : 30 Cri L Jour 557 ✻ 1940 Bom 18 (20) [AIR V 27] : 41 Cri L Jour 273 (DB). (Case under Bombay Prevention of Gambling Act.)

[2] In order to justify conviction there must be actual evidence of knowledge on the part of the accused and this knowledge cannot be presumed from the mere fact that the place had been kept as a common gaming house for a month. 1923 Rang 141 (143) [AIR V 10] : 24 Cri L Jour 871. (Case under Burma Gambling Act, S. 12.)

[3] Mere receipt of a sum of money from one of the players or from the winner on a single occasion would not be sufficient to prove an offence under S. 12, Burma Gambling Act (corresponding to S. 3) without evidence of other incriminating circumstances. 1923 Rang 144 (144) [AIR V 10] : 24 Cri L Jour 933.

[4] Evidence that gambling with *cowries* was going on in the house—Conviction under S. 3 of person in possession of the house is proper. 1936 Nag 138 (138) [A I R V 23] : 37 Cri L Jour 586.

[5] Section 3 contemplates a more serious offence than S. 4. 1936 Nag 78 (79) [A I R V 23] : 37 Cri L Jour 588 : ILR (1936) Nag 89.

[6] The offences under Ss. 3 and 4 are different offences. The offence under S. 3 is that the owner or occupier opens or keeps the house as a common gaming house. He may do this without himself taking part in gaming there under S. 4. 1924 Oudh 403 (403) [AIR V 11] : 25 Cri L Jour 698.

[7] A conviction under S. 3 based upon legal evidence is not vitiated merely because of the defects and irregularities in the warrant. 1927 Lah 699 (701) [A I R V 14] : 28 Cri L Jour 825.

[*See also* ('56) 1956 Raj L W 29 (30). (Case decided under the Rajasthan Public Gaming Ordinance.)]

[8] In an enclosure erected for a variety entertainment, one of the items was the ring game. This was a game where the public may, if they so desire, try to throw brass rings, which they buy from the management at four to the anna, over small coins on a board. If

whoever advances or furnishes money for the purpose of gaming with persons frequenting such house, walled enclosure, room or place ;

shall be liable to a fine not exceeding two-hundred rupees, or to imprisonment of either description, as defined in the Indian Penal Code,[a] for any term not exceeding three months.[b]

[a] *See* S. 53 of the Code. [b] As to enhanced punishment for a second conviction of an offence under S. 3 or S. 4, *see* S. 15 of this Act.

STATE AMENDMENTS

MADHYA PRADESH

In its application to the State of Madhya Pradesh, in section 3—

(i) for the words "house, walled enclosure, room or place" wherever they occur *substitute* the words "house, room, tent, enclosure, space, vehicle, vessel or place";

— C. P. Act III of 1927, S. 4.

(ii) for the last paragraph the following shall be *substituted*, namely :—

"Shall be punished—

(a) for a first offence with imprisonment which may extend to six months or with fine which may extend to one thousand rupees ;

(b) for a second offence with imprisonment which may extend to one year and, in the absence of special reasons to the contrary to be mentioned in the judgment of the Court, shall not be less than fourteen days, either with or without fine which may extend to two thousand rupees ; and

(c) for a third or subsequent offence with imprisonment which may extend to one year and, in the absence of special reasons to the contrary to be mentioned in the judgment of the Court, shall not be less than four months, together with fine which may extend to two thousand rupees."

— *Ibid*, S. 5, and M. P. Act XXV of 1950, S. 3 [3-11-1950].

PUNJAB

Same as that of Madhya Pradesh (i). —Punj. Act I of 1929, S. 4.

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in section 3—

(i) for the words "house, walled enclosure, room or place" wherever they occur the words "house, room, tent, walled enclosure, space, vehicle, vessel or place" shall be *substituted*

— U. P. Act I of 1917, S. 3.

(ii) For the words "two hundred rupees" *substitute* the words "five hundred rupees".

— U. P. Act XXXIV of 1952, S. 2 [5-12-1952].

Section 3 — Note 1 *(contd.)*

they succeed in throwing a ring over a coin they keep the coin. The coins ranged from one anna to a rupee—*Held*, that this enclosure could not be described as a "common gaming house." 1935 Lah 225 (226) [AIR V 22] : 36 Cri L Jour 1258 (DB).

[9] Single occasion of gambling in a tent on banks of river where persons had gone for bathing—Magistrate convicting seven persons under S. 3 and only one under S. 4— Conviction is irregular. 1919 All 374 (374) [A I R V 6] : 20 Cri L Jour 303.

[10] Mere fact that occasionally people used to play cards in a house, and perhaps for money, does not necessarily make it a common gaming house. 1935 Mad 648 (649) [AIR V 22] : 36 Cri L Jour 799. (Case under Madras Gaming Act.)

[11] Where over and above the fact that instruments of gaming were found in the house there is evidence of two witnesses to the effect that they staked money and the stakes had been accepted by the accused, there can be no doubt that the instruments of gaming were kept or used for such gaming. 1933 All 554 (555) [AIR V 20] : 34 Cri L Jour 1244 (DB).

[12] The evidence of the punter sent out as a decoy and the recovery of the marked coin may by themselves be insufficient under particular circumstances to convict an accused under S. 3. Where however the search has also produced a note book maintained by the accused containing an entry regarding the bet and there is also evidence of other witnesses corroborating the punter it cannot be said that there is no sufficient evidence to support a conviction. ('54) Madh B L J (1954) H C R 1164 (1167). (Case under S. 3 of the M. B. Gambling Act.)

[13] The recovery of instruments of gaming is relevant if the offences under Ss. 3 and 4 are to be proved by presumption. But public gambling punishable under S. 13 is to be proved by evidence and no question of presumption arises. The recovery of instruments of gaming may be circumstantial evidence to prove public gambling but is not conclusive and may not be considered enough in certain circumstances. 1959 All 799 (800) [AIR V 46 C 244] : 1959 Cri L Jour 1397.

[14] Offences under Ss. 3 and 4 as amended in U. P. are not cognizable. 1961 All 377 (378) [AIR V 48 C 98]: 1961 (2) Cri L Jour 53.

Burden of proof

[15] The ingredients under S. 3 must be proved by the prosecution and no duty is cast on the accused persons to prove their innocence. 1955 NUC (Punj) 3442 [AIR V 42].

[16] Where the accused is charged for an offence under S. 3 of the Gambling Act, it is

Section 3 — Note 1 *(contd.)*

incumbent on the prosecution under the law to prove by definite evidence the commodity in respect of which the alleged Satta Gambling was going on, and where it has not been proved, the accused is entitled to acquittal. AIR 1937 All 734, *Rel. on.* Thus, where there is no evidence as to what was the commodity in respect of which the accused had indulged in Satta, and where no gambling was going on in the shop of the accused at the time of raid nor was anyone present there besides the accused, no conviction under S. 3 can be sustained. ('57) 1957 All L Jour 95 (96).

[17] In a prosecution of the accused for an offence of gambling in American futures it is for prosecution to prove that the 'Muddemal slips' contain a record of betting transactions or were in any other manner connected with betting in American futures. It is therefore for the prosecution to explain how the bets in American futures are recorded and to satisfy the Court that the slips seized were a part of this record. 1954 Madh-B 145 (146) [A I R V 41 C 69] : 1954 Cri L Jour 1347. (Case decided under M. B. Gambling Act.)

2. Place. — [1] In the case of a public place used as a gaming house, S. 3 would apply to a man who habitually used that spot, has his regular beat or stand there, but not to a casual gambler whether he handed over or accepted the money staked. 1936 Nag 78 (79, 80) [AIR V 23] : ILR (1936) Nag 89 : 37 Cri L Jour 588.

[2] The word 'place' in S. 3 cannot be so construed as to embrace the whole of a public thoroughfare. 'A place' must be a definite area so marked out that it can be found and recognized. A public street is not such a place. 1937 Nag 102 (102) [AIR V 24] : 38 Cri L Jour 694.

[3] Pan-stall used as common gaming house —Area in front of it in which the customers usually stand is included in it and forms part of the common gaming house. 1941 Nag 16 (16) [AIR V 28] : ILR (1942) Nag 134 : 42 Cri L Jonr 32.

3. Profit or gain.—[1] To sustain conviction for keeping a common gambling house the prosecution must prove not only that he owned the house, or was the occupier of it and that the instruments of gambling were kept or used in it, but that they were kept or used for his profit or gain. 1918 All 100 (101) [AIR V 5] : 19 Cri L Jour 958.

[2] The words "used for the benefit or gain of the person owning the house" require strict proof by the prosecution who must show that the owner or occupier takes a fixed commission irrespective of the result or so manipulates the conditions that he cannot possibly lose. 1924 All 338 (340) [AIR V 11] : 46 All 447 : 25 Cri L Jour 902 (FB) ✠ 1923 All 182 (193) [AIR V 10] : 25 Cri L Jour 297 : 45 All 258 ✠ 1922 All 61 (62) [AIR V 9] : 23 Cri L Jour 196 (DB).

[3] Where from the method of business carried on, the chance of loss to a booth-keeper is extremely rare and almost nil, the offence of keeping common gaming house is complete. 1925 All 309 (309, 310) [AIR V 12]: 26 Cri L Jour 872 ✠ 1924 All 338 (340) [AIR V 11] : 25 Cri L Jour 902 : 46 All 447 (FB).

[4] In order to bring the case under the Act it is not necessary to prove that profit is certain to result. A mere expectation of profit would suffice. 1927 All 480 (481) [AIR V 14] : 28 Cri L Jour 442 : 49 All 562.

[5] The occasion on which the applicants were gambling was Kartiki Ekadashi, when gambling is customary. On such occasions the gamblers are in the habit of setting aside small sums for the remuneration of those who minister to their comfort in the way of supplying drinks and other refreshments, and such payments may represent no advantage whatsoever to any person who can be reasonably regarded as occupying, using or keeping the premises. ('21) 22 Cri L Jour 498 (499) (Nag).

[6] In search of accused's house under S. 5, Cauris were found therein — *Held*, Cauris fall within definition of instruments of gaming and that there is a presumption that the house was used as a common gaming house — *Held* also that the presumption would be rebutted if the object of the persons assembled was merely to indulge in a common friendly amusement with a view to pass time, the idea of making any gain being entirely foreign to the mind of the entire party. 1925 Oudh 674 [674, 675) [AIR V 12] : 26 Cri L Jour 1609.

[7] Where a person found gaming in a common gaming house is found to collect money which it is legitimate to infer is nal (commission) money, it does not follow that he does so for his own use. Before he can be convicted under S. 3 it must be shown that he was collecting the money for his own use or profit. 1949 Nag 58 (59) [AIR V 36 C 24] : ILR (1948) Nag 838 : 50 Cri L Jour 174 (DB).

[8] Merely finding implements of gaming in the house does not justify conviction. 1923 All 192 (193) [AIR V 10] : 45 All 258 : 25 Cri L Jour 297.

[9] The mere presence of the implements of gaming or the facts that some moneys were found in a glass placed near the knee of the occupier or that some money was lying in front of the other accused hardly serve as evidence that the house was a common gaming house and that the people present there were engaged in gaming for the sake of gain or profit. 1955 N U C (Punj) 3442 [AIR V 42].

[10] For a conviction under S. 3 proof that 'nal' was being taken is necessary. But in the case of gambling in a public place, which is an offence under S. 13, no such proof is required. ('55) 1955 All L Jour 515 (516).

4. Diwali gambling.—[1] Presumption at Diwali gambling is not so strong as at gambling at other times. 1922 Oudh 224 (225) [AIR V 9] : 25 Oudh Cas 111 : 24 Cri L Jour 14.

[2] A person simply allowing the use of his house to gamblers during a Dipavali festival without any idea of demanding rent etc., cannot be said to keep a common gambling house within Ss. 3 and 4 of Public Gambling

4. Penalty for being found in gaming-house.

Whoever is found in any such house, walled enclosure, room or place, playing or gaming with cards, dice, counters, money or other instruments of gaming, or is found there present for the purpose of gaming, whether playing for any money, wager, stake or otherwise, shall be liable to a fine not exceeding one hundred rupees, or to imprisonment of either description, as defined in the Indian Penal Code,[a] for any term not exceeding one month,[b]

and any person found in any common gaming-house during any gaming or playing therein shall be presumed, until the contrary be proved, to have been there for the purpose of gaming.

[a] *See* section 53 of the Code. [b] As to enhanced punishment for a second conviction of an offence under section 3 or section 4, *see* section 15 of this Act.

STATE AMENDMENTS

MADHYA PRADESH

In its application to the State of Madhya Pradesh, in section 4—

(i) for the words "house, walled enclosure, room or place" wherever they occur the words "house, room, tent, enclosure, space, vehicle, vessel or place" shall be *substituted*.
— C. P. Act III of 1927, S. 4.

(ii) for the words "one hundred rupees" the words "five hundred rupees" and for the words "one month" the words "four months" shall be *substituted*.
—M. P. Act XXV of 1950, S. 4 [3-11-1950].

Section 3 — Note 4 *(contd.)*

Act. 1919 All 345 (347) [AIR V 6] : 20 Cri L Jour 283 (DB).

[3] Gambling in Dewali should not be considered to be an offence; but the law will not countenance gambling even at Dewali if it is in contravention of the Gambling Act. 1930 Oudh 403 (403) [AIR V 17]: 32 Cri L Jour 82: 6 Luck 208.

[4] Where certain persons, about 42 in number, were found in the house of a respectable Hindu gentleman on the day after the Diváli festival indulging in a common friendly amusement and the idea of making a profit by levying a commission was not present to the mind of the owner of the house, *held*, that the necessary elements constituting an offence under Ss. 3 and 4 were not made out. 1917 Oudh 102 (103) [AIR V 4]: 29 Oudh Cas 4 : 18 Cri L Jour 494.

[5] Where the only evidence that anything was done in contravention of the Act was that the owner of the house had in front of him a small pot containing a few annas and there was no reason to suppose that the sum represented his profits or that it was what is known as 'nal' and the sums staked were quite trifling, *held*, that it was only a case of Dewali Gambling in a private house and no offence was committed. 1930 Oudh 403 (403) [AIR V 17] : 32 Cri L Jour 82 : 6 Luck 208.

5. Joint trial of keeper and persons found.—[1] The joint trial of the keeper of a common gaming house and of other persons being found in such a house is not illegal. 1922 Lah 458 (458) [AIR V 9] : 3 Lah 359 : 28 Cri L Jour 621 ✠ 1927 Lah 699 (700) [AIR V 14] : 28 Cri L Jour 825 ✠ ('13) 14 Cri L Jour 293 (294, 295): 9 Nag L R 68 ✠ 1923 All 88 (88) [AIR V 10] : 24 Cri L Jour 155 ✠ 1929 All 937 (938, 939) [AIR V 16] : 31 Cri L Jour 35.

[But see ('10) 11 Cri L Jour 211 (212) (Lah).]

6. Sentence.—[1] It is not proper to convict the accused person under the two sections and pass a cumulative sentence on one count only. 1929 All 937 (939) [AIR V 16] : 31 Cri L Jour 35.

SECTION 4 — SYNOPSIS

1. Scope.
2. "Found in any such house."
3. Gaming house.
4. "Playing or gaming with cards" etc.
5. Gambling without intention to profit is no offence.
6. Illegal search—Effect on conviction.
7. Effect of illegal arrest.

1. Scope. — [1] If two persons are gambling in a room, forming part of a common gambling house they must be convicted for gambling. ('10) 11 Cri L Jour 334 (334) (Mad).

[2] Person caught actually in act of taking bets over telephone can be convicted. 1940 Sind 28 (29) [AIR V 27] : I L R (1940) Kar 150 : 41 Cri L Jour 399.

[3] Where two persons accepted money for satta gambling and the gambling was taking place on a public road and they are found present there for the purpose of gaming, they are guilty of an offence under S. 4. 1936 Nag 78 (79) [AIR V 23] : I L R (1936) Nag 89 : 37 Cri L Jour 588.

[4] Where a house is not proved to be a common gambling house, the persons present in it are not guilty unless they actually gamble. 1918 All 100 (101) [AIR V 5] : 19 Cri L Jour 958.

[5] The only ground for the conviction of applicant under S. 4 was the evidence of approver—Applicant should not be convicted unless approver's evidence is corroborated in material particulars. 1934 Oudh 90 (92) [AIR V 21] : 9 Luck 355 : 35 Cri L Jour 397.

[6] On a conviction for being found in a gaming-house under S. 4 of the Gambling Act an order for forfeiture of the money seized in the house is legal under S. 8. 1919 All 188

PUNJAB

Same as that of Madhya Pradesh (i). — Punj. Act I of 1929, S. 4.

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in section 4—

(i) for the words "house, walled enclosure, room or place" wherever they occur the words "house, room, tent, walled enclosure, space, vehicle, vessel or place" shall be *substituted*. —U. P. Act I of 1917, S. 3.

(ii) for the words "one hundred rupees" *substitute* the words "three hundred rupees". —U. P. Act XXXIV of 1952, S. 3 [5-12-1952].

STATE AMENDMENT

SECTION 4-A

PUNJAB

In its application to the State of Punjab, after section 4, *insert* the following section, namely :—

"**4-A.** *Enhanced punishment if offence under section 3 or 4 relates to gaming with figures, etc.*—Where an offence committed by any person under section 3 or section 4 relates to gaming on any figures or numbers or dates to be subsequently ascertained or disclosed, such person shall, notwithstanding anything contained in those sections,—

(a) in the case of an offence under section 3, be liable to fine not exceeding one thousand rupees, or to imprisonment of either description for a term not exceeding one year, or to both; and

(b) in the case of an offence under section 4, be liable to fine not exceeding five hundred rupees, or to imprisonment of either description for a term not exceeding six months, or to both." —Punj. Act IX of 1960, S. 3 [28-1-1960].

Section 4 — Note 1 *(contd.)*

(188) [AIR V 6] : 41 All 272 : 20 Cri L Jour 133.

[7] Offences under Ss. 3 and 4 as they stand amended in U. P. are not cognizable offences. 1961 All 377 (378) [AIR V 48 C 98] : 1961 (2) Cri L Jour 53.

2. "Found in any such house."—[1] The Act nowhere makes the act of gambling even in a common gaming house itself an offence, and in order to convict under Ss. 4 and 6 the accused must actually be found in the house when the house was searched. ('94) 1894 Pun Re (Cr) No. 35, p. 118 (119).

[2] The only crime under the Public Gambling Act is being found in the place where gambling is going on, and under the Act it is no offence to gamble in a public place as long as one is not found doing it. Persons not found in the place where gambling was going on cannot be convicted under S. 4 of the Act. 1938 Lah 631 (633) [AIR V 25] : 39 Cri L Jour 856.

[3] A person is found in the house within the meaning of S. 4 if he is actually seen gambling in the house before the police officer effects his entry or is caught under circumstances which make it sufficiently clear that he was gambling in the house when the arrival of the police gave the alarm to the inmates even though he is actually arrested outside the house. 1952 All 469 (469) [AIR V 39] : 1952 Cri L Jour 852.

[4] Arrest in gambling house not necessary —Proof of actual presence sufficient. 1930 Lah 314 (314) [AIR V 17]: 32 Cri L Jour 65 ✠ 1921 Nag 118 (120) [AIR V 8] : 17 Nag L R 59 : 22 Cri L Jour 508.

3. Gaming house. — [1] In order to make out the offence the gambling must be in a common gaming house. The mere fact that occasionally people used to play cards in a house and perhaps for money does not necessarily make it a common gaming house. The term "common gaming house" must at least imply that the house was one used as a public resort and one in which a large number of persons are invited habitually to congregate. It, however, makes no difference that the house was not open to all persons who might be desirous of using the same for gaming. 1953 Mad 243 (244) [AIR V 40 C 93] : 1953 Cri L Jour 492. (Case under the Madras Gaming Act, 3 of 1930.)

[2] The mere presence of implements of gaming or the facts that some moneys were found near the occupier or the other accused can hardly serve as evidence that the house was a common gaming house or that the people present there were engaged in gaming for the sake of profit or gain. 1955 N U C (Punj) 3442 [AIR V 42] ✠ 1955 NUC (Kutch) 3689 [AIR V 42]. (Case decided under the Bombay Prevention of Gambling Act. It was held here that the mere finding of cards and money during a raid was not sufficient but that it must be considered whether they were used or intended to be used as instruments of gaming. Where persons were found sitting in a circle and a pack of card was there it might be assumed that they were playing cards. If money was also found piled up in the centre there was a further reason for belief that cards were being played for stake.)

4. "Playing or gaming with cards" etc.—[1] Gambling per se is not an offence. It is only gambling in a common gaming house that is an offence. Therefore a charge cannot be framed unless the prosecution establishes by evidence that the accused were found playing or gaming in a common gaming house. 1953 Hyd 60 (61) [AIR V 40 C 27] : I L R (1952) Hyd 700 : 1953 Cri L Jour 498 (DB). (Case under S. 5, Hyderabad Gambling Act, 2 of 1308F.)

[2] Where it is not established that a particular house is a common gambling house, the

5. Powers to enter and authorise police to enter and search.

If the Magistrate of a district[a] or other officer invested with the full powers of a Magistrate,[a] or the District Superintendent of Police, upon credible information, and after such enquiry as he may think necessary, has reason to believe that any house, walled enclosure, room or place, is used as a common gaming-house,

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Section 4 — Note 4 *(contd.)*

presence of the accused in that house can raise no presumption against them, and even if the house is a common gaming house, no presumption will arise against them unless it can be shown that gambling was going on at the time when they were present. 1918 All 100 (101) [AIR V 5] : 19 Cri L Jour 958.

[3] Persons present at gambling game are presumed to take part in it—When legitimate business is carried on with bets at intervals, such presumption is weak. 1938 Nag 63 (64) [AIR V 25] : 39 Cri L Jour 55.

[4] Where the accused resides in a locality of which the residents are addicted to gambling, no presumption that the accused is a gambler can be made against him by the mere fact of his residence in the locality. 1936 All 109 (110) [AIR V 23] : 37 Cri L Jour 354.

[5] Prosecution must prove by definite evidence the commodity in respect of which the alleged gambling was going on. Vague and general statement by the prosecution witnesses that gambling was going on proves nothing in law. 1939 All 734 (735) [AIR V 26] : 41 Cri L Jour 141.

[6] Cowries and money were seized while gambling with cowries was actually witnessed by the police before they took in. The cowries were obviously being used as instruments of gaming — *Held* the accused were rightly convicted under S. 4. 1936 Nag 138 (138) [AIR V 23] : 37 Cri L Jour 586.

[7] In a prosecution of the accused for an offence of gambling in American futures it is for the prosecution to prove that the "Muddemal slips" contain a record of betting transactions or were in any other manner connected with betting in American futures. It is, therefore, for the prosecution to explain how the bets in American futures are recorded and to satisfy the Court that the slips seized were part of the record. 1954 Madh B 145 (146) [AIR V 41 C 69] : 1954 Cri L Jour 1347. (Case under M. B. Gambling Act.)

[8] Recovery of instruments of gaming is relevant only when an offence is sought to be proved under Ss. 3 and 4 and not where an offence is to be proved under S. 13. 1959 All 799 (800) [AIR V 46 C 244] : 1959 Cri L Jour 1397.

5. Gambling without intention to profit is no offence. — [1] Gambling at places other than public places is not an offence unless there is an arrangement such as would enable a person to take a share out the winnings of each deal irrespective of the person who wins or loses. If there is such an agreement the game is carried on for the profit or gain of the person who takes such a share and the house or the enclosure where the game is being played would fall within the definition of common gaming house. ('55) 1955 All L Jour 515 (516).

[2] In Diwali festival some persons were found indulging in common friendly amusement in house of respectable gentleman having no intention to make profit — *Held*, elements constituting an offence under Ss. 3 and 4 were not made out. 1917 Oudh 102 (103) [AIR V 4] : 20 Oudh Cas 4 : 18 Cri L Jour 494 ✠ 1951 Pat 405 (406) [AIR V 38 C 102] : 52 Cri L Jour 365✠ ('47) 1947 O A (H C "B") 57 (59).

[3] Gambling in Diwali should not be considered to be an offence; but the law will not countenance gambling even at Diwali if it is in contravention of the Gambling Act. 1930 Oudh 403 (403) [AIR V 17]: 6 Luck 208: 32 Cri L Jour 82.

[4] An offence of gambling cannot be condoned on the ground of custom prevailing amongst Hindus to gamble on the Diwali day. ('56) 1956 All L Jour 935 (938).

6. Illegal search—Effect on conviction.— [1] The effect of the illegality of the search warrant would only be that no presumption can be raised either as to the house concerned being a gaming house or as to the purpose of the persons assembled there being gaming. But that does not in any way prevent the Magistrate convicting the accused on the other evidence produced before him regarding actual gambling and realisation of commission. ('56) 1956 Raj L W 29 (30). (Case decided under Rajasthan Public Gambling Ordinance.)

7. Effect of illegal arrest. — [1] Even if the arrest is illegal, the Court will still have jurisdiction under S. 190, Criminal Procedure Code to take cognisance of the offence, and the question whether the arrest was valid or not would not affect the question whether the accused was guilty or not. 1941 Nag 338 (339) [AIR V 28] : 43 Cri L Jour 89 : I L R (1942) Nag 198.

[2] "Found" in S. 4 does not necessarily mean "found in the course of a lawful search by the police" or "arrested in the course of such search". 1921 Nag 118 (119) [AIR V 8] : 17 Nag L R 59 : 22 Cri L Jour 508.

SECTION 5 — SYNOPSIS

1. Scope.
2. Credible information necessary for taking action.
3. "Credible information."
4. Procedure relating to search.
5. Search witnesses.
6. Delegation of authority to search.
7. Search warrant.
8. Warrant must state identity of place to be searched.

he may either himself enter, or by his warrant authorise any officer of police, not below such rank as the [A][State Government] shall appoint in this behalf to enter with such assistance as may be found necessary, by night or by day, and by force if necessary, any such house, walled enclosure, room or place,

and may either himself take into custody, or authorise such officer to take into custody, all persons whom he or such officer finds therein, whether or not then actually gaming;

and may seize or authorise such officer to seize all instruments of gaming, and all moneys and securities for money, and articles of value, reasonably suspected to have been used or intended to be used for the purpose of gaming which are found therein;

and may search or authorise such officer to search all parts of the house, walled enclosure, room or place which he or such officer shall have so entered when he or such officer has reason to believe that any instruments of gaming are concealed therein, and also the persons of those whom he or such officer so takes into custody;

and may seize or authorise such officer to seize and take possession of all instruments of gaming found upon such search.

[a] Now District Magistrate and Magistrate of the first class, respectively, *see* Code of Criminal Procedure, 1898 (V of 1898), S. 3.

STATE AMENDMENTS

MADHYA PRADESH

In its application to the State of Madhya Pradesh, in section 5—

(i) for the words "house, walled enclosure, room or place" wherever they occur the words "house, room, tent, enclosure, space, vehicle, vessel or place" shall be *substituted*. —C. P. Act III of 1927, S. 4.

(ii) the first paragraph, after the words "or the District Superintendent of Police" *insert* the words "or the Deputy or the Assistant Superintendent of Police"; and

(iii) in the fourth paragraph, *add* at the end the following words, namely:—

"and also all moneys and securities for money found on the person of such persons as are found playing or gaming or found there present for the purpose of gaming within the meaning of section 4".

—M. P. Act XXV of 1950, S. 5 [3-11-1950].

PUNJAB

Same as that of Madhya Pradesh (i). —Punj. Act I of 1929, S. 4.

UTTAR PRADESH

In section 5, for the words "house, walled enclosure, room or place" wherever they occur the words "house, room, tent, walled enclosure, space, vehicle, vessel or place" shall be *substituted*. —U. P. Act I of 1917, S. 3.

Section 5 — Synopsis *(contd.)*

9. Presumption regarding validity.

10. Seizure of money found on person.

11. Presumption under S. 6.

12. Trial.

13. Instruments of gaming—See S. 1.

1. Scope. — [1] The rules contained in Ss. 5 and 6 of the Public Gambling Act appear in a penal statute which must be strictly interpreted, and they would not be applicable to cases in which all the essential conditions provided by the law have not been duly observed. ('56) 1956 All L Jour 935 (937).

[2] The District Magistrate permitted a particulur game being played by the members of a registered club under certain conditions. But later on purporting to act under S. 5 he passed an order directing the stoppage of the game altogether on the ground that the club was allowing non-members to take part in that game. On the club challenging that order it was held that the District Magistrate had no authority under S. 5 to pass such an order altogether stopping the game. 1955 Assam 84 (86) [AIR V 42 C 18] (DB).

[3] There is nothing wrong or illegal in investing a Superintendent of Police with powers of District Superintendent of Police to issue warrants under S. 5, Public Gambling Act. 1956 Punj 226 (227) [AIR V 43 C 89] : ILR (1955) Punj 24 : 1956 Cri L Jour 1348.

[4] In a case decided under S. 38 of the Mysore Police Act (5 of 1908) (which is similar to S. 5 of the Public Gambling Act) it was held that a warrant signed by an Assistant Superintendent was also a valid warrant inasmuch as under the Rules made under that Act his duties within his sub-division were the same as those of the District Superintendent of Police. 1953 Mys 14 (16) [AIR V 40 C 6]:ILR (1953) Mys 44:1953 Crl L Jour 238.

[5] An Assistant Superintendent of Police cannot search a place without a warrant. 1925 All 301 (301) [AIR V 12] : 26 Cri L Jour 896.

Section 5 *(contd.)*

2. Credible information necessary for taking action. — [1] Credible information of the house being a common gaming house should precede the issue of the search warrant. ('71) 1871 Pun Re (Cr) No. 19, p. 35(36) (DB).

[2] Without credible information and enquiry as would afford reasonable grounds for belief to the Magistrate or police officer, that such house was used as a common gaming house, he would not be empowered to make the entry or search. ('70) 2 N W P H C R 476 (478) (DB) ✣ ('91) 1891 All W N 111 (111, 112) ✣ ('39) 1939 Nag L Jour 357 (358).

[3] It is not legal to issue a warrant under S. 5, if the Magistrate concerned has merely reason to believe that a house is used for cotton gambling, or indeed for any other kind of gambling as such. Magistrate must have reason to believe that such house is used as a common gaming house. 1941 Cal 413 (414) [AIR V 28] : ILR (1941) 1 Cal 58 : 42 Cri L Jour 643.

[4] The credible information, which the police officer must obtain before he can enter a place must show that the gambling is being carried on for the profit of the owner or occupier, and there ought to be evidence to describe either how the game itself was played, or how a toll, if any, was levied. ('21) 22 Cri L Jour 498 (498) (Nag).

[5] The Act does not require an enquiry. All it requires is that the Magistrate should have credible information. He may make an enquiry if he thinks it to be necessary but he is not bound to do so. 1938 All 252 (253) [AIR V 25] : ILR (1938) All 422:39 Cri L Jour 548.

[6] Where the Superintendent of Police issued the warrant and he signed it certifying that he "had reason to believe," etc., the only interpretation to be placed on the warrant is that the Superintendent of Police had reason to belive and therefore he acted upon credible informtion within S. 5. 1926 Lah 459 (460) [AIR V 13] : 7 Lah 310 : 27 Cri L Jour 990 ✣ ('97) 1897 Punj Re (Cr) No. 17, p. 46 (47, 48).

[7] A warrant cannot be issued unless the house is used as a common gaming house. It is not sufficient that information should be received that the house is going to be used in this way in the future. 1921 All 410 (410) [AIR V 8] ✣ 1934 All 524 (525) [AIR V 21] : 35 Cri L Jour 878.

[8] A blank warrant signed by the issuing authority and intended to be filled up by the police with necessary details as and when the occasion arose cannot be said to be legal under S. 5. Such a warrant cannot be said to have been issued on credible information and such enquiry which was thought to be necessary. ('54) 1954 Raj L W 680 (681).

3. "Credible information."—[1] Credible information includes any information which in the judgment of the officer to whom it is given, appears entitled to credit in the particular instance and which he believes and it need not be sworn information. 1929 Lah 720 (720) [AIR V 16] : 30 Cri L Jour 625 ✣ ('82) 1882 Punj Re (Cr) No. 7 p. 6 (8) (FB).

[2] A police report is prima facie credible information. ('13) 14 Cri L Jour 293 (295) : 9 Nag L R 68.

[**But see** ('76) 1876 Pun Re (Cr) No. 9, p. 14 (15) (DB). (Not good law.)]

[3] The report of the police officer that a person allowed gambling in his house was held insufficient for the issue of a warrant under S. 6 of the Hyderabad Gambling Act 2 of 1350F. (which is similar to S. 5 of this Act) on the ground that it was not "credible information" within the meaning of that section as to the house being used as a common gaming house. 1953 Hyd 60 (62) [A I R V 40 C 27] : ILR (1952) Hyd 700 : 1953 Cri L Jour 498 (DB).

[4] Under S. 6 of the Bombay Prevention of Gambling Act, 4 of 1887 (which is similar to this section) it was held that a Magistrate could issue a warrant on a complaint made to him on oath after making such enquiry as he thinks fit and satisfying himself that there are good grounds to suspect that the house, room or place is used as a common gaming house. 1957 Bom 66 (67) [A I R V 44 C 27] : ILR (1957) Bom 98 : 1957 Cri L Jour 362 (DB).

4. Procedure relating to search. — [1] Under S. 5, a Magistrate may himself enter or authorise specified police officers to enter. But if he does not authorize any police officer but professes to take action himself, it is his duty to conduct the search personally and if he does not do so, but sends a police officer to conduct the search, S. 5 is not duly complied with and the presumption under S. 6 does not arise. 1933 Lah 234 (235) [AIR V 20] : 34 Cri L Jour 252.

[*See also* ('07) 6 Cri L Jour 60 (66, 67) : 31 Bom 438 (DB).]

[2] Section 5 which authorises the District Superintendent to search does not provide as to how the search has to be conducted. Hence by S. 5 (2) of the Criminal P. C., the provisions of that Code relating to search are attracted and the District Superintendent has to conduct the search in accordance with Ss. 165 and 103 of that Code. Where in accordance therewith he goes personally and conducts the search and seizes the instruments of gaming and gets the inventory of the articles seized written under his personal supervision, control and direction the requirements of law as to a valid search are fully satisfied. The law does not require the list should be written by him personally. 1954 J & K 28 (29) [A I R V 41 C 13] : 12 J & K L R 85 : 1954 Cri L Jour 488 (DB).

[3] Warrant in the name of sub-inspector—Sub-inspector present near room used for gambling, but actual arrest made by constable — This does not vitiate warrant. 1939 Bom 465 (466) [AIR V 26] : 41 Cri L Jour 127 (DB).

5. Search witnesses.—[1] A search under the Gambling Act cannot be said to be vitiated on the ground that the search witnesses lived half a mile away from the accused's house. 1934 Oudh 90 (91) [A I R V 21] : 9 Luck 355 : 35 Cri L Jour 397.

[2] The search witnesses need not be residents of the locality and they need not even

Section 5 — Note 5 *(contd.)*

be respectable. Such witnesses are not accomplices and their evidence does not require corroboration, though it should be submitted to careful scrutiny. If the evidence as such is acceptable, it should not be disregarded. 1937 Nag 251 (252, 253) [A I R V 24] : 38 Cri L Jour 702.

[3] A search under the Gambling Act is not covered by the provisions of S. 103, Criminal P. C. 1934 Oudh 90 (91) [A I R V 21] : 9 Luck 355 : 35 Cri L Jour 397 ✣ 1922 Lah 458 (459) [A I R V 9] : 3 Lah 359 : 23 Cri L 621 ✣ 1929 All 937 (939) [A I R V 16] : 31 Cri L Jour 35 ✣ 1937 Nag 251 (252, 253) [A I R [AIR 24] : 38 Cri L Jour 702.

[4] In a case decided under the Madras Gaming Act 3 of 1930 it was held that a search made under that Act was not vitiated either by the fact that the search witnesses were not persons living in the vicinity or by the fact that one of them was not examined. It was held that S. 103 of the Criminal P. C. did not apply to such a search. 1953 Mad 243 (245) [A I R V 40 C 93] : 1953 Cri L Jour 492.

6. Delegation of authority to search. — [1] A warrant issued under S. 5 of the Public Gambling Act is a special warrant and not a general warrant of search as under the Criminal P. C. The officer named in the warrant is a delegate of the Court and he cannot therefore legally delegate his authority to another, and he cannot endorse the warrant to another to execute it. If the warrant is executed not by the officer mentioned in it, but by another to whom it is endorsed, the presumption under S. 6, will not arise. 1948 Lah 81 (82, 83, 84) [AIR V 35 C 30] : 49 Cri L Jour 150 (DB) ✣ 1956 All 449 (452) [AIR V 43 C 156] : 1956 Cri L Jour 952 (DB). (30 All 60 and AIR 1920 All 150, *Overruled*; AIR 1955 All 231 must be held to be impliedly *Overruled*.) ✣('95) 1895 Pun Re (Cr) No. 22, p. 61 (62).

[**But see** 1945 Nag 216 (217) [AIR V 32] : ILR (1945) Nag 649 : 47 Cri L Jour 148.]

[2] Where the Government notification has authorised only the officers in charge of police stations to make searches under the Act an endorsement of the warrant to the second officer by the station officer to whom it has been addressed and the search made by the second officer are irregular. The effect of such irregularity is that the rule in S. 6 becomes inapplicable to the case. ('56) 1956 All L Jour 935 (936).

7. Search warrant. — [1] A search warrant issued under S. 5 by a first class Magistrate is not invalid by reason of the fact that the house to be searched is situated outside the limits of the tahsils in respect of which such Magistrate has been appointed sub-divisional officer. ('12) 13 Cri L Jour 716 (716) : 34 All 597.

[2] It is not necessary that the warrant issued by a Magistrate to search the house should be filled up by him or his clerk. 1945 Nag 216 (217) [AIR V 32] : ILR (1945) Nag 649 : 47 Cri L Jour 148.

[3] The warrant must state that the Magistrate who granted it had reason to believe that the premises were used as a common gaming house. 1940 Cal 586 (586) [AIR V 27] : 42 Cri L Jour 253.

[4] It is not necessary that officer issuing warrant must state in warrant that he is satisfied from credible information. The law only requires that he must be satisfied from credible information received. 1955 N U C (Madh B) 3005 [AIR V 42].

[5] There is no prescribed form for a search warrant under the Act. The Magistrate is not required to record anywhere his reasons for believing any information the police may have given him or that any place is used as a common gaming house. All that is required is that he should have reason to believe and where he has he can issue the warrant without conforming to any particular form. 1953 Mad 243 (245) [AIR V 40 C 93] : 1953 Cri L Jour 492. (Case under Madras Gaming Act.)

[6] The law does not require that a warrant under S. 5 must be directed to one or more police officers. Hence a warrant which is not addressed to any particular police officer is not defective for that reason only. 1948 All 428 (429) [AIR V 35 C 162] : 49 Cri L Jour 710].

[**But see** 1924 All 128 (129) [AIR V 11] : 24 Cri L Jour 630.]

[7] A warrant in the alternative to five different police officers can be a good warrant. ('97) 1897 Pun Re (Cr) No. 17, p. 46 (48).

[8] Where the Government Notification read that "in all towns where there is a Sub-Inspector or Assistant Sub-Inspector no officer below the rank of Sub-Inspector or Assistant Sub-Inspector . . . shall execute the warrant" it was held that a warrant could be issued to either of the officers for execution and not only to the Sub-Inspector. ('55) ILR (1955) Punj 630 (633) (DB).

[9] Omission to affix the seal of the Court on a search warrant issued under the Act is a mere irregularity curable by S. 537, Criminal P. C. ('10) 11 Cri L Jour 570 (571) : 1910 Pun Re (Cr) No. 23 (DB).

[10] In a case decided under S. 6 of the Bombay Prevention of Gambling Act 4 of 1887 (which is similar to S. 5 of this Act) it was held that the Magistrate issuing a warrant under that section was not bound to confer all the powers mentioned therein on the officer to whom it was issued for execution. The exclusion of one or more of the powers granted under the warrant from the powers conferrable under S. 6 of that Act was held not to render the warrant defective. 1957 Bom 66 (67) [AIR V 44 C 27] : ILR (1957) Bom 98 : 1957 Cri L Jour 362 (DB).

[11] A warrant issued under S. 6 of the Bombay Prevention of Gambling Act, 4 of 1887 (which is similar to S. 5 of this Act) conferring in substance only these powers which could be conferred under that section was held not to become invalid merely because it had not been issued in the prescribed form. 1957 Bom 66 (68) [AIR V 44 C 27]:ILR (1957) Bom 98 : 1957 Cri L Jour 362 (DB). (The fact

Section 5 — Note 7 *(contd.)*
that the warrant cast an obligation on the officer to produce the articles seized before the Magistrate while cl. (d) of S. 6 did not provide for any such obligation does not vitiate the warrant)

[12] An irregularity in a search warrant issued under S. 5 will not *per se* vitiate a conviction following the search if the conviction can be supported without invoking the presumptions under S. 6. ('11) 12 Cri L Jour 28 (29) : 6 Nag L R 168.

[13] To issue a warrant to raid houses where gambling goes on at the time of Divali, is highly undesirable. 1930 Oudh 403 (404) [AIR V 17]: 6 Luck 208 : 32 Cri L Jour 82.

8. Warrant must state identity of place to be searched.—[1] Warrant is illegal if, at the time the Magistrate signs it, it does not state the place used as a gaming house. 1924 Lah 247 (247, 248) [AIR V 11] : 24 Cri L Jour 633.

[2] A warrant issued for the search of any house which the police officer might think proper to search, is illegal. ('12) 13 Cri L Jour 832 (832) : 35 All 1.

[3] Warrant sufficient to fix identity of place — Mere minor misdescription does not render search illegal. 1955 N U C (Madh B) 3005 [AIR V 42]. (Case under M. B. Gambling Act 51 of 1949.)

[4] Description in warrant adequate to identify place—Non-mentioning of boundaries is immaterial. 1941 Nag 16 (16) [A I R V 28] : ILR (1942) Nag 134 : 42 Cri L Jour 32+1938 All 252 (252) [AIR V 25] : ILR (1938) All 422 : 39 Cri L Jour 548.

[See however ('39) 1939 Nag L Jour 357 (358)+1924 All 128 (129) [A I R V 11] : 24 Cri L Jour 630.]

[5] Warrant wrongly describing the house in question as standing in name of accused. Warrant giving sufficient particulars to identify that house had been rented and was being occupied by accused — Misdescription is immaterial and does not vitiate the warrant. 1953 Mad 243 (245) [AIR V 40 C 93] : 1953 Cri L Jour 492. (Case under Madras Gaming Act.)

[6] Reading S. 5 with the interpretation clause there is no reason for holding that two or more houses may not be specified in the warrant provided they are clearly described. ('97) 1897 Pun Re (Cr.) No. 17, p. 46 (48).

9. Presumption regarding validity.—[1] The issue of a warrant under S. 5 of the Gambling Act being a judicial act, there is the initial presumption under S. 114 of the Evidence Act that the Magistrate who issued the warrant did so complying with the terms of the section. That being the case, the presumption set out in S. 6 of the Gambling Act would apply. ('47) 51 Cal W N 284 (285, 286).

[2] The fact that the warrant issued does not state that it was issued after the receipt of credible information does not make it invalid. As the Magistrate issues the warrant he presumably thinks that the information is credible, though it would be better if the form of warrant reproduces the wording of the section. 1938 Nag 63 (63) [AIR V 25] : ILR (1939) Nag 556 : 39 Cri L Jour 55+1937 Nag 396 (397) [AIR V 24] : I L R (1939) Nag 380 : 39 Cri L Jour 85.

[3] When a warrant issued under the section is duly signed and shows on the face of it that it was issued on credible information it should be presumed that the Magistrate signing the warrant had such information. ('13) 14 Cri L Jour 293 (295) : 9 Nag L R 68+1924 Oudh 403 (403) [AIR V 11] : 25 Cri L Jour 698+1946 Lah 26 (29, 30, 31) [AIR V 33 C 7] : 47 Cri L Jour 368 : ILR (1945) Lah 119 (FB).

[4] If the Court chooses to draw a presumption under S. 114, Illustration (e), Evidence Act, regarding the credibility of the information on the basis of which the warrant under S. 5 was issued the mere production of a warrant might be sufficient to prove the credibility of the information and it is not incumbent upon the prosecution to place before the Court the nature of the information received. But if the prosecution depends in any particular case on the mere production of the warrant, it would do so at its own risk, because the Court may refuse to draw the presumption, in which case the probability is that the prosecution case would fail. 1946 Lah 26 (29, 30, 31) [A I R V 33 C 7] : 47 Cri L Jour 368 : ILR (1945) Lah 119 (FB).

[5] Provided the warrant issued under S. 5, is on the face of it regular, the presumption under S. 114, Illustration (e), Evidence Act, does arise. But the Court is not bound to raise the presumption under S. 114, Illustration (e), Evidence Act. The presumption is rebuttable and it is open to the Court in proper cases even when the warrant is in proper form to refuse to raise the presumption on good cause being shown. It is open to the Magistrate to hold, after hearing all the evidence, including such evidence as the accused may wish to lead that the mere issue or service of warrant in a particular case is not sufficient to give rise to the presumption that the house searched is a common gaming house merely because cards and other such instruments of gaming happen to be found therein. If it is shown that upon the whole information before the officer issuing the warrant, there was no reason to believe that the premises searched were used as a common gaming house, for the profit or gain of some person connected with them, as owner or otherwise, it would be difficult to uphold the validity of the warrant, as laying down foundation for the presumptions mentioned in S. 6. 1946 Lah 26 (30) [A I R V 33 C 7] : 47 Cri L Jour 368 : I L R (1945) Lah 119 (FB).

10. Seizure of money found on person.—[1] Money found in pocket of persons arrested or ring found on personal search cannot be forfeited. 1943 Nag 286 (286) [AIR V 30] : ILR (1943) Nag 667 : 45 Cri L Jour 93+1937 Nag 251 (253) [AIR V 24] : 38 Cri L Jour 702+1930 Nag 49 (50) [AIR V 17] : 26 Nag L R 151 : 31 Cri L Jour 277+1923 Nag 66 (67) [AIR V 10] : 23 Cri L Jour 608+1927 Lah

6. Finding cards, etc., in suspected houses, to be evidence that such houses are common gaming-houses.

When any cards, dice, gaming-tables, cloths, boards or other instruments of gaming are found in any house, walled enclosure, room or place entered or searched under the provisions of the last preceding section, or about the person of any of those who are found therein, it shall be evidence, until the contrary is made to appear, that such house, walled enclosure, room or place, is used as a common gaming-house, and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Magistrate or police-officer, or any of his assistants.

STATE AMENDMENTS

MADHYA PRADESH

In its application to the State of Madhya Pradesh, in section 6, for the words "house, walled-enclosure, room or place" wherever they occur the words "house, room, tent, enclosure, space, vehicle, vessel or place" shall be *substituted*. — C. P. Act III of 1927, S. 4.

PUNJAB

Same as that of Madhya Pradesh. — Punj. Act I of 1929, S. 4.

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in section 6, for the words "house, walled enclosure, room or place" wherever they occur the words "house, room, tent, walled enclosure, space, vehicle, vessel, or place" shall be *substituted*. — U. P. Act I of 1917, S. 3.

Section 5 — Note 10 *(contd.)*

338 340) [AIR V 14] : 8 Lah 320 : 28 Cri L Jour 352.

[2] Section 8 is controlled by S. 5 and S. 5 does not authorise seizure of money from the pockets of persons taken into custody. 1943 Nag 286 (286) [AIR V 30] : ILR (1943) Nag 667 : 45 Cri L Jour 93+1926 Lah 290 (291) [AIR V 13] : 27 Cri L Jour 951.

11. Presumption under S. 6. — [1] In order to entitle the prosecution to invoke to its aid the presumption under S. 6, the prosecution must prove affirmatively that the search was in accordance with the provisions of S. 5, and where this fact is not proved the conviction of the accused cannot be sustained merely on the strength of the presumption referred to in S. 6. 1936 All 109 (111, 112) [AIR V 23] : 37 Cri L Jour 354+1933 Lah 234 (235) [AIR V 20] : 34 Cri L Jour 252.

[2] Presumption under S. 6 arises only when provisions of S. 5 are strictly complied with. 1941 Cal 413 (414) [A I R V 28] : I L R (1941) 1 Cal 58 : 42 Cri L Jour 643+1930 Cal 365 (366) [AIR V 17] : 31 Cri L Jour 999.

[*See also* ('07) 6 Cri L Jour 60 (67) : 31 Bom 438 (DB).]

[3] Presumption under S. 6 would not arise if it is found that the warrant was an illegal warrant. 1930 All 740 (740) [A I R V 17] : 32 Cri L Jour 141+1928 All 20 (21) [AIR V 15] : 50 All 412 : 28 Cri L Jour 1001.

[4] Unless a house is searched under the provisions of S. 5, the mere finding of cards or dice and money is not sufficient evidence that such house is a common gaming house. ('71) 1871 Pun Re (Cr.) No. 19, p. 35 (35) (DB).

[5] Where the warrant was issued in the name of an officer who was not correctly designated in it and the said officer did not follow the directions given in the warrant and also exceeded the authority that was given to him and the house searched was not the house named in the warrant it was held that the prosecution was not entitled to rely on the presumptions under S. 6. 1952 J & K 14 (15) [AIR V 39] : 1952 Cri L Jour 298 : 10 J & K L R 77.

12. Trial.—[1] It is ordinarily undesirable that a Magistrate who believes that the information that a house has been used as a public gaming house is credible, should try the case. 1938 Nag 63 (63, 64) [AIR V 25]: ILR (1939) Nag 556 : 39 Cri L Jour 55.

[2] Magistrate issuing warrant may be examined by the accused as to the source of his information and the filling up of the warrant —Such Magistrate should not try the case himself. 1924 Lah 247 (248) [A I R V 11] : 24 Cri L Jour 633.

13. Instruments of gaming.—*See* S. 1.

SECTION 6 — SYNOPSIS

1. Presumption under section mandatory.
2. Strict compliance with S. 5 a condition for raising the presumption.
3. Presumption can be rebutted by slight evidence.
4. Cases under other similar Acts.

1. Presumption under section mandatory.— [1] The context of S. 6 clearly shows that the word 'evidence' is used in it in the sense of 'proof' and not in the sense of evidence which falls short of proof. The rule thus interpreted appears to give exceptional weight to the results of the search made under S. 5. In other words it renders imperative a presumption which has always been regarded as permissible by the rules of evidence. ('56) 1956 All L Jour 935 (937)+('84) 1884 All WN 286 (288) (DB).

[2] The term 'evidence' as used in the section does not merely mean an item of proof open to acceptance or rejection by the Court; what is intended to be conveyed by S. 6 is that if the evidence is not rebutted in any manner, those consequences which are detail-

Section 6 — Note 1 *(contd.)*

ed in the section would necessarily follow. 1946 Lah 26 (30) [AIR V 33 C 7] : ILR (1945) Lah 119 : 47 Cri L Jour 368 (FB).

[3] Under S. 6 the Court must draw a presumption from the finding of cards, etc., that the house was used as a common gaming house. 1933 All 574 (575) [AIR V 20] : 34 Cri L Jour 1232 (DB)✣1940 Bom 129 (130) [AIR V 27] : ILR (1940) Bom 322 : 41 Cri L Jour 571 (DB)✣1941 All 330 (333) [AIR V 28]: ILR (1941) All 576 : 42 Cri L Jour 864 (DB)✣1938 Nag 63 (64) [AIR V 25] : ILR (1939) Nag 556: 39 Cri L Jour 55 ✣ 1940 All 412 (413) [AIR V 27] : ILR (1940) All 559 : 41 Cri L Jour 879 ✣ 1929 Lah 720 (720) [AIR V 16] : 30 Cri L Jour 625.

[4] On a search of a house persons were found therein engaged in gambling and instruments of gaming were also found. There was evidence that the owner made profit by allowing his house to be used as a place for gambling. *Held*, that it must be presumed under S. 6 that the house in question was a common gaming house in absence of evidence to the contrary. 1920 All 200 (200) [AIR V 7]: 42 All 470 : 21 Cri L Jour 438.

[5] Presumptions which arise from the finding of instruments of gaming in a place are that the place was used as a common gaming house and that the persons found there were there for the purpose of gaming, so that where the finding of instruments of gaming and the presence of the accused at the place is proved, the burden is thrown upon the accused to show that the place was not a common gaming house. Where this burden is not discharged by the accused his conviction is justified. 1940 Bom 62 (62) [AIR V 27]: ILR (1940) Bom 105 : 41 Cri L Jour 253 (DB).

[6] The very wording of the first part of S. 6 which speaks of any cards, dice, gaming tables, cloths, boards or other instruments of gaming shows that it is not necessary to prove that the particular instrument was in fact used for gaming. 1940 All 412 (413) [AIR V 27] : ILR (1940) All 559 : 41 Cri L Jour 979.

[7] Before relying on the presumption under S. 6, the prosecution must establish that the place where the accused was found gambling really was the place named in the search warrant. 1937 Cal 54 (55) [AIR V 24] : 38 Cri L Jour 784 (DB).

[8] No presumption against the accused can be made by the mere fact that residents of a particular locality are addicted to gambling, and in a case where it is manifest that police has, on previous occasions, made unsuccessful attempts to falsely implicate a man under the Gambling Act, the Court must, before recording an order of conviction, be satisfied that there was evidence of unimpeachable character to support the conviction. 1936 All 109 (110) [AIR V 23] : 37 Cri L Jour 354.

2. Strict compliance with S. 5 a condition for raising the presumption. — [1] Presumption referred to in S. 6 can only apply to searches conducted in pursuance of a warrant issued under S. 5. 1935 Mad 648 (649) [AIR V 22] : 36 Cri L Jour 799✣('07) 6 Cri L Jour 60 (65) : 31 Bom 438 (DB).

[2] In the absence of strict compliance with the provisions of S. 5, presumption under S. 6 cannot be raised. 1933 Lah 234 (235) [AIR V 20] : 31 Cri L Jour 252.✣ 1956 All 449 450, (452) [AIR V 43 C 156] : 1956 Cri L Jour 952 (DB). (The presumption which encroaches on the liberty of a person has got to be strictly construed.) ✣ 1935 Sind 102 (103) [AIR V 22]: 29 Sind L R 19 : 36 Cri L Jour 902 (DB)✣1936 All 109 (111, 112) [AIR V 23] : 37 Cri L Jour 354✣1925 All 301 (301) [AIR V 12] : 23 Cri L Jour 896✣('79) 4 Cal 710 (711, 712) (DB) ✣ ('11) 12 Cri L Jour 28 (29) : 6 Nag L R 168.

[3] It is only when an entry in the house is effected and search is made on receipt of credible information by the officers mentioned in S. 5 that a house etc., is used as a common gaming house and instruments of gaming are recovered on such search that the presumption referred to in S. 6 comes into play. In other words unless there is something on record to show that the officer who conducted the search or issued the warrants for search did so in pursuance of the belief that the house was used as a common gaming house no presumption can, on the recovery of instruments of gaming from the house, be made against the accused. 1955 NUC (Punj) 3442 [AIR V 42].

[4] The presumption under S. 6 would not arise if it is found that the warrant was an illegal warrant. 1930 All 740 (740) [AIR V 17] : 32 Cri L Jour 141✣1948 All 428 (429) [AIR V 35 C 162] : 49 Cri L Jour 710. (Warrant issued under S. 5 defective—No presumption under S. 6 that the accused present in the house had gathered there for gambling.)✣ 1927 Lah 699 (700) [AIR V 14]: 28 Cri L Jour 825 ✣ ('84) 1884 All W N 291 (292)✣1928 All 20 (21) [AIR V 15] : 50 All 412 : 28 Cri L Jour 1001✣('10) 11 Cri L Jour 570 (571) : 1910 Pun Re (Cr) No. 23.

[5] The provisions of S. 6 of the Public Gambling Act constitute a special rule of evidence as to the onus probandi in such cases; and, although with reference to the general terms of S. 114 of the Evidence Act S. 6 of the Public Gambling Act has not seriously altered the ordinary rules of evidence as to presumptions or burden of proof, the provisions of the section must not be held strictly applicable to cases in which search is not made by a duly authorised officer under the provisions of S. 5. ('56) 1956 All L Jour 935 (936, 937).

[6] Where the notification of the Provincial Government authorised a sub-inspector to enter and search only places where there was no inspector of police and the warrant was issued to a sub-inspector in a place where there was an inspector — *Held*, that the irregularity rendered the rule of evidence in S. 6 inapplicable to the case. But it is only an irregularity curable under S. 537, Criminal Procedure Code. ('84) 1884 All W N 286 (287) (DB)✣('84) 1884 All W N 59 (59).

[7] A search by a police officer below the rank of sub-inspector, under a warrant issued by a Magistrate is irregular and does not raise

Section 6 — Note 2 *(contd.)*

the presumptions under S. 6. A conviction based on such presumptions but unsupported by any other evidence should be set aside. ('11) 12 Cri L Jour 28 (29) : 6 Nag L R 168.

[8] Police officer having no authority to issue warrant, issuing it—Search of the house made and persons arrested — Presumption under S. 6 cannot be raised but the fact that the house was a gaming house can be proved *aliunde*. ('04) 1 Cri L Jour 269 (271) (All).

[9] Search of alleged gaming house by police who were not authorised by Magistrate or District Superintendent of Police — Arrest of persons found—Direct evidence of witness to show that the house was a gaming house—*Held*, that though the action of police may have been illegal, accused could be convicted as it was proved that the house was a gaming house, without resorting to any presumption under S. 6. ('79) 4 Cal 659 (661) (DB).

[10] There is nothing in S. 6 to render the results of a search conducted under an irregularly issued warrant inadmissible in evidence. If there is sufficient evidence to sustain the conviction irrespective of the special rule contained in S. 6, the conviction is proper. Mere irregularity in issuing the search warrant does not prejudice the accused or occasion any failure of justice within the meaning of S. 537 of the Code of Criminal Procedure. ('56) 1956 All L Jour 935 (937).

3. Presumption can be rebutted by slight evidence. — [1] The presumption arising under S. 6, however is not conclusive and may in certain circumstances be extremely weak. Even in a case where no defence evidence is led the presumption may be rebutted by bringing out circumstances which go to show that some or all the ingredients which constitute the offence under S. 3 or the offence under S. 4 are lacking and in such a case the accused persons will not be held guilty. 1954 Punj 164 (165) [AIR V 41 C 84] : ILR (1954) Punj 782 : 1954 Cri L Jour 1209.

[2] When a gambling game is being played there is a strong presumption that the persons present are taking part in it; but when bets are being made at intervals and legitimate business is being carried on throughout, the presumption is not a strong one, and if persons found there give a reasonable explanation of their presence, it should ordinarily be accepted. 1938 Nag 63 (64) [AIR V 25] : 39 Cri L Jour 55 : ILR (1939) Nag 556.

[3] Where, on a search, under S. 6, packets of playing cards are found in a shop, the mere denial of the house owner is often sufficient and indeed the only available proof that unlawful gaming was not going on in such shop, unless other circumstances of the case indicate that, in fact, unlawful gaming was going on. 1937 Rang 469 (469) [AIR V 24] : 39 Cri L Jour 134.

[4] Where it was found that a certain number of Hindus were gambling in a house on a Satam day on which according to the local customs Hindus used to gamble and that no non-Hindus were admitted to the premises — *Held* that the presumption was sufficiently rebutted by the fact that it was the Satam day on which the gambling was going on. 1933 Sind 42 (43) [AIR V 20] : 27 Sind L R 32 : 34 Cri L Jour 356 (DB).

[5] The presumption raised by the Act is not as strong when the gambling takes place on the Diwali occasion as when it takes place at other times. 1955 N U C (Punj) 3442 [AIR V 42].

4. Cases under other similar Acts. — *Bombay Prevention of Gambling Act, 4 of 1887* —[1] Where in a prosecution under Ss. 4 and 5, Bombay Prevention of Gambling Act IV of 1887 the prosecution proves that the police entered the house in question under a proper warrant issued under S. 6 and seized the instruments of gaming there, it is the duty of the Court to hold that the owner of the house was keeping a common gaming house and that every person was present there for the purpose of gaming unless the accused are able to prove the contrary. In such a case the prosecution need not prove by positive evidence that the owner was keeping a common gaming house and that the persons found there were assembled for the purpose of gaming. ('52) 5 Sau L R 79 (81). (Accused, Muhammadans, playing on Idd holiday in broad day light with the doors of the house kept open—Raid made by police under proper warrant — Still accused cannot be convicted under Ss. 4 and 5 because the circumstances of the case rebutted the presumption arising under S. 7.)

[2] Where the accused are found in possession of cards and counters with different colours which are generally used in place of coins, the presumption under S. 7 arises that the place where such instruments of gaming are found is a common gaming house and it is for the accused to displace that presumption. ('50) 3 Sau L R 169 (170, 171) (DB).

[3] In a case decided under the Bombay Prevention of Gambling Act, 4 of 1887, it was held that the presumption under S. 7 (which is similar to S. 6 of this Act) arose where the warrant issued to the officer under S. 6 in substance authorised him to enter a common gaming house and search it. The fact that the Magistrate did not confer on him all the powers conferrable under S. 6 was held not to vitiate the warrant and thereby prevent the presumption arising. 1957 Bom 66 (67) [AIR V 44 C 27] : ILR (1957) Bom 98 : 1957 Cri L Jour 362 (DB). (Similarly the fact that the warrant imposes an obligation on the officer to produce the articles seized before the Magistrate when S. 6 has not created any such duty does not vitiate the warrant and disable the prosecution from availing itself of the presumption under S. 7.)

[4] The presumption under S. 7 of the Bombay Prevention of Gambling Act, 4 of 1887, cannot arise where the special warrant issued under the Act does not supply the requirements of S. 6. 1951 Sau 55 (56) [AIR V 38 C 27] : 52 Cri L Jour 812 (DB).

[5] Where by a notification the Government empowered all police officers of a certain rank and above to issue warrants under S. 6 of the

Section 6 — Note 4 *(contd.)*

Bombay Prevention of Gambling Act, 4 of 1887 and a warrant was issued under such a general empowerment it was held that it was unauthorised and hence the presumption under S. 7 of that Act could not be made. 1955 N U C (Kutch) 3689 [AIR V 42].

Hyderabad Gambling Act 2 of 1305F

[6] The presumption under S. 7, Hyderabad Gambling Act, 2 of 1305F can arise only where search is made in strict compliance with S. 6. There must be affirmative proof of a due search effected before the prosecution would be entitled to invoke the aid of the presumption. 1953 Hyd 60 (61, 62) [AIR V 40 C 27] : I L R (1952) Hyd 700 : 1953 Cri L Jour 498 (DB).

[7] It is necessary that S. 7 of the Hyderabad Gambling Act, 2 of 1305F should be very strictly construed. The section authorises a presumption of guilt against the accused and is a departure from the principle of criminal jurisprudence that an accused person is presumed to be innocent until the contrary is proved. Under the Act onus probandi is shifted from the accuser to the accused who has to establish his innocence and hence there is the necessity for strict construction. 1953 Hyd 60 (62) [A I R V 40 C 27] : ILR (1952) Hyd 700 : 1953 Cri L Jour 498 (DB).

[8] Where the search warrant issued is before the Court and is on the face of it regular the presumption under S. 91, Hyderabad Evidence Act arises and the Court may presume that the officer issuing the warrant has acted on credible information. It would follow therefrom that the presumption under S. 7, Hyderabad Gambling Act, 2 of 1305F arises it as a result of the ensuing search the articles indicated in that section are found. But when the warrant is not produced and is not on the file of Court no such presumption can arise. 1953 Hyd 60 (62) [AIR V 40 C 27]: I L R (1952) Hyd 700 : 1953 Cri L Jour 498 (DB).

Jaipur Gambling Act

[9] A presumption of guilt, on discovery of any instrument of gaming in or about the person of the accused, can be made under S. 6, Jaipur Gambling Act but this section applies only to common gaming house of which a search has been taken under the provisions of S. 5 and has no application to offences sought to be prevented under S. 13 of the Act. ('46) 1946 Jaipur L R 408 (411).

J. and K. Gambling Act, 18 of 1977 (1920 A. D.)

[10] Where a search was not conducted under the direct supervision and control of the District Superintendent of Police and he had signed the inventory only at a later stage it was held that the presumption under S. 6 of the *J.* and *K.* Gambling Act did not arise because the search was one not made according to law. 1954 J & K 28 (29, 30) [AIR V 41 C 13] : 12 J & K L R 85 : 1954 Cri L Jour 488 (DB).

M. B. Prevention of Gambling Act

[11] The presumption under S. 114 is permissive and the Magistrate can refuse to draw the presumption, on good cause being shown, even where the warrant is in proper form. In cases under the M. B. Prevention of Gambling Act this permissive presumption is tacked on to the mandatory one under S. 7 of the Act to give the best evidence in support of the propriety or legality of the warrant so that there would be no risk of a refusal to draw the presumption. ('49) 1949 Madh B L R 98 (101) (DB).

[12] Where there is proof of persons being found in a house raided under a warrant validly issued under S. 6 of the M. B. Prevention of Gambling Act a presumption that they were there for the purposes of gambling must arise under S. 7 of that Act. In such cases proof aliunde is unnecessary. ('49) 1949 Madh B L R 98 (100) (DB).

[13] The accusation against the accused was that they were present in the house when it was raided by the sub-inspector along with panchas and certain things including cards and money were seized by him in the search. The accused admitted their presence and the fact of their gambling. On these facts the Magistrate was justified in holding that the police officer had sufficient ground to suspect that cards and money seized were instruments of gaming. Further he was also entitled to draw the presumption under S. 6 of the M. B. Gambling Act about the guilt of the accused in view of the fact that the raid was made after credible information. ('54) Madh B L J 1954 H C R 708 (710).

[14] Presumption liable to be drawn under S. 6 is a weak one and a reasonable explanation of the accused ought generally to be accepted. 1955 N U C (Madh B) 3005 [A I R V 42].

[15] A game involving chance when played with stakes amounts to gaming even if it involves also skill. It is only a game which is one of pure skill that would not amount to gaming. 1955 N U C (Madh-B) 3005 [AIR V 42].

Madras Gaming Act, 3 of 1930

[16] Though the terms of S. 9 of the Madras Gaming Act, 3 of 1930 do not prohibit a conviction being based solely on the presumption raised under S. 6 of that Act the courts, as a matter of practice, would require something more in addition to convict the accused. ('54) 1954-2 Mad L Jour 618 (619).

Mysore Police Act, 5 of 1908

[17] Rule 60 of the Mysore Police Manual makes it clear that the duties of the Assistant Superintendent in charge of a sub-division are, within the sub-division, the same as those of the Superintendent. Hence he must be deemed to be a District Superintendent of Police for the purpose of signing the search warrant under S. 38, Mysore Police Act and for the purpose of the presumption under S. 63 of that Act arising on a search made under such a warrant. 1953 Mys 14 (16) [AIR V 40 C 6] : ILR (1953) Mys 44 : 1953 Cri L Jour 238.

[18] Even if the accused were found in the gaming house while there was play the presumption under S. 63 of the Mysore Police Act, 5 of 1908 is, until the contrary is proved, that they were there for the purpose of

7. Penalty on persons arrested for giving false names and addresses.

If any person found in any common gaming-house entered by any Magistrate or officer of police under the provisions of this Act, upon being arrested, by any such officer or upon being brought before any Magistrate, on being required by such officer or Magistrate to give his name and address, shall refuse or neglect to give the same, or shall give any false name or address, he may upon conviction before the same or any other Magistrate be adjudged to pay any penalty not exceeding five hundred rupees, together with such costs as to such Magistrate shall appear reasonable, and on the non-payment of such penalty and costs, or in the first instance, if to such Magistrate it shall seem fit, may be imprisoned for any period not exceeding one month.

STATE AMENDMENT

MADHYA PRADESH

In its application to the State of Madhya Pradesh, in section 7, for the words "five hundred rupees" the words "one thousand rupees" and for the words "one month", the words "four months" shall be *substituted*. — M. P. Act XXV of 1950, S. 6, [3-11-1950].

8. On conviction for keeping a gaming-house, instruments of gaming to be destroyed.

On conviction of any person for keeping or using any such common gaming-house, or being present therein for the purpose of gaming, the convicting

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Section 6 — Note 4 *(contd.)*

gaming. 1953 Mys 14 (16) [AIR V 40 C 6] : ILR (1953) Mys 44 : 1953 Cri L Jour 238.

[19] Large number of persons found playing cards late at night in a house with all its doors closed — Search taking place under S. 38 of the Mysore Police Act, 5 of 1908 — Playing cards and a large sum of money lying on 'Akhada' recovered by police—*Held* that in the circumstances a natural presumption arose that the accused were engaged in playing a game of chance irrespective of whether the warrant was in accordance with law or not. 1953 Mys 14 (15) [AIR V 40 C 6] : ILR (1953) Mys 44 : 1953 Cri L Jour 238.

[20] It is not correct to say that the entire proceedings conducted in pursuance of a defective warrant should be held ab initio void or that the irregularity and illegality in the search vitiate the trial and affect the conviction. The only contention that the accused can put forth as a result of the warrant being defective is that the presumptions arising under the explanation to S. 63, Mysore Police Act, 5 of 1908 do not arise. 1956 Mys 42 (43) [AIR V 43 C 18] : ILR (1955) Mys 627 : 1956 Cri L Jour 631.

Rajasthan Public Gambling Ordinance, 1949

[21] A Person found in the house at the time of the search can be presumed to be gambling only where cards, dice and other instruments of gaming are found in the house. No such presumption can be made against him where only a piece of paper and a rupee note are found in the house unless the prosecution proves the contents of the paper and discloses how its contents led to the conclusion that the paper was meant for gambling. ('54) 1954 Raj L W 680 (681, 682).

[22] Where the search warrant in question cannot be said to be legal under S. 5 the presumption under S. 6 cannot also be raised. ('54) 1954 Raj L W 680 (681).

[23] Where a warrant under which a search was made was bad it was held that it rendered it impossible only to raise a presumption under S. 6 of the Rajasthan Public Gambling Ordinance of 1949 but not the conviction of the accused on other evidence which was before the Court. ('56) 1956 Raj L W 29 (30).

Section 8 — Note 1

[1] Everything found on the premises or on the persons there which is surely tainted with the gaming mark, that is to say, "reasonably suspected to have been used or intended to be used for the purpose of gaming" is liable to forfeiture and may or may not be returned under the discretion of the Magistrate under the provisions of S. 8 but not otherwise. 1924 Pat 42 (46) [AIR V 11] : 25 Cri L Jour 321.

[2] Section 8 justifies the seizing and forfeiting of money found on the table or on the floor or other places in the house. 1921 All 241 (242) [AIR V 8] : 22 Cri L Jour 648.

[3] Under S. 8, the instruments of gaming only can be dealt with. The lamps found in the house cannot be dealt with since they are not gaming instruments. ('39) 1939 Nag L Jour 357 (358).

[4] The money seized under S. 5 and forfeited under S. 8 is money seized as found on the premises and connected with gaming by suspicion, not money found in the pockets of those taken into custody. Section 8 is controlled by S. 5 and as S. 5 does not authorise seizure of money from pockets of those who are taken into custody, the moneys seized in personal search cannot be forfeited. 1943 Nag 286 (286) [AIR V 30] : ILR (1943) Nag 667 : 45 Cri L Jour 93 ✣ 1950 All 199 (199) [AIR V 37 C 74] : ILR (1950) All 1299 : 51 Cri L Jour 640 (DB) ✣ 1919 All 72 (72) [AIR V 6] : 41 All 366 : 21 Cri L Jour 42 ✣ 1930 Nag 49 (50) [AIR V 17] : 26 Nag L R 151 : 31 Cri L Jour 277 ✣ 1927 Lah 338 (340) [AIR V 14] : 8 Lah 320 : 28 Cri L Jour 332 ✣ 1926 Lah 290 (291) [AIR V 13] : 27 Cri L Jour 951 ✣ 1921 All 241 (242) [AIR V 8] : 22 Cri L Jour

Magistrate may order all the instruments of gaming found therein to be destroyed, and may also order all or any of the securities for money and other articles seized, not being instruments of gaming, to be sold and converted into money, and the proceeds thereof with all moneys seized therein to be forfeited or, in his discretion, may order any part thereof to be returned to the persons appearing to have been severally thereunto entitled.

9. Proof of playing for stakes unnecessary.

It shall not be necessary, in order to convict any person of keeping a common gaming-house, or of being concerned in the management of any common gaming-house, to prove that any person found playing at any game was playing for any money, wager or stake.

10. Magistrate may require any person, apprehended to be sworn and give evidence.

It shall be lawful for the Magistrate before whom any persons shall be brought, who have been found in any house, walled enclosure, room or place entered under the provisions of this Act, to require any such persons to be examined on oath or solemn affirmation, and give evidence touching any unlawful gaming in such house, walled enclosure, room or place, or touching any act done for the purpose of preventing, obstructing or delaying the entry into such house, walled enclosure, room or place or any part thereof, of any Magistrate or officer authorised as aforesaid.

Section 8 — Note 1 *(contd.)*

648 (DB) ✠ 1924 Pat 42 (46) [AIR V 11] : 25 Cri L Jour 321.

-[See however 1940 Sind 22 (23) [AIR V 27] : ILR (1940) Kar 125 : 41 Cri L Jour 385 ✠ 1940 Sind 28 (29, 30) [AIR V 27] : ILR (1940) Kar 150 : 41 Cri L Jour 399].

[5] Before a Court can exercise its jurisdiction to pass an order of forfeiture of money or destruction of property under S. 8 of the Public Gambling Act, it is necessary that the accused must be convicted of the offence under the Act with which he was charged. His conviction therefore is a condition precedent to any such order. Being a penal enactment it must be construed strictly and in the case of acquittal of the accused the Court will have no power to pass an order of forfeiture of the monies or destruction of the articles of gaming under S. 8 of the Act. 1953 All 463 (463) [AIR V 40 C 216] : 1953 Cri L Jour 1017.

[6] Section 13 of the Act justifies only confiscation of instruments of Gaming. Money is not an instrument of gaming and therefore its confiscation under S. 13 is not justified. Section 8 clearly says that all money found in a gaming house may be confiscated and there is no question whether money is an instrument of gaming or not. 1938 All 252 (253) [AIR V 25] : ILR (1938) All 422 : 39 Cri L Jour 548.

Case under Indore Prevention of Gambling Act, 1 of 1909

[7] Section 8 of the Indore Prevention of Gambling Act, 1 of 1909 is controlled by S. 6 of that Act. All moneys found in the common gaming house and seized by the police may be forfeited provided they could reasonably be suspected to have been used or to be intended to have been used for the purpose of gaming. 1951 Madh-B 33 (34) [AIR V 38 C 5].

Section 10 — Note 1

[1] Section 10 must be read strictly, and if the warrant is not issued strictly in accordance with the provisions of the Act, then a person found in the house when it is searched cannot be examined under S. 10. 1934 All 524 (525) [AIR V 21] : 35 Cri L Jour 878 ✠ 1953 Vindh Pra 18 (19) [AIR V 40 C 10] : 1953 Cri L Jour 985 ✠ ('39) 1939 Nag L Jour 357 (358) ✠ 1925 All 301 (301) [AIR V 12] : 26 Cri L Jour 396 ✠ 1944 Nag 328 (328) [AIR V 31] : ILR (1945) Nag 430 : 46 Cri L Jour 147.

[2] The prosecution can proceed against some only of the persons found gaming or present in a common gambling house and can call others not prosecuted as witnesses. S. 10 does not apply to such persons. It applies to persons converted by the Magistrate into witnesses, out of the persons brought before him for trial. ('13) 14 Cri L Jour 293 (295) : 9 Nag L R 68.

[3] A person found in the house or other place upon entry by the police will in due course be brought before the Magistrate as an accused in most cases and still he would be liable to be examined on oath. Whether he is going to deny all knowledge or refuse to give evidence against himself or voluntarily implicate himself is to be seen after the oath is administered to him. He is certainly entitled to claim the benefit of article 20 (3) of the Constitution but that is not a matter on the ground of which his co-accused can object to his being examined as a witness. Similarly his having pleaded not guilty has also no bearing on his liability to be examined. That concerns only the value of the evidence that he might give. If he does voluntarily implicate himself S. 30, Evidence Act would be applicable though the position of such a witness is somewhat stronger because of the

No person so required to be examined as a witness shall be excused from being so examined when brought before such Magistrate as aforesaid, or from being so examined at any subsequent time by or before the same or any other Magistrate, or by or before any Court on any proceeding or trial in any ways relating to such unlawful gaming or any such acts as aforesaid, or from answering any question put to him touching the matters aforesaid, on the ground that his evidence will tend to criminate himself.

Any such person so required to be examined as a witness, who refuses to make oath or take affirmation accordingly or to answer any such question as aforesaid, shall be subject to be dealt with in all respects as any person committing the offence described in section 178 or section 179 (as the case may be) of the Indian Penal Code.

STATE AMENDMENTS

MADHYA PRADESH

In its application to the State of Madhya Pradesh, in section 10, for the words "house, walled enclosure, room or place" wherever they occur the words "house, room, tent, enclosure, space, vehicle, vessel or place" shall be *substituted*. — C. P. Act III of 1927, S. 4.

PUNJAB

Same as that of Madhya Pradesh. — Punj. Act I of 1929, S. 4.

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in section 10, for the words "house, walled enclosure, room or place" wherever they occur the words "house, room, tent, walled enclosure, space, vehicle, vessel or place" shall be *substituted*. — U. P. Act I of 1917, S. 3.

11. Witnesses indemnified.

Any person who shall have been concerned in gaming contrary to this Act, and who shall be examined as a witness before a Magistrate on the trial of any person for a breach of any of the provisions of this Act relating to gaming, and who, upon such examination, shall in the opinion of the Magistrate make true and faithful discovery, to the best of his knowledge, of all things as to which he shall be so examined, shall thereupon receive from the said Magistrate a certificate in writing to that effect, and shall be freed from all prosecutions under this Act for anything done before that time in respect of such gaming.

Section 10 — Note 1 *(contd.)*

right of the co-accused to cross-examine him. 1953 Vindh Pra 18 (19) [AIR V 40 C 10] : 1953 Cri L Jour 985.

[4] The whole procedure of the Public Gambling Act is a special one and overrides the general law as to the procedure connected with pardons laid down in the Criminal Procedure Code. It is open to a Magistrate in pursuance of the provisions of Ss. 10 and 11 to grant a pardon to a co-accused and use his evidence against the accused. 1934 Oudh 90 (92) [AIR V 21] : 9 Luck 355 : 35 Cri L Jour 397.

[5] The evidence of an accomplice who accepts the pardon tendered to him by the trying Magistrate under S. 10 must be viewed with great care and caution and it is not safe to rely on his uncorroborated testimony. 1934 Oudh 90 (92) [AIR V 21] : 9 Luck 355 : 35 Cri L Jour 397 *1920 All 150 (152) [AIR V 7] : 42 All 385 : 21 Cri L Jour 737.

[6] There is no prohibition in S. 10 against the conviction of an approver who does not depose truthfully. 1937 Nag 396 (397) [AIR V 24] : ILR (1939) Nag 380 : 39 Cri L Jour 85 * 1920 All 150 (151) [AIR V 7] : 42 All 385 : 21 Cri L Jour 737.

[7] Approver not making truthful statement —Approver can be returned to dock and convicted — The procedure is not governed by Criminal Procedure Code and no separate trial is necessary. 1937 Nag 396 (397) [AIR V 24]: ILR (1939) Nag 380 : 39 Cri L Jour 85.

[8] Evidence of punter — Evidence of person, deliberately sent by investigating officer, to offer bet, should be received with caution, unless corroborated. ('55) 1955 Cri L Jour 170 (2) (Madh B). (Case under M. B. Prevention of Gambling Act.)

Section 11 — Note 1

[1] Section 11 allows an approver to be acquitted only if a disclosure made is found to be true and faithful. 1917 Oudh 102 (103) [AIR V 4] : 20 Oudh Cas 4 : 18 Cri L Jour 494 * 1937 Nag 396 (397) [AIR V 24] : ILR (1939) Nag 380 : 39 Cri L Jour 85.

[2] Where an accomplice has accepted the pardon tendered to him by the trying Magistrate under S. 10 in order to save his own skin, his evidence must be viewed with great care and caution, and it will not be safe to act upon his evidence unless corroborated in material particulars. 1934 Oudh 90 (92) [AIR V 21] : 9 Luck 355 : 35 Cri L Jour 397.

12. Act not to apply to certain games.

Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played.

STATE AMENDMENTS

PUNJAB

In its application to the State of Punjab, Section 12 is *repealed* by Punj. Act I of 1929, S. 5.

UTTAR PRADESH

In its application to the State of Uttar Pradesh, Section 12 is *repealed* by U. P. Act I of 1917, S. 4.

13. Gaming and setting birds and animals to fight in public streets.

A police officer may apprehend without warrant—any person found playing for money or other valuable thing with cards, dice, counters or other instruments of gaming, used in playing any game not being a game of mere skill in any public street, place or thoroughfare situated within the limits aforesaid, or

any person setting any birds or animals to fight in any public street, place or thoroughfare situated within the limits aforesaid or

any person there present aiding and abetting such public fighting of birds and animals.

Such person when apprehended shall be brought without delay before a Magistrate, and shall be liable to a fine not exceeding fifty rupees, or to imprisonment, either simple or rigorous, for any term not exceeding one calendar month;

Section 12 — Note 1

[1] Ring game is not a game of mere skill. ('28) 29 Cri L Jour 738 (738) (All) ✣ ('11) 12 Cri L Jour 612 (613) : 34 All 96 (DB) ✣ 1914 Cal 532 (534) [AIR V 1] : 15 Cri L Jour 276 (DB).

[2] In the dart game there was a target divided into different coloured half inch squares each numbered from 1 to 10 in sequence, but the vertical rows did not contain the numbers arranged in their sequence. The numbers were scattered about the board haphazard. The player was given 5 darts and if he put one of these darts into one of the squares bearing the number on which he had staked he got twice his stake back. The darts which were of varying weight and length were thrown from a distance of about 12 feet in a bad light, and the numbers were not distinguishable except by persons of keen eye sight—*Held* the dart game was game of chance and was not intended to be anything else. 1934 Nag 225 (226) [AIR V 21] : 31 Nag L R 24 : 36 Cri L Jour 60.

[3] In the roll-up or table game the player rolled 2 resilient rubber balls up to the far end of the table where there are 13 shallow cups numbered 1 to 13. The sum of the numbers of the 2 cups in which the balls eventually settled was the player's score and it was open to him to bet that he would score 6 or under or 7 or 8 and over; if he successfully staked on 6 and under or on 8 and over he presumably got twice his stake back, and if he successfully staked on 7 he got a higher reward —*Held* that the element of chance in the roll-up or table game was greater than in the dart game. 1934 Nag 225 (226) [AIR V 21]: 31 Nag L R 24 : 36 Cri L Jour 60.

[4] Articles for sale of value of two pice to one rupee—Number of tickets equal to number of articles — Tickets sold for one anna each—Sale does not constitute gambling. 1933 All 482 (482) [AIR V 20] : 34 Cri L Jour 1128.

SECTION 13 — SYNOPSIS

1. Scope.
2. Public place.
3. "Limits aforesaid."
4. Sentence.
5. Confiscation of money.

1. Scope. — [1] Gaming is not punishable by law unless it be carried on in public places or thoroughfares or in common gaming houses. ('71) 3 N W P H C R 134 (135).

[2] The gist of offence under S. 13 is such publicity of action that the ordinary passer-by cannot avoid seeing it and get enticed in consequence. ('13) 14 Cri L Jour 670 (672) : 9 Nag L R 164.

[3] Section 13 which makes it an offence to gamble in a public street, place or thoroughfare does not lay down as a necessary ingredient of the offence the condition that 'Nal' should be taken out. Therefore if a person is found gambling in a public street, place or thoroughfare he commits an offence punishable under S. 13 even without proof of 'Nal' being taken out. ('55) 1955 All L Jour 515 (516).

[4] Before the prosecution can succeed in proving a case under S. 13, they must bring home clearly to the accused persons that they were responsible for carrying on the game and, therefore, were gambling at the time when the offence is alleged to have been com-

Destruction of instruments of gaming found in public street.

and such police-officer may seize all instruments of gaming found in such public place or on the person of those whom he shall so arrest, and the Magistrate may on conviction of the offender order such instruments to be forthwith destroyed.

STATE AMENDMENTS

MADHYA PRADESH

In its application to the State of Madhya Pradesh, in section 13—

(i) for the first three paragraphs, *substitute* the following, namely :—

"A Police Officer may apprehend and search without warrant—

(a) any person found gaming or reasonably suspected to be gaming in any public street, or thoroughfare, or in any place to which the public have or are permitted to have access;

(b) any person setting any birds or animals to fight in any public street, thoroughfare, or in any place to which the public have or are permitted to have access;

(c) any person there present aiding and abetting such public fighting of birds and animals." —M. P. Act XII of 1954, S. 3 [26-3-1954].

(ii) in the fourth paragraph, for the words "fifty rupees" the words "one hundred rupees" and for the words "one calendar month" the words "four calendar months" shall be *substituted*; and

(iii) in the fifth paragraph, after the words "may seize" the words "all moneys and" and after the words "order such", the words "moneys to be forfeited and such" shall be *inserted*. —M. P. Act XXV of 1950, S. 7 [3-11-1950].

PUNJAB

In its application to the State of Punjab, for section 13, *substitute* the following sections, namely :—

"**13.** *Penalty for gaming in public street, etc.*—Whoever is found gaming in any public street, place or thoroughfare or setting any bird or any animal to fight in any such street, place or thoroughfare shall be punishable with fine not exceeding fifty rupees or with imprisonment of either description for a term not exceeding one month.

"**13A.** *Enhanced punishment if offence under section 13 relates to gaming with figures, etc.* — Where an offence committed by any person under section 13 relates to gaming on

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Section 13 — Note 1 *(contd.)*

mitted. 1936 Cal 184 (184, 185) [AIR V 23] : 62 Cal 865 : 37 Cri L Jour 530 (DB).

[5] Gaming, wagering or betting have all one common feature, that the game is a game of chance and played with stakes. In order, therefore, that gaming be established, the prosecution must establish (1) that the game being played was a game of chance, and (2) that it was being played with stakes. The mere proof that some game of cards was being played and that some money was found in possession of the accused is not enough to establish that they were gaming. 1952 All 817 (817) [AIR V 39] : 1952 Cri L Jour 1471.

[6] Where the eye-witnesses stated that they saw satta gambling being indulged in by the applicant with one *B*, but they did not depose about the words used by *B* and the applicant, and what they stated was the effect produced on their minds by the words used by *B* and the applicant, *Held*, that the words uttered by the applicant and *B* would be the real evidence and it would be for the Court to interpret them and determine whether they amount to betting or wagering. The effect produced by them on the minds of the witnesses was wholly irrelevant and inadmissible in evidence; it was not for them to judge whether the applicant was betting or not. 1959 All 799 (799) [AIR V 46 C 244] : 1959 Cri L Jour 1397.

[7] The recovery of instruments of gaming is relevant only if the offences under Ss. 3 and 4 are to be proved by presumption. Public gambling punishable under S. 13 is to be proved by evidence and not by presumption. The recovery of instruments of gaming may constitute circumstantial evidence to prove the offence but it is not conclusive. It may not be considered enough in certain circumstances. 1959 All 799 (800) [AIR V 46 C 244]: 1959 Cri L Jour 1397.

[8] Section 13 as amended by U. P. Act 1 of 1917 does not apply to a case of wagering contract in respect of sale of goods. 1927 All 823 (824) [AIR V 14] : 49 All 926 (DB).

[9] Betting on a number of carts that would enter a cotton market compound on a particular day does not amount to an offence. The act is not covered by S. 13. ('39) 1939 Nag L Jour 401 (401).

[10] To obtain conviction under S. 13 accused must have been found playing for money or other valuable thing with some instrument of gaming. 1917 Nag 154 (157) [AIR V 4]: 14 Nag L R 137: 19 Cri L Jour 917.

[11] It is not every kind of gambling which is prohibited by S. 13. What is prohibited by it is playing for money or other valuable thing with instruments of gaming. Where what has been seized can by no stretch of imagination be regarded as an instrument of gaming and the transaction which the prosecution has proved is nothing more than betting then the conviction of the accused under S. 13 cannot be sustained. ('54) I L R (1954) Nag 411 (413, 414).

[12] In order that a person may be guilty under this section he must be found actually

any figures or numbers or dates to be subsequently ascertained or disclosed, such person shall, notwithstanding anything contained in that section, be liable to fine not exceeding five hundred rupees, or to imprisonment of either description for a term not exceeding six months or to both.

"13B. *Power to arrest without warrant.* — Any police officer may arrest without a warrant any person committing in his view any offence made punishable by section 13 or section 13A." —Punj. Act IX of 1960, S. 4 [28-1-1960].

UTTAR PRADESH

In its application to the State of Uttar Pradesh, in section 13—

(a) for the words "playing for money or other valuable thing with cards, dice, counters or other instruments of gaming, used in playing any game not being a game of mere skill" *substitute* the word "gaming." —U. P. Act I of 1917, S. 5.

(b) in the fourth paragraph, for the words "to a fine not exceeding fifty rupees, or to imprisonment, either simple or rigorous, for any term not exceeding one calendar month" *substitute* the following, namely,—

"*(a) For* the first offence to a fine not exceeding two hundred and fifty rupees or to imprisonment of either description for a term not exceeding one month; and

(b) For the second and every subsequent offence to a fine not exceeding five hundred rupees or to imprisonment of either description for a term not exceeding six months.

Explanation. — *For* the purpose of this section "public place" includes any open space situate adjacent to and abutting a public street and not separated therefrom by a boundary wall." —U. P. Act XXXIV of 1952, S. 4 [5-12-1952].

STATE AMENDMENT

SECTION 13A
UTTAR PRADESH

In its application to the State of Uttar Pradesh, after section 13, *insert* the following new section, namely :—

"13A. *Exemption of games of mere skill.*—Nothing in this Act shall apply to any game of mere skill, as distinguished from a game of chance or a game of chance and skill combined, unless it is carried on in a common gaming-house." —U. P. Act X of 1938, S. 2.

Section 13 — Note 1 *(contd.)*

playing in a public place for money or other valuable thing with cards, dice, counters or other instruments of gaming used in playing any game. Recording bets or laying bets about an uncertain event which the recorders and betters cannot prevent or bring about is not 'playing' a game in any reasonable sense of that expression. ('46) 1946 Jaipur L R 408 (411). (Case decided under Jaipur Gambling Act.)

[13] If a Police Party finds people playing with certain instruments used for gaming, they have no right to arrest any of the persons under S. 13 unless the persons are found playing for money or other valuable thing. It is the most important ingredient for the offence that the person or persons must have been seen playing for money or other valuable thing. The fact that the accused were playing for money or other valuable thing cannot be inferred from the conduct of the persons in running away at the sight of the Police. It is necessary for the Police Officer to state in so many words that he found the persons playing for money or other valuable thing. ('61) 1961 (2) Cri L Jour 504 (505, 506) (Manipur.)

[14] Books of accounts in which bets are recorded by their very nature are not instruments of gaming under S. 13. 1952 Hyd 147 (148) [AIR V 39] : ILR (1952) Hyd 445 : 1952 Cri L Jour 1307 (DB). (Case decided under S. 13 of the Hyderabad Public Gambling Act, 2 of 1305F.)

[15] Slips used for recording bets are not instruments of gaming. 1959 All 799 (800) [AIR V 46 C 244] : 1959 Cri L Jour 1397 ✠ ('46) 1946 Jaipur L R 408 (411). (Case decided under Jaipur Gambling Act.)

[16] Applicant said to have indulged in satta gambling with B—Slips recording bets recovered from possession of B — Applicant could not be convicted in absence of any connection arising out of gaming between him and slips. 1959 All 799 (800) [AIR V 46 C 244]: 1959 Cri L Jour 1397.

[17] Where the petitioner alleged to be indulging in Satta gambling accepted one rupee currency note from a decoy punter for staking on certain numbers and after he made an entry regarding the stake on a slip of a paper, the raiding party arrived and took into possession from the petitioner, one rupee currency note, a pencil, the slip and some cash, *Held*, that these facts did not constitute the offence under S. 13 of the Act. At best it was merely a preparation which was not culpable. That apart, merely entering on a chit the alleged stakes could not constitute gambling as envisaged under S. 13. 1960 Punj 72 (73) [AIR V 47 C 29] : 1960 Cri L Jour 275 (1).

2. Public place.—[1] The word 'place' is used along with 'public street' or 'thoroughfare.' A public place must be interpreted in connection with a public street and a public thoroughfare with which it is joined. 1944 Nag 328 (329) [AIR V 31] : ILR (1945) Nag 430 : 46 Cri L Jour 147 ✠ ('13) 14 Cri L Jour 670 (672) : 9 Nag L R 164.

[2] No doubt, a public street, place or thoroughfare is not necessarily a street, place or throughfare where the public has a right

Section 13 — Note 2 *(contd.)*

to go or which the public has a right to use. If a street, place or thorougfare is in fact used by the public, it will be a public street, place or thoroughfare within the meaning of S. 13. A public place must be a place which is either open to the public or is used by the public. 1954 All 356 (357) [AIR V 41 C 151] : 1954 Cri L Jour 765. (An arhar field on the road side in which crop is standing cannot be said to be a public place.)

[3] In order to bring a particular spot within S. 13, it is not necessary that the public should have a legal right to go to it. All that is necessary is that the public actually go there, whether as of right or on sufferance of the proprietors. 1927 Lah 672 (673) [A I R V 14] : 9 Lah 255 : 28 Cri L Jour 790 ✣ 1924 All 768 (769) [AIR V 11] : 46 All 787 : 25 Cri L Jour 1308 ✣ 1917 Nag 154 (157, 159) [A I R V 4] : 14 Nag L R 137 : 19 Cri L Jour 917 ✣ 1942 Lah 36 (37) [AIR V 29] : 43 Cri L Jour 446 ✣ 1926 Lah 149 (149, 150) [AIR V 13] : 26 Cri L Jour 1455 ✣ 1925 Nag 123 (123) [A I R V 12] : 25 Cri L Jour 1073.

[4] When the public have access to a place without their access being refused or interfered with, that place is a public place, whether the public have a right to go there or not. 1922 All 542 (542) [AIR V 9] : 44 All 265 : 23 Cri L Jour 67 ✣ ('54) 1954 All L Jour 487 (488). (Case under S. 13 as it stood before the U. P. Amendment of 1952.)✣1952 Hyd 147 (148) [AIR V 39] : ILR (1952) Hyd 445 : 1952 Cri L Jour 1307 (DB). (Case decided under S. 13 of the Hyderabad Public Gambling Act, 2 of 1305F.) ✣ 1938 All 209 (209) [AIR V 25] : ILR (1938) All 348 : 39 Cri L Jour 441✣ 1922 Oudh 275 (276) [AIR V 9] : 26 Oudh Cas 41 : 23 Cri L Jour 581.

[5] In order to be a public place or a public thoroughfare within the meaning of S. 13, the place or the thoroughfare must either be open to the public or actually used by the public and the mere publicity of the gambling place or its visibility from a public place or a public thoroughfare is not sufficient. 1934 All 17 (19) [AIR V 21] : 35 Cri L Jour 564 ✣ 1954 All 356 (357) [AIR V 41 C 159] : 1954 Cri L Jour 765. (Publicity of place not a necessary element in making a place a public place.) ✣ ('54) 1954 All L Jour 487 (488). (Case under S. 13 as it stood before U. P. Amendment of 1952.)✣ 1952 Hyd 147 (148) [AIR V 39] : ILR (1952) Hyd 445 : 1952 Cri L Jour 1307 (DB). (Case decided under S. 13 of the Hyderabad Public Gambling Act -2 of 1305F) ✣ 1927 All 560 (561) [AIR V 14] : 49 All 913 : 28 Cri L Jour 666 ✣ 1922 Oudh 275 (276) [AIR V 9]: 26 Oudh Cas 41 : 23 Cri L Jour 581 ✣ ('82) 1882 Pun Re (Cr) No. 17, p. 21 (21) (DB) ✣ ('82) 1882 Pun Re (Cr) No. 13 p. 16 (16, 17) (DB).

[6] It is not the question of title to the place nor the nature of its metes and bounds but the use to which the place is put. 1924 All 768 (769) [AIR V 11] : 46 All 787 : 25 Cri L Jour 1308 ✣ 1954 All 356 (357) [AIR V 41 C 159] : 1954 Cri L Jour 765. (Public ownership not necessary to make a place a public place.) ✣ ('54) 1954 All L Jour 487 (488). (Case decided under S. 13, as it stood before U. P. Amendment of 1952 — A place may be a public place irrespective of whether it is owned by a private person, or is vested in a public body like Municipal Board or District Board or the State.)

[7] The question whether any place is a public place within the meaning of S. 13 depends upon the character of the place itself and the use actually made of it. 1942 Lah 36 (37) [AIR V 29] : 43 Cri L Jour 446 ✣ 1952 Hyd 147 (148) [AIR V 39] : I L R (1952) Hyd 445: 1952 Cri L Jour 1307 (DB). (Case decided under S. 13 of the Hyderabad Public Gambling Act 2 of 1305F.)

[8] The word "place" is used in S. 13 in conjunction with street and thoroughfare and could not have been intended to apply to a private place open to public view. 1927 All 560 (561) [A I R V 14] : 49 All 913 : 28 Cri L Jour 666 ✣ 1930 Oudh 394 (395) [AIR V 17] : 6 Luck 90 : 31 Cri L Jour 1118.

[9] A place which is private property may be a public place within the meaning of S. 13, and the question whether it is a public place depends on the character of the place itself and the use actually made of it. ('36) 37 Cri L Jour 712 (712) (Nag) ✣ 1926 Lah 149 (149, 150) [AIR V 13] : 26 Cri L Jour 1455 ✣ ('13) 14 Cri L Jour 670 (672): 9 Nag L R 164✣ ('04) 31 Cal 542 (546): 1 Cri L Jour 349 (DB)✣ 1925 Nag 123 123) [AIR V 12]: 25 Cri L Jour 1073.

[10] The fact that the gaming was going on a place which was exposed to public view and not shut out does not make the place a public place. 1944 Nag 328 (329) [AIR V 31]: ILR (1945) Nag 430 : 46 Cri L Jour 147✣1920 Lah 104 (105) [AIR V 7] : 21 Cri L Jour 512✣ 1934 All 17 (19) [AIR V 21] : 35 Cri L Jour 564 ✣ 1930 Oudh 394 (395) [AIR V 17] : 31 Cri L Jour 1118: 6 Luck 90✣1927 All 560 (561) [AIR V 14] : 49 All 913 : 28 Cri L Jour 666.

[11] A place which is in full view of the public as they pass to and fro, is also freely accessible for all classes of the public and belongs to public body, which has never enclosed it is a public place within S. 13. 1927 Lah 672 (673) [AIR V 14] : 9 Lah 255 : 28 Cri L Jour 790 ✣ 1930 Oudh 394 (395) [AIR V 17] : 6 Luck 90 : 31 Cri L Jour 1118.

[12] Private grove used by the public without interference is a public place. 1922 All 542 (542) [AIR V 9] : 44 All 265 : 23 Cri L Jour 67 ✣ 1949 All 125 (126) [AIR V 36 C 48] : 50 Cri L Jour 136.

[13] The bank of a tank forming part of a temple property, to which the public are allowed to have access and where the people actually sit to bask in the sun is a public place within the meaning of S. 13. 1942 Lah 36 (37) [AIR V 29] : 43 Cri L Jour 446.

[14] A footpath through a private grove used by the public as of right is a public place. 1922 Oudh 196 (197) [AIR V 9] : 25 Oudh Cas 114 : 23 Cri L Jour 579.

[15] A serai used as a stand for hackney carriages, and resorted to by the public is a public place. 1926 Lah 149 (149, 150) [AIR V 13] : 26 Cri L Jour 1455.

[16] A blind alley approached by a circuitous lane and removed at a considerable

14. Offences by whom triable.

Offences punishable under this Act shall be triable by any Magistrate having jurisdiction in the place where the offence is committed.

But such Magistrate shall be restrained within the limits of his jurisdiction under the Code of Criminal Procedure, as to the amount of fine or imprisonment he may inflict.

15. Penalty for subsequent offence.

Whoever, having been convicted of an offence punishable under section 3 or section 4 of this Act, shall again be guilty of any offence punishable under either of such sections, shall be subject for every such subsequent offence to double the amount of punishment to which he would have been liable for the first commission of an offence of the same description :

Section 13 — Note 2 *(contd.)*

distance from a high way is not a "public" place. 1923 Lah 278 (279) [AIR V 10] : 23 Cri L Jour 624.

[17] The bank of a canal belonging to the Government is not a public place. 1921 Lah 141 (142) [AIR V 8].

[18] The premises of a railway station to which the public have no right to go is not a public place. 1920 Lah 262 (262) [AIR V 7] : 21 Cri L Jour 691.

[19] On the face of it, an arhar field would not be a public place since the public would have no access thereto. It is private property into which if any unconnected person were to enter he would be committing trespass. Where the arhar field on which gaming was found to be going on, although it was an open space, was not adjacent to and abutting a public street but was separated therefrom by another field the field is not a public place, not only per se, but even under the extended definition of that term under the explanation added to the section by S. 4 of the U. P. Public Gambling (Amendment) Act, XXX of 1952. ('57) 1957 All L Jour 282 (282, 283).

[20] The accused who is found gambling in a grove, which is a private property commits no offence. ('04) 1 Cri LJ 272 (272, 273) (All).

[21] A verandah attached to a room of a private house, looking on an alley, is not a 'public place'. ('81) 1881 All W N 17 (17).

[22] Chabutra of shop belonging to a private person is not public place. ('81) 1881 All W N 8 (8).]

[*See also* ('33) 1933 Mad W N 1422 (1423).]

[23] Gambling in a zamindar's grove near a village — A footpath running through the grove — Gambling not taking place on footpath—*Held*, the gambling was not in a 'public place' within meaning of S. 13. ('04) 1904 All W N 92 (92).

3. "Limits aforesaid." — [1] 'Limits aforesaid' refer to the whole of the territories under the administration of a Lieutenant-Governor. Hence gambling in a kachcha public road outside municipal limits is an offence. ('11) 12 Cri L Jour 107 (108) (All).

4. Sentence. — [1] A person who offends against S. 13 can be punished either with imprisonment or with fine, but not with both. 1927 Lah (672) (674) [AIR V 14] : 28 Cri L Jour 790✣('80) 1880 Pun Re (Cr) No. 25 p. 42 (42) (DB).

[2] The imposition of the maximum penalty of a fine under S. 13 for the purpose of rewarding the police officer and the informer out of it is illegal. Magistrates as judicial officers should not concern themselves with rewarding the services of a police officer and an informer. ('47) 1947 O A (H C "B") 1 (1).

[3] The Act makes no provision for a reward to the informer except when the accused is convicted under S. 3 or S. 4. Hence in the case of a conviction under S. 13 an order rewarding the informer is illegal. ('47) 1947 O A (H C "B") 1 (1, 2).

5. Confiscation of money.—[1] Only the instruments of gaming can be confiscated under S. 13. 1918 All 390 (390) [AIR V 5] : 40 All 517 : 19 Cri L Jour 700.

[2] Section 13 justifies only confiscation of instruments of gaming; money is not an instrument of gaming and therefore, its confiscation under S. 13 is not justified. Section 8 of the Act says clearly that all money found in a gaming house may be confiscated and there is no question whether money is an instrument of gaming or not. 1938 All 252 (253) [AIR V 25]: ILR (1938) All 422: 39 Cri L Jour 548.

[3] Money found in possession of accused cannot be forfeited. 1921 Oudh 175 (175) [AIR V 8] : 24 Oudh Cas 264✣('57) 1957 Cri L Jour 284 (284) (Madh B). (Case decided under S. 12 of the M. B. Gambling Act 51 of 1949.) ✣ ('39) 1939 Nag L Jour 403 (403) ✣ 1938 All 11 (11) [AIR V 25] : 39 Cri L Jour 227✣('04) 26 All 270 (271): 1 Cri L Jour 35✣ ('91) 1891 Pun Re (Cr) No. 18 p. 60 (61).

[4] Section 13 does not justify the seizure of money. Money is not an instrument of gaming within the meaning of that section. In so far as the Act is concerned, the Magistrate has no authority to confiscate this money. But he has this authority under the provisions of S. 517, Criminal P. C., where it has been produced before the Court. 1938 All 209 (210) [AIR V 25] : ILR (1938) All 348 : 39 Cri L Jour 441.

Section 14 — Note 1

[1] Magistrate issuing warrant trying case— Accused is materially prejudiced. 1934 All 987 (988) [AIR V 21] : 36 Cri L Jour 293.

Provided that he shall not be liable in any case to a fine exceeding six hundred rupees, or to imprisonment for a term exceeding one year.

STATE AMENDMENTS

MADHYA PRADESH

In its application to the State of Madhya Pradesh, in section 15, the words and figure "section 3 or" shall be *omitted*. —C. P. Act III of 1927, S. 7.

PUNJAB

In its application to the State of Punjab, for section 15 *substitute* the following :—

"**15.** *Penalty for subsequent offence under section 3.* — Whoever, having been convicted of an offence punishable under section 3, shall again be convicted of any offence punishable under that section shall be punished :—

(a) for a second offence with imprisonment of either description which may extend to six months, or with a fine which may extend to Rs. 1,000 or with both;

(b) for a third or any subsequent offence, with imprisonment of either description, which may extend to one year, and in the absence of special reasons to the contrary to be recorded in the judgment of the Court, shall not be less than one month, together with a fine which may extend to Rs. 1,000." —Punj. Act I of 1929, S. 7.

UTTAR PRADESH

In its application to the State of Uttar Pradesh for existing S. 15, *substitute* the following, namely :—

"**15.** Whoever, having been convicted of an offence punishable under section 3 or 4 of this Act, shall again be guilty of any offence punishable under either of the said sections, shall for every such subsequent offence be liable—

(a) if it is an offence under section 3 to a fine not exceeding one thousand rupees and to imprisonment of either description for a term not exceeding twelve months; and

(b) if it is an offence under section 4 to a fine not exceeding five hundred rupees and to imprisonment of either description for a term not exceeding six months."

—U. P. Act XXXIV of 1952, S. 5 [5-12 1952].

STATE AMENDMENTS

SECTIONS 15A, 15B

PUNJAB

In its application to the State of Punjab, after section 15 *insert* the following new sections, namely :—

"**15A.** *Penalty for subsequent offence under section 4.*—Whoever having been convicted of an offence punishable under section 4 shall again be convicted of any offence punishable under that section shall be liable for every such subsequent offence to double the amount of punishment to which he would have been liable for the first commission of an offence of the same description." —Punj. Act I of 1929, S. 8.

"**15B.** *Enhanced punishment for subsequent offence under sections 4A and 13A.* — Whoever, having been convicted of an offence punishable under section 4A or section 13A, is again convicted of an offence punishable under either of those sections shall,—

(a) for a second offence, be punished with not less than twice the punishment awarded to him on his first conviction; and

(b) for a third or any subsequent offence, be punished with the punishment specified in clause (a) :

Provided that the punishment under clause (b) shall not be less than imprisonment of either description for six months." —Punj. Act IX of 1960, S. 5 [28-1-1960].

16. Portion of fine may be paid to informer.

The Magistrate trying the case may direct any portion of any fine which shall be levied under sections 3 and 4 of this Act, or any part of the moneys or proceeds of articles seized and ordered to be forfeited under this Act, to be paid to an informer.

Section 16 — Note 1

[1] Section 16 authorises the payment of any portion of fine levied under Ss. 3 and 4 to informers, but it does not authorise the payment of any portion of fine to police officers for their efforts. ('70) 1870 Pun Re (Cr) No. 2 p. 4 (4) (DB).

[2] The practice of giving rewards to police officers is to be deprecated as it encourages false prosecutions. 1948 All 93 (94) [AIR V 35 C 39] : ILR (1947) All 739 : 49 Cri L Jour 13.

17. Recovery and application of fines.

All fines imposed under this Act may be recovered in the manner prescribed by section 61 of the Code of Criminal Procedure[a] [b][* * *].

[a] *See* now the Code of Criminal Procedure, 1898 (V of 1898), Ss. 386, 387. [b] The words "and such fines shall (subject to the provisions contained in the last preceding section) be applied as the Lieutenant-Governor or Chief Commissioner, as the case may be, shall from time to time direct" were *omitted* by A. O., 1937 [1-4-1937].

18. Offences under this Act to be "offences" within the meaning of Penal Code. *[Repealed by the Repealing Act, 1874 (XVI of 1874), S. 1 and Sch., Pt. I.]*

STATE AMENDMENT

PUNJAB

In its application to the State of Punjab, after section 17, the following new section shall be deemed to be *inserted*, namely :—

"18. *Exemption of games of mere skill.* — Nothing in this Act shall apply to any game of mere skill wherever played." —Punj. Act I of 1929, S. 9.

[THE] PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT, 1958

(ACT XXXII of 1958)

[The Act printed here is as on 1-3-1961]

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STATEMENT OF OBJECTS AND REASONS

"The Public Premises (Eviction) Act, 1950, was enacted to provide a speedy machinery for the eviction of persons in unauthorised occupation of public premises and certain incidental matters. This Act has been declared ultra vires by the Calcutta, Allahabad and Punjab High Courts. The Calcutta High Court has held [*see* (1954) 58 Cal. W N 1066] that the provisions of the Act constitute a wholly unreasonable restriction on the fundamental right guaranteed to a citizen of acquiring and holding property and as such are void. According to the Allahabad High Court, [*see* AIR 1956 All 507 and 684] the provisions of the Act are discriminatory. The Punjab High Court, however, did not agree [*see* AIR 1958 Punj 1] with the Allahabad High Court that the Act offended against Art. 14 of the Constitution but it has held in agreement with the Calcutta High Court that the Act offends against the fundamental right to property conferred on citizens by the Constitution.

2. The above decisions have made it impossible for Government to take speedy action even in flagrant cases of unauthorised occupation of public premises and the only way in which such persons may be evicted is by the ordinary process of law which often involves considerable delay. It has, therefore, become necessary to provide a speedy machinery for the eviction of persons who are in unauthorised occupation of public premises keeping in view at the same time the necessity of complying with the provisions of the Constitution. The present Bill seeks to achieve this object.

3. This Bill provides for the appointment of estate officers who have been empowered to evict persons in unauthorised occupation of public premises. The procedure which the estate officer is to follow for evicting such persons has been laid down in the Bill itself. Reasonable opportunity has to be given to the persons affected to show cause against the proposed order of eviction and also to present their case to the estate officer at the time of the inquiry. If the estate officer makes an order of eviction, he is to give the persons in occupation of the public premises thirty days' time to vacate the premises. Provision has also been made for an appeal

against every order of the estate officer to an independent judicial officer who will be the District Judge of the district in which the public premises are situated or such other judicial officer of not less than ten years' standing as the District Judge may nominate in this behalf. The provision for a fair hearing before estate officers and that of an appeal against their orders to an independent judicial officer will be a safeguard against any arbitrary exercise of powers by the estate officers. The Bill also contains provisions for recovery of rent and damages as an arrear of land revenue. This Bill seeks to replace the existing Public Premises (Eviction) Act, 1950."
—Gaz. of Ind., 1958, Extra, Pt. II-S. 3, p. 386.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Repealed in part by Act LVIII of 1960.

[THE] PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT, 1958

(ACT XXXII OF 1958)[a]

[16th September, 1958.]

An Act to provide for the eviction of unauthorised occupants from public premises and for certain incidental matters.

BE it enacted by Parliament in the Ninth Year of the Republic of India as follows :—

[a] For Statement of Objects and Reasons *see* Gaz. of Ind., 1958, Extra, Pt. II-Sec. 2 p. 386; and for Joint Committee Report *see ibid*, p. 635.

1. Short title and extent.

(1) This Act may be called THE PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT, 1958.

(2) It extends to the whole of India.

2. Definitions.

In this Act, unless the context otherwise requires,—

(a) "estate officer" means an officer appointed as such by the Central Government under section 3;

(b) "public premises" means any premises belonging to, or taken on lease or requisitioned by, or on behalf of, the Central Government; and, in relation to the Union territory of Delhi, includes also—

(i) any premises belonging to the Municipal Corporation of Delhi or any municipal committee or notified area committee, and

(ii) any premises belonging to the Delhi Development Authority, whether such premises are in the possession of, or leased out by, the said Authority;

(c) "premises" means any land or any building or part of a building and includes,—

(i) the garden, grounds and out-houses, if any, appertaining to such building or part of a building, and

(ii) any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof;

(d) "prescribed" means prescribed by rules made under this Act;

(e) "unauthorised occupation," in relation to any public premises, means the occupation by any person of the public premises without authority for such occupation, and includes the continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever.

Section 1 — Note 1

[1] The provisions of the Act do not offend the provisions of Art. 19 (1) (f) of the Constitution and the Act is valid. 1961 Punj 98 (100) [AIR V 48 C 30] : ILR (1961) 1 Punj 354 (DB).

3. Appointment of estate officers.

The Central Government may, by notification in the Official Gazette,—

(a) appoint such persons, being gazetted officers of Government, as it thinks fit to be estate officers for the purposes of this Act; and

(b) define the local limits within which, or the categories of public premises in respect of which, each estate officer shall exercise the powers conferred, and perform the duties imposed, on estate officers by or under this Act.

4. Issue of notice to show cause against order of eviction.

(1) If the estate officer is of opinion that any persons are in unauthorised occupation of any public premises and that they should be evicted, the estate officer shall issue in the manner hereinafter provided a notice in writing calling upon all persons concerned to show cause why an order of eviction should not be made.

(2) The notice shall—

(a) specify the grounds on which the order of eviction, is proposed to be made; and

(b) require all persons concerned, that is to say, all persons who are, or may be, in occupation of, or claim interest in, the public premises, to show cause, if any, against the proposed order on or before such date as is specified in the notice, being a date not earlier than ten days from the date of issue thereof.

(3) The estate officer shall cause the notice to be served by having it affixed on the outer door or some other conspicuous part of the public premises, and in such other manner as may be prescribed, whereupon the notice shall be deemed to have been duly given to all persons concerned.

(4) Where the estate officer knows or has reasons to believe that any persons are in occupation of the public premises, then, without prejudice to the provisions of sub-section (3), he shall cause a copy of the notice to be served on every such person by post or by delivering or tendering it to that person or in such other manner as may be prescribed.

OBJECTS AND REASONS

"The Committee think that apart from the service of notice by affixation on the outer door or some other conspic uous part of public premises, the other modes of service should be regulated by rules to be made by the Central Government under" section 13 of the Act. Sub-sect. (3) is accordingly amended.

"The Committee are of opinion that if the estate officer knows or has reasons to believe that any persons are in occupation of public premises, he should serve notice on them by post or by delivering or tendering the same to them or in such other manner as may be prescribed in rules to be made under" section 13 of the Act. Sub-section (4) has been amended accordingly. —J. C. R.

5. Eviction of unauthorised occupants.

(1) If, after considering the cause, if any, shown by any person in pursuance of a notice under section 4 and any evidence he may produce in support of the same and after giving him a reasonable opportunity of being heard, the estate officer is satisfied that the public premises are in unauthorised occupation, the estate officer may, on a date to be fixed for the purpose, make an order of eviction, for reasons to be recorded therein, directing that the public premises shall be vacated by all persons who may be in occupation thereof or any

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Section 4 — Note 1

[1] Section 4 provides for the issue of a show-cause notice, which gives the person affected a right to appear and state his case before the estate officer who has been substituted for the "competent officer". Further if necessary, a full dress inquiry is contemplated. Moreover, the right of appeal conferred by the new Act is much more comprehensive and satisfactory than that in the old Act repealed by it as, being *ultra vires*. 1961 Punj 98 (100) [AIR V 48 C 30] : ILR (1961) 1 Punj 354 (DB).

part thereof, and cause a copy of the order to be affixed on the outer door or some other conspicuous part of the public premises.

(2) If any person refuses or fails to comply with the order of eviction within forty-five days of the date of its publication under sub-section *(1)*, the estate officer or any other officer duly authorised by the estate officer in this behalf may evict that person from, and take possession of, the public premises and may, for that purpose, use such force as may be necessary:

Provided that in the case of any such person who is not a Government employee and who has been in continuous occupation of the public premises for a period exceeding three years immediately preceding the date of the publication of the order of eviction, the estate officer shall not, if an application is made to him in this behalf, evict such person from the public premises within ninety days of such publication.

OBJECTS AND REASONS

Sub-section (1).— "This sub-clause has been amended to provide that the estate officer should take evidence which may be produced by the aggrieved party and that he should record reasons when he makes any order of eviction. The amendment also enjoins the estate officer to fix a date for making such order of eviction."— J. C. R.

6. Disposal of property left on public premises by unauthorised occupants.

(1) Where any persons have been evicted from any public premises under section 5, the estate officer may, after giving fourteen days' notice to the persons from whom possession of the public premises has been taken and after publishing the notice in at least one newspaper having circulation in the locality, remove or cause to be removed or dispose of by public auction any property remaining on such premises.

(2) Where any property is sold under sub-section *(1)*, the sale proceeds shall, after deducting the expenses of the sale and the amount, if any, due to the Central Government on account of arrears of rent or damages, be paid to such person or persons as may appear to the estate officer to be entitled to the same:

Provided that where the estate officer is unable to decide as to the person or persons to whom the balance of the amount is payable or as to the apportionment of the same, he may refer such dispute to the Civil Court of competent jurisdiction and the decision of the Court thereon shall be final.

OBJECTS AND REASONS

"A new Proviso has been added to sub-cl. (2) of this clause to enable the estate officer to refer to the Civil Court of competent jurisdiction any dispute between rival claimants to the balance of the sale proceeds of property left on public premises."—J. C. R.

7. Power to recover rent or damages in respect of public premises as arrears of land revenue.

(1) Where any person is in arrears of rent payable in respect of any public premises, the estate officer may, by order, require that person to pay the same within such time and in such instalments as may be specified in the order.

(2) Where any person is, or has at any time been, in unauthorised occupation of any public premises, the estate officer may, having regard to such principles of assessment of damages as may be prescribed, assess the damages on account of the use and occupation of such premises and may, by order, require that person to pay the damages within such time and in such instalments as may be specified in the order:

Provided that no such order shall be made until after issue of a notice in writing to the person calling upon him to show cause within such time as may be specified in the notice why such order should not be made, and until his objections, if any, and any evidence he may produce in support of the same, have been considered by the estate officer.

(3) If any person refuses or fails to pay the arrears of rent or any instalment thereof payable under sub-section *(1)* or the damages or any instalment thereof payable under sub-section *(2)* within the time specified in the order relating thereto, the estate officer may issue a certificate for the amount due to the Collector who shall proceed to recover the same as an arrear of land revenue.

OBJECTS AND REASONS

Sub-section (2). — "This clause has been amended to empower the estate officer to recover rent or damages in respect of public premises in such instalments as he may specify in his order."

— J. C. R.

8. Power of estate officers.

An estate officer shall, for the purpose of holding any inquiry under this Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) any other matter which may be prescribed.

9. Appeals.

(1) An appeal shall lie from every order of the estate officer made in respect of any public premises under section 5 or section 7 to an appellate officer who shall be the District Judge of the district in which the public premises are situate or such other judicial officer in that district of not less than ten years' standing as the District Judge may designate in this behalf.

(2) An appeal under sub-section *(1)* shall be preferred—

(a) in the case of an appeal from an order under section 5, within thirty days from the date of publication of the order under sub-section *(1)* of that section; and

(b) in the case of an appeal from an order under section 7, within thirty days from the date on which the order is communicated to the appellant:

Provided that the appellate officer may entertain the appeal after the expiry of the said period of thirty days, if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(3) Where an appeal is preferred from an order of the estate officer, the appellate officer may stay the enforcement of that order for such period and on such conditions as he deems fit.

(4) Every appeal under this section shall be disposed of by the appellate officer as expeditiously as possible.

(5) For the purposes of this section, a presidency town shall be deemed to be a district and the Chief Judge or the principal Judge of the City Civil Court therein shall be deemed to be the District Judge of the district.

10. Finality of orders.

Save as otherwise expressly provided in this Act, every order made by an estate officer or appellate officer under this Act shall be final and shall not be called in question in any original suit, application or execution proceeding.

Section 9 — Note 1

[1] Section 9 deals with appeals and S. 9 (4) clearly envisages a regular hearing of an appeal by an experienced judicial officer. It is thus clear that even if a question of disputed title arises out of the issue of a notice under S. 4 by an estate officer, the affected person has every opportunily to present his case and the dispute can be properly adjudicated on before any final action is taken under S. 5 of the Act. 1961 Punj 98 (100) [AIR V 48 C 30]: ILR (1961) 1 Punj 354 (DB).

11. Protection of action taken in good faith.

No suit, prosecution or other legal proceeding shall lie against the Central Government or the appellate officer or the estate officer in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or orders made thereunder.

12. Delegation of powers.

The Central Government may, by notification in the Official Gazette, direct that any power exercisable by it under this Act shall, subject to such conditions, if any, as may be specified in the notification, be exercisable also by a State Government or an officer of the State Government.

13. Power to make rules.

(1) The Central Government may, by notification in the Official Gazette, make rules[a] for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the form of any notice required or authorised to be given under this Act and the manner in which it may be served;

(b) the holding of inquiries under this Act ;

(c) the procedure to be followed in taking possession of public premises;

(d) the manner in which damages for unauthorised occupation may be assessed and the principles which may be taken into account in assessing such damages;

(e) the manner in which appeals may be preferred and the procedure to be followed in appeals;

(f) any other matter which has to be, or may be, prescribed.

(3) All rules made under this section shall, as soon as may be after they are made, be laid for not less than thirty days before each House of Parliament and shall be subject to such modifications as Parliament may make during the session in which they are so laid or the session immediately following.

[a] For Public Premises (Eviction of Unauthorised Occupants) Rules, 1958, *see* G. S. R. 1159, published in Gaz. of Ind. 1958, Extra, Pt. II-Sec. 3 (i), p. 549.

14. Repeal. *[Repealed by the Repealing and Amending Act, 1960 (LVIII of 1960), S. 2 and Sch. I.]*

[THE] PUBLIC SERVANTS (INQUIRIES) ACT, 1850
(ACT XXXVII of 1850)

[The Act printed here is as on 1-3-1961.]

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ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Short title given by Act I of 1897.
—Amended by Acts I of 1897; X of 1914.
—Adapted by A. O., 1937; A.C.A.O., 1948; A.L.O., 1950.
—Amended by Bih. Act XXXIV of 1951.
—Amended by Bom. Act XVII of 1945.
—Extended by Acts LIX of 1949; XXX of 1950.
—Extended in Bombay by Bom. Act IV of 1950.
—Extended in Madhya Pradesh by M. P. Act XII of 1950.
—Extended in Madras by Mad. Acts XXXV of 1949; XXII of 1957.
—Extended in Punjab by Punj. Act V of 1950.
—Extended partially to Berar by Act IV of 1941.
—Repealed in part by Acts XIV of 1870; XVI of 1874; XII of 1876; and locally by XVI of 1868.

[THE] PUBLIC SERVANTS (INQUIRIES) ACT, 1850
(ACT XXXVII OF 1850)[a]

[1st November, 1850.]

For regulating inquiries into the behaviour of Public Servants.

WHEREAS it is expedient to amend the law for regulating inquiries into the behaviour of public servants not removable [b][from their appointments] without the sanction of Government, and to make the same uniform throughout [c][* * *] [d][India]; It is enacted as follows :—

[a] The short title was given to the Act by the Public Servants (Inquiries) Act (1850) Amendment Act, 1897 (I of 1897), S. 1.

This Act has been declared to be in force in all the Provinces of India, except the Scheduled Districts, by the Laws Local Extent Act, 1874 (XV of 1874), S. 3.

It has been declared in force in the Santhal Parganas by the Santhal Parganas Settlement Regulation (III of 1872), S. 3 and partially extended to Berar by the Berar Laws Act, 1941 (IV of 1941).

It has been declared by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the following Scheduled Districts, namely:—

West Jalpaiguri	*See* Gaz. of Ind..	1881, Pt. I. p. 74.
The Districts of Hazaribagh, Lohardaga (now the Ranchi District, *see* Cal. Gaz. 1899, Pt. I, p. 44), and Manbhum, and Pargana Dalbhum and the Kolhan in the District of Singbhum . . .	Ditto	1881, Pt. I. p. 504.

The Scheduled portion of the Mirzapur District	*See* Gaz. of Ind.	1879, Pt. I, p. 383.
Jaunsar Bawar	Ditto	1879, Pt. I, p. 382.
The District of Lahaul	Ditto	1886, Pt. I, p. 301.
The Scheduled Districts of the C. P.	Ditto	1879, Pt. I, p. 771.
The Scheduled Districts in Ganjam and Vizagapatam	Ditto	1898, Pt. I, p. 870.
Assam (except the North Lushai Hills).	Ditto	1897, Pt. I, p. 299.
The Porahat Estate in the Singbhum District	Ditto	1897, Pt. I, p. 1059.

It has been extended, by notification under S. 5 of the last-mentioned Act, to the following Scheduled Districts, namely :—

Kumaon and Garhwal	*See* Gaz. of Ind.,	1876, Pt. I, p. 606.
The Tarai of the Province of Agra	Ditto	1876, Pt. I, p. 505.

As to the application of this Act in cases under the Bombay and Madras Civil Courts Acts, *see* the Bombay Civil Courts Act, 1869 (XIV of 1869), S. 33, and the Madras Civil Courts Act, 1873 (III of 1873), S. 20. For application of this Act to enquiries into the alleged misconduct of a Munsif, *see* the Bengal, North-Western Provinces and Assam Civil Courts Act, 1887 (XII of 1887), S. 28 (3).

This Act has been extended to the new Provinces and merged States by the Merged States (Laws) Act, 1949 (LIX of 1949), S. 3 [1-1-1950] and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (XXX of 1950), S. 3 [16-4-1950].

It has been extended to the States merged in or transferred to the State of—

Bombay : *see* Bom. Act IV of 1950, S. 3 [30-3-1950].

Madhya Pradesh : *see* M. P. Act XII of 1950, S. 3 and Sch. II [3-4-1950].

Madras : *see* Mad Acts XXXV of 1949, S. 3 [1-1-1950]; XXII of 1957, S. 3 and Sch. [18-12-1957].

Punjab : *see* Punj. Acts V of 1950, S. 3 [15-4-1950]; XXIII of 1960.

[b] *Inserted* by the Public Servants (Inquiries) Act (1850) Amendment Act, 1897 (I of 1897), S. 2. [c] The words "territories under the Government of" were *omitted* by A.C.A O., 1948 [23-3-1948]. [d] *Substituted* for "the East India Company", by Act I of 1897, S. 2.

STATE AMENDMENT

BIHAR

In the preamble, *omit* the words "not removable from their appointments without the sanction of Government, and to make the same uniform throughout India".

— Bih. Act XXXIV of 1951, S. 2 [28-11-1951].

1. Repeal of Acts. *[Repealed by the Repealing Act, 1870 (XIV of 1870), S. 1 and Sch., Part II.]*

2. Articles of charge to be drawn out for public inquiry into conduct of certain public servants.

Whenever the Government shall be of opinion that there are good grounds for making a formal and public inquiry into the truth of any imputation of

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Section 2 — Note 1

[1] As the law stands at present the only purpose for which an enquiry under the Act can be made is to help the Government to come to a definite conclusion regarding the misbehaviour of a public servant and thus enable it to determine provisionally the punishment which should be imposed upon him prior to giving him a reasonable opportunity of showing cause as is required under Art. 311 (2) of the Constitution. 1954 SC 375 (378) [AIR V 41 C 91] : 1954 S C R 1150:1954 Cri L Jour 993 ✠ 1956 Pat 384 (395) [(S) AIR V 43 C 97] (DB). (An enquiry under the Act is not at all compulsory and it is quite open to the Government to adopt any other method if it so chooses. It is matter of convenience merely and nothing else.)

[2] The Public Servants (Inquiries) Act, 1850 is not a penal Act and its object is not to provide punishment for an officer guilty of misconduct. The Act merely provides for an inquiry into the conduct of a Government servant and the only thing that can be done as a consequence of the inquiry is the dismissal or removal of the Government servant. The Act and the Prevention of Corruption Act lie in entirely different fields and there is no question of either Act being repealed pro tanto by the other. 1956 Punj 58 (70) [(S) AIR V 43 C 24] : ILR (1956) Punj 236 (DB).

[3] The Public Servants Inquiries Act, 1850 is an empowering Act and it vests the Government with power to proceed against a Government servant who has been guilty of misconduct. The fact that it is not obligatory on the Government to proceed against every Government servant against whom an imputation may be made is scarcely a violation of the provisions of Art. 14. There is no question

misbehaviour by any person in the service of [a][the Government, not removable from his appointment without the sanction of the Government,] it [b][may] cause the substance of the imputations to be drawn into distinct articles of charge, and [b][may] order a formal and public inquiry to be made into the truth thereof.

[a] *Substituted* for "the East India Company not removable from his office without the sanction of the same Government" by the Public Servants (Inquiries) Act (1850) Amendment Act, 1897 (I of 1897), S. 3. [b] *Substituted* for "shall" by A. O., 1937 [1-4-1937].

STATE AMENDMENT

BIHAR

In S. 2, *omit* the words "not removable from his appointment without the sanction of the Government". —Bih. Act XXXIV of 1951, S. 3 [28-11-1951].

Section 2 — Note 1 *(contd.)*

of any classification. To give such discretion to Government is not only lawful but essential. There is therefore nothing in this Act which offends against the provisions of Art. 14. 1956 Punj 58 (70) [(S) AIR V 43 C 24] : ILR (1956) Punj 236 (DB).

[4] The Public Servants (Inquiries) Act is the Central Act and applies to these servants who are liable to dismissal with the sanction of the Government and the Rules made for subordinate services are those which are made for another class of people and this is a reasonable classification. Objection to the power of the Government to appoint any one they like for the purpose of the enquiry cannot also come under Art. 14. 1955 Punj 3 (4) [(S) AIR V 42 C 2].

[5] Members of the Indian Civil Service are not liable to be dismissed from their appointment without the sanction of the Government under which they are serving and are not excluded from the purview of the Public Servants (Inquiries) Act, 1850.

Rule 55 of the Civil Services (Classification, Control and Appeal) Rules means that an order of dismissal, removal or reduction in rank shall not be passed without an enquiry either according to the procedure prescribed by the Public Servants (Inquiries) Act, 1850, or the procedure prescribed by the Rule.

The Rule does not mean that even if an enquiry be held under the Public Servants (Inquiries) Act, 1850, before an order of dismissal or removal or reduction is passed against a member of the civil service, another enquiry expressly directed under R. 55 shall be made.

By Art. 314, to civil servants appointed by the Secretary of State the same rights in disciplinary matters as were available before the Constitution (including a right to enquiry under R. 55 of the Civil Services (Classification, Control and Appeal) Rules) are guaranteed.

But the guarantee being one of an enquiry directed under one of the two alternative powers conferred either under the Public Servants (Inquiries) Act or under R. 55 of the Civil Services (Classification, Control and Appeal) Rules, the exercise of authority under one of the two alternatives is not prima facie illegal.

The procedure prescribed by Act 37 of 1850 and the procedure to be followed under R. 55 are in substance not materially different.

No discrimination is practised merely because resort is had to one of two alternative sources of authority, unless it is shown that the procedure adopted operated to the prejudice of the public servant concerned.

On a plea of inequality before the law, the enquiry held by the Enquiry Commissioner is not liable to be declared void because it was held in a manner though permissible in law, not in the manner, the public servant says it might have been held. 1960 S C 493 (497, 498, 499, 500) [AIR V 47 C 84] : (1960) 2 S C R 569 : ILR (1960) 1 Punj 824.

[6] Public servant proceeded against under Appendix 24 of Punjab Civil Services Rules and not under Public Servants (Inquiries) Act — There is no contravention of Art. 14 of the Constitution. 1955 Punj 1 (3) [AIR V 42 C 1].

[7] Civil Services (Classification, Control and Appeal) Rules, R. 55 — Rules have no statutory force. Procedure under Public Servants (Inquiries) Act followed — Compliance with Civil Services (Classification, Control and Appeal) Rules, is not essential — Constitutional guarantee is satisfied. 1960 Pat 116 (122) [AIR V 47 C 35] (DB).

[8] Section 2 read with S. 23 makes it quite clear that a public inquiry into the conduct of an officer holding a particular post can be ordered only by the Government, Central or Provincial, which is clothed with the power of ordering his removal from the said post. Thus in the case of a civil servant employed under a State Government, the State Government which has power to appoint him to the post of Deputy Commissioner has power also to order his removal from the said post. It follows as a consequence that, in view of the provisions of S. 2, the State Government has full power to order an inquiry into charges brought against such civil servant although its power to award a punishment to him is strictly limited by the provisions of R. 52 of the Civil Services (Classification, Control and Appeal) Rules. Even assuming that the State Government had no power to order such an inquiry against a civil servant under the Act, such an irregularity entitles the public servant to claim that the entire proceedings should be quashed and that the order which is based on those proceedings should be set aside. The provisions of the Public Servants (Inquiries) Act, 1850, or of R. 55 of the Civil Services (Classification, Control and Appeal) Rules are fully satisfied if the officer conducting the removal proceedings observes the fundamental rules of a fair and impartial trial even though he

3. Authorities to whom inquiry may be committed. Notice to accused.

The inquiry may be committed either to the Court, Board or other authority to which the person accused is subordinate, or to any other person or persons, to be specially appointed by the Government, commissioners for the purpose: notice of which commission shall be given to the person accused ten days at least before the beginning of the inquiry.

STATE AMENDMENT

BIHAR

In S. 3, *omit* the words "Court, Board or other".

— Bih. Act XXXIV of 1951, S. 4 [28-11-1951].

Section 2 — Note 1 *(contd.)*

does not comply with the technical rules of evidence and procedure. Proceedings of this kind cannot be rendered void when they are conducted in accordance with the rules of natural justice and they cannot be set aside for non-compliance with the legal formalities unless the failure to observe the said formalities has brought about a miscarriage of justice. 1956 Punj 58 (61, 69) [(S) AIR V 43 C 24] : ILR (1956) Punj 236 (DB).

[9] In an enquiry under the Act there is neither any question of investigating an offence in the sense of an act or omission punishable by law for the time being in force, nor is there any question of imposing punishment prescribed by the law which makes that act or omission an offence. 1954 S C 375 (379) [AIR V 41 C 91] : 1954 SCR 1150 : 1954 Cri L Jour 993.

[10] Where an I. C. S. Officer is employed under the State Government, there is nothing in the Constitution which abrogates the authority of the State Government to direct an enquiry against him under S. 2 of the Act. AIR 1956 Punj 58, Affirmed. The special method of recruitment of the officer to the service does not warrant the view that the officer is not employed under the Government of the State, in connection with the affairs of which he was serving. 1960 S C 493 (496) [AIR V 47 C 84] : (1960) 2 SCR 569 : ILR (1960) 1 Punj 824.

[11] The foundation for ordering a formal and public inquiry is the Government's satisfaction that there are sufficient grounds for making such an inquiry into the truth of any imputation of misconduct by a person in the service of the Government and not removable from office without their sanction. 1958 Ker 374 (375) [AIR V 45 C 128] (DB).

[12] Misconduct of a servant comprises positive acts and not mere neglects or failures. It differs from carelessness. Where the notification under the Act 11 of 1122 speaks of imputations not of misconduct but irregularity the notification is defective. This is not cured by reading the notification along with the charges framed since they do not form part of the notification and do not accompany it. 1958 Ker 374 (375) [AIR V 45 C 128] (DB).

[13] The provisions of the Criminal Procedure Code relating to the misjoinder of charges do not apply to the Public Servants (Inquiries) Act and the inquiry cannot be held to be bad merely on the ground that more than three charges were made the subject-matter of one inquiry. 1956 Punj 58 (71) [(S) AIR V 43 C 24] : ILR (1956) Punj 236 (DB).

[14] The expression "appointment" appearing in S. 2 has been used not in the sense of designation of a person to discharge the duties of a particular office but meaning only the office or post to which one is appointed. It is not synonymous with the expression "service". A person may be appointed to a service by the Central Government but if he is employed under a State Government he may be appointed to a post by the State Government. 1956 Punj 58 (61) [(S) AIR V 43 C 24] : ILR (1956) Punj 236 (DB).

[15] Paragraph 11 (b) (i) of Part D of the Second Schedule of the Constitution deals merely with the remuneration of Judges. There is nothing to preclude a Judge from undertaking an inquiry of a Public Servant under the Public Servants (Inquiries) Act, 1850, at the request of a State Government and the inquiry does not become invalid merely because it was not undertaken at the request of the President. 1956 Punj 58 (70) [(S) AIR V 43 C 24] : ILR (1956) Punj 236 (DB).

Section 3 — Note 1

[1] Commissioners appointed under Act (XXXVII of 1850), to enquire into the conduct of a public servant, are 'Court', within meaning of S. 195, Criminal Procedure Code. 1931 Lah 662 (663) [AIR V 18] : 12 Lah 391 : 32 Cri L Jour 1252.

[2] A Commissioner appointed under the Act does not constitute a Court within the meaing of the Contempt of Courts Act. 1956 S C 66 (74) [(S) AIR V 43 C 18] : 1955-2 SCR 955 : 35 Pat 65 : 1956 Cri L Jour 156. (AIR 1954 Pat 289, *Reversed* and AIR 1951 Punj 49, *Overruled.*)

[3] The fundamental rules have been framed by the State of Assam in the exercise of the powers vesting in it under the Government of India Act. It has provided for the delegation of its powers for administrative efficiency and needs. The Public Servants (Enquiries) Act does not provide for any such delegation. But as the Government acting under the provisions of the Government of India Act could delegate its authority, there is no essential conflict between R. 6 of the Fundamental Rules and the provisions of the Public Servants (Inquiries) Act, 1850. It is true that the Act merely provides for an inquiry and report and not for final decision. But the Fundamental Rules which are complementary complete the picture in this respect by providing that the final decision may be given by any authority exercising

4. Conduct of Government prosecution.

When the Government shall think fit to conduct the prosecution, it shall nominate some person to conduct the same on its behalf.

5. Charge by accuser to be written and verified. Penalty for false accusation. Institution of inquiry by Government.

When the charge shall be brought by an accuser, the Government shall require the accusation to be reduced to writing, and verified by the oath or solemn affirmation of the accuser; and every person who shall wilfully and maliciously make any false accusation under this Act, upon such oath or affirmation, shall be liable to the penalties of perjury, but this enactment shall not be construed to prevent the Government from instituting any inquiry which it shall think fit, without such accusation on oath or solemn affirmation as aforesaid.

6. Security from accuser left by Government to prosecute.

Where the imputations shall have been made by an accuser, and the Government shall think fit to leave to him the conduct of the prosecution, the Government before appointing the commission shall require him to furnish reasonable security that he will attend and prosecute the charge thoroughly and effectually, and also will be forthcoming to answer any counter-charge or action which may be afterwards brought against him for malicious prosecution or perjury or subornation of perjury, as the case may be.

7. Power of Government to abandon prosecution and to allow accuser to continue it.

At any subsequent stage of the proceedings, the Government may, if it think fit, abandon the prosecution, and in such case may, if it think fit, on the application of the accuser, allow him to continue the prosecution, if he is desirous of so doing, on his furnishing such security as is hereinbefore mentioned.

8. Powers of commissioners. Their protection. Service of their process. Powers of Court, etc., acting under commission.

The commissioners shall have the same power of punishing contempts and obstructions to their proceedings, as is given to Civil and Criminal Courts by [a][the Code of Criminal Procedure, 1898,] and shall have the same powers for the summons of witnesses, and for compelling the production of documents, and for the discharge of their duty under the commission, and shall be entitled to the same protection as the Zila and City Judges, except that all process to cause the attendance of witnesses or other compulsory process, shall be served through and executed by the Zila or City Judge in whose jurisdiction the witness or other person resides, on whom the process is to be served, and if he resides within Calcutta, Madras or Bombay, then through the Supreme Court of Judicature[b] thereto. When the commission has been issued to a Court, or other person or persons having power to issue such process in the exercise of

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Section 3 — Note 1 *(contd.)*

delegated powers. The Government when framing the rules has given this power of delegation to itself and in doing so it has not exceeded its rule making power. 1956 Assam 12 (14) [AIR V 43 C 8] : ILR (1955) 7 Assam 410 (DB).

[4] Under S. 3 the authority to which a person accused is subordinate is also competent to make the enquiry and if rules are made pursuant to a statutory provision authorising that authority to hold enquiries it would be perfectly competent for that authority to do so. The essential element in the awarding of penalties and punishment against public servants is not as to who conducts the enquiry but whether the person has been given the opportunities under Art. 311 (2) of the Constitution and that the enquiry is fair and unbiased. 1959 Andh-Pra 497 (502, 503) [AIR V 46 C 143].

Section 8 — Note 1

[1] A Commissioner appointed under the Public Servants (Inquiries) Act, 1850, does not constitute a Court within the meaning of the term as used in the Contempt of Courts Act. 1956 S C 66 (72) [(S) AIR V 43 C 18] : 1955-2 S C R 955 : 34 Pat 65 : 1956 Cri L Jour 156. (A I R 1954 Pat 289, *Reversed*; AIR 1951 Punj 49, *Overruled*.)

their ordinary authority, they may also use all such power for the purposes of the commission.

[a] *Substituted* for "Act XXX, 1841", by the Repealing and Amending Act, 1914 (X of 1914), S. 2 and Sch. [b] *See* the Indian High Courts Act, 1861 (24 & 25 Vict., c. 104), S. 11, which was repealed and re-enacted by the Government of India Act.

STATE AMENDMENT

BOMBAY

In S. 8, for the word "Bombay" *substitute* "Greater Bombay".

— Bom. Act XVII of 1945, S. 9 and Sch. E.

9. Penalty for disobedience to process.

All persons disobeying any lawful process issued as aforesaid for the purposes of the commission shall be liable to the same penalties as if the same had issued originally from the Court or other authority through whom it is executed.

10. Copy of charge and list to be furnished to accused.

A copy of the articles of charge, and list of the documents and witnesses by which each charge is to be sustained, shall be delivered to the person accused, at least three days before the beginning of the inquiry, exclusive of the day of delivery and the first day of the inquiry.

11. Procedure at beginning of inquiry. Non-appearance of accused and admission of charge.

At the beginning of the inquiry the prosecutor shall exhibit the articles of charge to the commissioners, which shall be openly read, and the person accused shall thereupon be required to plead "guilty" or "not guilty" to each of them, which pleas shall be forthwith recorded with the articles of charge. If the person accused refuses, or without reasonable cause neglects, to appear to answer the charge either personally or by his counsel or agent, he shall be taken to admit the truth of the articles of charge.

12. Prosecutor's right of address.

The prosecutor shall then be entitled to address the commissioners in explanation of the articles of charge, and of the evidence by which they are to be proved : his address shall not be recorded.

13. Evidence for prosecution and examination of witnesses. Re-examination by prosecutor.

The oral and documentary evidence for the prosecution shall then be exhibited ; the witnesses shall be examined by or on behalf of the prosecutor and may be cross-examined by or on behalf of the person accused. The prosecutor shall be entitled to re-examine the witnesses on any points on which they have been cross-examined, but not on any new matter, without leave of the commissioners, who also may put such questions as they think fit.

14. Power to admit or call for new evidence for prosecution. Accused's right to adjournment.

If it shall appear necessary before the close of the case for the prosecution, the commissioners may in their discretion allow the prosecutor to exhibit evidence not included in the list given to the person accused, or may them-

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Section 13 — Note 1

[1] If a formal proof was waived and some of the documents were taken in evidence when their proper custody was proved, there was no such violation of the rules of evidence as would justify the Court to hold that the enquiry was not in conformity with the provisions of the Public Servants (Inquiries) Act, 1850. 1956 Pat 384 (396) [(S) AIR V 43 C 97] (DB).

[2] If a proper enquiry was instituted by the Government under Act 37 of 1850 and if the Government servant was afforded opportunity to defend himself by cross-examining the witnesses called against him and to examine himself or any other witness and if he was also given reasonable opportunity to show cause against the punishment which is eventually determined on by the Government, the High Court cannot set aside the order of enquiry officer even if on the evidence a different conclusion is possible. 1960 Pat 116 (124) [AIR V 47 C 35] (DB).

selves call for new evidence; and in such case the person accused shall be entitled to have, if he demand it, an adjournment of the proceedings for three clear days, before the exhibition of such new evidence exclusive of the day of adjournment and of the day to which the proceedings are adjourned.

15. Defence of accused. To be recorded only when written.

When the case for the prosecution is closed, the person accused shall be required to make his defence, orally or in writing, as he shall prefer. If made orally, it shall not be recorded; if made in writing, it shall be recorded, after being openly read, and in that case a copy shall be given at the same time to the prosecutor.

16. Evidence for defence and examination of witnesses.

The evidence for the defence shall then be exhibited, and the witnesses examined, who shall be liable to cross-examination and re-examination and to examination by the commissioners according to the like rules as the witnesses for the prosecution.

17. Examination of witnesses and evidence by prosecutor. *[Repealed by the Repealing Act, 1876 (XII of 1876), S. 1 and Sch., Part I.]*

18. Notes of oral evidence.

The commissioners or some person appointed by them shall take notes in English of all oral evidence, which shall be read aloud to each witness by whom the same was given, and, if necessary, explained to him in the language in which it was given, and shall be recorded with the proceedings.

19. Inquiry when closed with defence. Prosecutor when entitled to reply and give evidence. Accused not entitled to adjournment.

If the person accused makes only an oral defence, and exhibits no evidence, the inquiry shall end with his defence; if he records a written defence, or exhibits evidence, the prosecutor shall be entitled to a general oral reply on the whole case, and may also exhibit evidence to contradict any evidence exhibited for the defence, in which case the person accused shall not be entitled to any adjournment of the proceedings, although such new evidence were not included in the list furnished to him.

20. Power to require amendment of charge and to adjourn. Reason for refusing adjournment to be recorded.

When the commissioners shall be of opinion that the articles of charge or any of them are not drawn with sufficient clearness and precision, the commissioners may, in their discretion, require the same to be amended, and may thereupon, on the application of the person accused, adjourn the inquiry for a reasonable time. The commissioners may also, if they think fit, adjourn the inquiry from time to time, on the application of either the prosecutor or the person accused on the ground of sickness or unavoidable absence of any witness or other reasonable cause. When such application is made and refused, the commissioners shall record the application, and their reasons for refusing to comply with it.

Section 16 — Note 1

[1] None of the provisions of the Public Servants (Inquiries) Act, 1850, say anything as to whether the accused person can examine himself as a witness or not. There was no violation of the provisions of the Public Servants (Inquiries) Act, 1850, when the accused came and was examined as defence witness nor were the provisions of S. 5 of the Oaths Act violated in such a case. 1956 Pat 384 (396) [(S) AIR V 43 C 97] (DB).

[2] There is nothing in the wording of S. 16 to warrant such an assumption, that the inquiry Commissioner is obliged to examine every item of evidence which the defence wishes to call. Every Court, tribunal or inquiry officer has the discretion of disallowing irrelevant or unnecessary evidence. 1956 Punj 58 (71) [(S) AIR V 43 C 24] : ILR (1956) Punj 236 (DB).

21. Report of commissioners' proceedings.

After the close of the inquiry the commissioners shall forthwith report to Government their proceedings under the commission, and shall send with the record thereof their opinion upon each of the articles of charge separately, with such observations as they think fit on the whole case.

22. Power to call for further evidence or explanation. Inquiry into additional articles of charge. Reference of report of special commissioners' final orders.

The Government, on consideration of the report of the commissioners, may order them to take further evidence, or give further explanation of their opinions. It may also order additional articles of charge to be framed, in which case the inquiry into the truth of such additional articles shall be made in the same manner as is herein directed with respect to the original charges. When special commissioners have been appointed, the Government may also, if it thinks fit, refer the report of the commissioners to the Court or other authority to which the person accused is subordinate, for their opinion on the case; and will finally pass such orders thereon as appear just and consistent with its powers in such cases.

STATE AMENDMENT

BIHAR

(i) Section 22 shall be *re-numbered* as sub-sec. (1) thereof and in the said sub-section so re-numbered—

(a) *Omit* the words "Court or other;" and

(b) After the words "pass such orders thereon," *insert* the words "or direct the authority to which the person accused is subordinate to pass such orders thereon."

(ii) *Add* the following sub-sec. (2), namely :—

"(2) Where the orders under sub-section (1) are passed by any authority other than the Government, the Government shall always have the power to review the orders and pass such other orders as appear to it to be just and proper."

—Bih. Act XXXIV of 1951, S. 5 [28-11-1951].

[a][**23. Definition of Government.**

In this Act, "the Government" means the Central Government in the case

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Section 21 — Note 1

[1] The Commissioner appointed under the Public Servants (Inquiries) Act (1850) does not constitute a Court within the meaning of the term as used in the Contempt of Courts Act. 1956 S C 66 (72) [(S) AIR V 43 C 18] : 1955-2 S C R 955 : 34 Pat 65 : 1956 Cri L Jour 156. (AIR 1954 Pat 289, *Reversed*; AIR 1951 Punj 49, *Overruled.*)

[2] The Fundamental Rules (Assam) have been framed by the State of Assam in the exercise of the powers vesting in it under the Government of India Act. It has provided for the delegation of its powers for administrative efficiency and needs. The Public Servants (Inquiries) Act does not provide for any such delegation. But as the Government acting under the provisions of the Government of India Act could delegate its authority there is no essential conflict between R. 6 of the Fundamental Rules and the provisions of the Public Servants (Inquiries) Act. 1956 Assam 12 (14) [AIR V 43 C 8] : ILR (1955) 7 Assam 410 (DB).

[3] No one is allowed to be a judge in his own cause. The rule applies and has been asserted not only in the case of Courts of justice in the proper sense but also in the case of administrative tribunals who are required to act judicially. 1955 Pat 131 (132) [(S) AIR V 42 C 26] (DB).

Section 22 — Note 1

[1] It is apparent from S. 22 that the Commission is in the nature of an advisory body and not a Court or tribunal in the strict sense of the term and its report is not binding on the parties or even on the Government. It is open to the Government to direct the Commission to take further evidence or to ask for further explanation. It is more or less in the nature of an advisory body and the report of the Commission is intended for the Government to make up its mind as to the action which it proposed to take. 1957 Assam 77 (82) [(S) AIR V 44 C 19] : ILR (1958) 8 Assam 91 (DB).

[2] The Commissioner appointed under the Public Servants (Inquiries) Act, 1850, does not constitute a Court within the meaning of the term as used in the Contempt of Courts Act. 1956 S C 66 (72) [(S) AIR V 43 C 18] : 1955-2 S C R 955 : 34 Pat 65 : 1956 Cri L Jour 156. (AIR 1954 Pat 289, *Reversed*; A I R 1951 Punj 49, *Overruled.*)

Section 23 — Note 1

[1] Section 2 read with S. 23 makes it quite clear that a public inquiry into the conduct of an officer holding a particular post can be ordered only by the Government, Central or Provincial, which is clothed with the power of ordering his removal from the said

of persons employed under that Government and the State Government in the case of persons employed under that Government.]

[a] *Substituted* for the original section by A. O., 1937 [1-4-1937].

[a]**24.** Saving of enactments as to dismissal of certain officers. Commission under Act for their trial.

Nothing in this Act shall be construed to repeal any Act or Regulation in force for the suspension or dismissal of Principal and other Sadr Amins or of Deputy Magistrates or Deputy Collectors, but a commission may be issued for the trial of any charge against any of the said officers, under this Act, in any case in which the Government shall think it expedient.

[a] This section was repealed as to the Lower Provinces and North-Western Provinces of Bengal, by the Principal Sadr Amins Act, 1868 (XVI of 1868), S. 1 and Sch.

25. Saving of power of removal without inquiry under Act.

Nothing in this Act shall be construed to affect the authority of Government, for suspending or removing any public servant for any cause without an inquiry under this Act.

STATE AMENDMENT

BIHAR

For section 25, substitute the following :—

"**25.** *Saving of power of removal without inquiry under Act.*—Nothing in this Act shall be construed to affect the power of the Government or the authority to which the person accused is subordinate, to suspend or remove any public servant for any cause without an enquiry under this Act."—Bih. Act XXXIV of 1951, S. 6 [28-11-1951].

[THE] PUBLIC SUITS VALIDATION ACT, 1932

(ACT XI of 1932)

[The Act printed here is as on 1-3-1961.]

CONTENTS

SECTIONS
1. Short title and extent.
2. Validation of certain pending public suits.
3. Restoration of certain dismissed public suits.
4. Retrial of certain appeals relating to public suits.

STATEMENT OF OBJECTS AND REASONS

"Sections 91 and 92 of the Code of Civil Procedure, 1908, empower the Advocate-General to institute, or to give consent to the institution of, certain suits relating to public matters. In order to provide for provinces where there is no Advocate-General, or for remoter areas in the Presidencies, section 93 of the Code provides that these powers of the Advocate-General may by exercised, with the previous sanction of the Local Government, by the Collector or by such officer as the Local Government may appoint in this behalf. Local Governments have taken the view that it is sufficient under this section for them to give previous sanction to the Collector, or to the special officer, generally, and not in res-

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Section 23 — Note 1 *(contd.)*

post. Thus in the case of a Civil Servant employed under a State Government the State Government which has power to appoint him to the post of Deputy Commissioner has power also to order his removal from the said post. 1956 Punj 58 (61, 62) [(S) AIR V 43 C 24] : ILR (1956) Punj 236 (DB).

[2] Where an I. C. S. Officer is employed under the State Government there is nothing in the Constitution which abrogates the authority of the State Government to direct an enquiry against him under S. 2. 1960 S C 493 (496) [AIR V 47 C 84] : (1960) 2 S C R 569 : ILR (1960) 1 Punj 824.

Section 25 — Note 1

[1] Government servants governed and protected by provisions of S. 96B, Government of India Act and the rules framed thereunder for punishments and removal from service—Such servants not coming within the scope of Public Servants Inquiries Act—The stipulation in this Act that the absence of an enquiry under the provisions of this Act is no bar to the removal of a servant cannot constitute any reason as to why the absence of an enquiry under rules framed under S. 96B of Government of India Act should not be a bar to the removal. 1937 P C 31 (35) [AIR V 24] : 64 Ind App 55 : I L R (1937) Mad 532. (*Reversing* A I R 1934 Mad 516.) * 1937 P C 27 (30) [AIR V 24] : 64 Ind App 40 : ILR (1937) Mad 517. (*Reversing* AIR 1934 Mad 516.)

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pect of each particular suit. Their Lordships of the Privy Council, however, have in a recent case held that the previous sanction of the Local Government must be recorded in respect of each particular suit. (*Prem Narayan* v. *Ram Charan* and *others* — An appeal from Allahabad [*see* A I R 1932 P C 51 (54).)] The result of this decision is that a large number of pending suits will be rendered subject to dismissal through no fault of plaintiffs.

The Bill is intended to remove this hardship. It validates all such suits now pending, and also provides for the retrial of all claims which may have been in the meantime dismissed, whether in the Court of first instance or in the Court of appeal on the ground of the absence of the requisite sanction."

—Gaz. of Ind., 1932, Part V, page 135.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. L. O., 1950 ; 3 A. L. O., 1956.

—Extended to Berar by Act IV of 1941.

—Extended in Madras by Mad. Act XXXV of 1949.

[THE] PUBLIC SUITS VALIDATION ACT, 1932

(ACT XI OF 1932)[a]

[8th April, 1932.]

An Act to validate certain suits relating to public matters.

WHEREAS it is expedient to validate certain suits relating to public matters which may be or have been held to be invalid by reason of the previous sanction of the Local Government in respect thereof not having been obtained as required by section 93 of the Code of Civil Procedure, 1908 ; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1932 Pt. V, page 135.

This Act has been extended to the States merged in the State of Madras : *see* Mad. Act XXXV of 1949, S. 3 and Schedule I [1-1-1950].

1. Short title and extent.

(1) This Act may be called THE PUBLIC SUITS VALIDATION ACT, 1932.

(2) It extends to all parts of [a][India except the territories which, immediately before the 1st November, 1956, were comprised in Part B States] to which sections 91, 92 and 93 of the Code of Civil Procedure, 1908, extend.

[a] *Substituted* for "Part A States and Part C States", by 3 A. L. O., 1956 [w. r. e. f. 1-11-1956]. Immediately before 1st November, 1956, the following were Part B States, namely, Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin.

2. Validation of certain pending public suits.

Where a suit relating to any of the public matters specified in sections 91 and 92 of the Code of Civil Procedure, 1908, is pending at the commencement of this Act, the institution of such suit shall not be deemed to be invalid on the ground that the previous sanction of the [A][State Government] in respect of such suit has not been obtained as required by section 93 of that Code.

Explanation. — For the purposes of this section a suit pending at the commencement of this Act includes a suit in respect of which an appeal lies or is pending at the commencement of this Act.

Section 1 — Note 1

[1] One object of the Act is to validate suits pending at time of its enactment which would otherwise be invalid by reason of previous sanction of Local Government not having been obtained, as required by S. 93, Civil P. C. 1933 Oudh 22 (24) [AIR V 20] : 8 Luck 266 (DB). (It is not necessary for plaintiff to obtain any sanction of the Local Government during pendency of suit.)

Section 2 — Note 1

[1] Section 2 of the Act is already a part of the law of the land and if by its terms the section is applicable to the suit as it then was, the suit cannot be again dismissed but should be proceeded with, if S. 2 warrants the procedure. 1936 Cal 815 (816) [AIR V 23] (DB). (Appeal from decree dismissing suit for defect in consent of Collector under S. 93 open to the plaintiff at the time of the passing of the Act — Suit becomes pending suit within the meaning of S. 2 — Once suit is restored, the defect in consent for which the suit was originally dismissed cannot once again form the basis of dismissal after the restoration — The suit ought to be proceeded with on merits.)

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3. Restoration of certain dismissed public suits.

Where any suit relating to any such public matter has, after the 30th day of November, 1931, and before the commencement of this Act, been dismissed by a Court of first instance solely on the ground that the sanction of the [A][State Government] in respect of such suit has not been obtained as required by section 93 of the Code of Civil Procedure, 1908, the Court shall, on application made within six months from the commencement of this Act, make an order setting aside its decree and shall proceed with the suit.

4. Retrial of certain appeals relating to public suits.

Where, in any appeal arising from a suit relating to any such public matter, a decree has been passed after the 30th day of November, 1931, and before the commencement of this Act, dismissing the appeal or dismissing the suit from which the appeal arose, solely on the ground that the previous sanction of the [A][State Government] in respect of the suit had not been obtained as required by section 93 of the Code of Civil Procedure, 1908, the Appellate Court shall, on application made within six months from the commencement of this Act, make an order setting aside its decree and shall proceed with the appeal.

[THE] PUBLIC WAKFS (EXTENSION OF LIMITATION) ACT, 1959

(ACT XXIX of 1959)

[The Act printed here is as on 1-3-1961.]

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SECTIONS

1. Short title and extent.
2. Definition.
3. Extension of period of limitation in certain cases for suits to recover possession of immovable property forming part of public wakfs.
4. Repeal and saving.

STATEMENT OF OBJECTS AND REASONS

"Following the partition of the country in August, 1947, a number of *wakf* properties passed into unauthorised hands. Many of the *mutwallis* who were in charge of these properties had migrated to Pakistan and the few who stayed behind could not for various reasons institute civil proceedings for the recovery of possession of these properties. The result is, that ever since the partition, a large number of these *wakf* properties has been in the possession of unauthorised occupants. Under the law as it stands at present, the title of the true owners would be extinguished, if the properties are in adverse possession for twelve years or more. It is, therefore, proposed to extend the period of limitation up to the 15th August, 1967, in respect of suits for the recovery of possession of any immovable property forming part of a public *wakf* in any case where the dispossession has taken place at any time between the 15th August, 1947 (the date of partition) and the 7th May, 1954 (the date from which power to declare any property as evacuee property under the Administration of Evacuee Property Act, 1950, ceased). This would enable the Wakf Boards constituted under the Wafk Act and other interested persons to institute such suits.

Since the period of limitation in some cases would expire in August, 1959 an Ordinance was promulgated for making the necessary alteration in the law of limitation. The present Bill seeks to replace the Ordinance by an Act of Parliament."

—Gaz of Ind., 1959, Extra., Pt. II-Section 2, page 583.

Section 3 — Note 1

[1] Section 3 is concerned only with question of restoration by the trial Court of a suit which had been dismissed on the ground of defect in the sanction required under S. 93, Civil P. C. Once the suit is restored it has to be proceeded with in accordance with law. 1936 Cal 815 (816) [AIR V 23] (DB).

[THE] PUBLIC WAKFS (EXTENSION OF LIMITATION) ACT, 1959

(ACT XXIX OF 1959)[a]

[1st September, 1959.]

An Act to extend the period of limitation in certain cases for suits to recover possession of immovable property forming part of public wakfs.

BE it enacted by Parliament in the Tenth Year of the Republic of India as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1959, Extra., Pt. II-Sec. 2, page 583.

1. Short title and extent.

(1) This Act may be called THE PUBLIC WAKFS (EXTENSION OF LIMITATION) ACT, 1959.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. Definition.

In this Act, "public wakf" means the permanent dedication by a person professing Islam of any immovable property for any purpose recognised by Muslim Law as a public purpose of a pious, religious or charitable nature.

3. Extension of period of limitation in certain cases for suits to recover possession of immovable property forming part of public wakfs.

Where a person entitled to institute a suit of the description referred to in Article 142 or Article 144 of the First Schedule to the Indian Limitation Act, 1908, for possession of any immovable property forming part of a public *wakf* or any interest therein has been dispossessed, or has discontinued the possession, at any time after the 14th day of August, 1947, and before the 7th day of May, 1954, or, as the case may be, the possession of the defendant in such a suit has become adverse to such person at any time during the said period, then, notwithstanding anything contained in the said Act, the period of limitation in respect of such a suit shall extend up to the 15th day of August, 1967.

Note :—*See* the Statement of Objects and Reasons given above.

4. Repeal and saving.

(1) The Public Wakfs (Extension of Limitation) Ordinance, 1959, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under this Act as if this Act had commenced on the 20th day of July, 1959.

[THE] PUNJAB LAWS ACT, 1872

(ACT IV of 1872)

[The Act printed here is as on 1-3-1961.]

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9 to 20. [*Repealed.*]

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49. [*Repealed.*]

50. Power to make rules as to matters mentioned in sections 43 to 48.

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50A. Conditions of validity of rules hereafter made under this Act.

50B. Penalties for breach of such rules.

51. Republication of rules and orders.

52. [*Repealed.*]

SCHEDULE I. — ENACTMENTS DECLARED TO BE IN FORCE.

SCHEDULE II.—[*Repealed.*]

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts XV of 1875 ; XXIV of 1881 ; IV of 1914.
—Amended in Punjab by Punj. Acts IV of 1900; II of 1920.
—Adapted by A. O., 1937; A. C. A. O., 1948; A. L. O., 1950; 2 A. L. O., 1956.
—Extended in Punjab by Punj. Acts V of 1950; XVIII of 1958.
—Repealed and amended by Acts XII of 1878; XII of 1891; VII of 1895; XXVI of 1937.
—Repealed in part by Acts I of 1878; VI of 1878; X of 1879; IV of 1882; X of 1882; XVII of 1887; VIII of 1890; III of 1907; XVII of 1914; IV of 1922; XLII of 1953.
—Repealed in part in Punjab by Punj. Acts II of 1903; II of 1905; I of 1910 ; V of 1941.

[THE] PUNJAB LAWS ACT, 1872

(ACT IV OF 1872)[a]

[28th March, 1872.]

An Act for declaring which of certain rules, laws and regulations have the force of law in the Punjab and for other purposes.

Preamble

WHEREAS certain rules, laws and regulations, made heretofore for the Punjab, acquired the force of law under the provisions of section 25 of the

[b]Indian Councils Act, 1861 ; and whereas it is expedient to declare which of the said rules, laws and regulations shall henceforth be in force in the Punjab, and to amend, consolidate or repeal others of the said rules, orders and regulations; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1871, Pt. V, p. 387.

This Act has been extended to the States merged in the State of Punjab : *see* Punj. Act V of 1950, S. 3, [15-4-1950], and to the territories transferred to the State of Punjab: *see* Punj. Act XVIII of 1958, S. 4 and Sch. I. [15-5-1958].

[b] That is, 24 & 25, Vict., c. 67. It has been repealed by the Government of India Act, 1915.

1. Short title.

This Act may be called THE PUNJAB LAWS ACT, 1872.

2. Local extent. Commencement.

It extends to the territories [a][which immediately before the 1st November, 1956, were comprised in the States of Punjab and Delhi],[b] but not so as to alter the effect of any regulations made for any parts of the said territories under the [c]Statute 33 Vict, Ch. 3, section 1; and it shall come into force on the first day of June, 1872.

[a] *Substituted* for "constituting the States of Punjab and Delhi," by 2 A. L. O., 1956. [1-11-1956]. [b] The Act is now extended to the transferred territories, that is, Pepsu—*See* Punj. Act XVIII of 1858. [c] *Repealed* by the Government of India Act, 1919.

3. Enactments in force.

The Regulations, Acts and orders specified in the First Schedule hereto annexed are in force in the [a][territories to which this Act extends] to the extent specified in the third column of the said Schedule.

[a] *Substituted* for "States of Punjab and Delhi" by 2 A. L. O., 1956 [1-11-1956].

4. Enactments repealed. *[Repealed by the Second Repealing and Amending Act, 1914 (XVII of 1914), S. 3 and Sch. II.]*

Civil Judicature

[a][5. Decisions in certain cases to be according to Native law.

In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be—

(a) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority;

Section 2 — Note 1

[1] The enforcement of the Punjab Laws Act, 1872 has not the effect of introducing Punjab Customary Laws into Himachal Pradesh. 1955 N U C (Him Pra) 4304 [A I R V 42].

Section 5 — Note 1

[1] In the Punjab the burden lies upon those who assert that they are governed by custom to prove the fact and to establish the particular custom, and if such evidence is not available the parties are governed by their personal law. 1949 P C 70 (71) [AIR V 36 C 27] : Pak L R (1949) Lah 821.

[2] In questions regarding succession and certain other matters the law in Punjab is contained in S. 5 of the Punjab Laws Act. Reading cls. (b) and (a) of that section together the position is that where the parties are Hindus the Hindu Law will apply in the first instance and whosoever asserts a custom at variance with the Hindu Law shall have to prove it though the quantum of proof required in support of a general and well established custom may be small while in cases of special customs the quantum may be larger. 1961 S C 1374 (1376) [A I R V 48 C 257].

[3] When either party to a suit sets up custom as a rule of decision it lies upon him to prove the custom which he seeks to apply. If he fails to do so, S. 5 (b) applies and the rule of decision must be the personal law of the parties subject to other provisions of the clause. 1959 S C 1041 (1049) [AIR V 46 C 139]: 1959 Supp. 2 SCR 781 : ILR (1959) Punj 1735.

[4] Per *Cornelius J.* — Arya Samajists are Hindus, and therefore, if no custom be pleaded, the rule of decision in relation to a mar-

(b) the Muhammadan law, in cases where the parties are Muhammadans and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to.]

[a] *Substituted* for the original S. 5, by the Punjab Laws (Amendment) Act, 1878 (XII of 1878), S. 1.

The provisions of this section have been *repealed* in so far as they are inconsistent with those of the Muslim Personal Law (Shariat) Application Act, 1937 (XXVI of 1937), *see* S. 6 of that Act.

6. Decisions in cases not specially provided for.

In cases not otherwise specially provided for, the Judges shall decide according to justice, equity and good conscience.

7. Local customs and mercantile usages when valid.

All local customs and mercantile usages shall be regarded as valid, unless they are contrary to justice, equity or good conscience, or have, before the passing of this Act, been declared to be void by any competent authority.

Descent of jaghirs

8, 8A to 8C. *[These sections and the heading "Descent of Jaghirs" were repealed by the Punjab Jaghirs Act, 1941 (Punj. V of 1941), S. 13.]*

Pre-emption

9 to 20. *[Repealed by the Punjab Pre-emption Act, 1905 (Punj. Act II of 1905), S. 2 (1).]*

Decrees concerning land

21. Copy of decrees affecting land to be forwarded to Deputy Commissioner. *[Repealed by the Punjab Land Revenue Act, 1887 (XVII of 1887).]*

Insolvency

22 to 32. *[Repealed by the Provincial Insolvency Act, 1907 (III of 1907).]*

33. Saving of previous insolvency proceedings. *[Repealed by the Amending Act, 1891 (XII of 1891).]*

Minors and the Court of Wards

34 to 38. *[Repealed by the Punjab Court of Wards Act, 1903 (Punj. Act II of 1903), S. 2 (1).]*

39. Indian Penal Code to apply to offences committed previous to 1st January, 1862.

The provisions of the Indian Penal Code, with the exception of Chapter VI, shall be applicable to all offences committed before first January, 1862, in

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Section 5 — Note 1 *(contd.)*

riage or divorce where both parties are Arya Samajists must be the Hindu law. If one of such parties is converted to Christianity, the marriage-bond between the parties will not in any way be affected and will retain all the characteristics of a Hindu marriage unless there shall follow upon the conversion of one party repudiation or desertion by the other, and unless consequential legal proceedings are taken and a decree is made as provided by the Native Converts' Marriage Dissolution Act, 1866. 1948 Lah 129 (132) [AIR V 35 C 44] : ILR (1947) Lah 621 (FB).

[5] Per *Cornelius J.*—In the case of a Hindu marriage in the Vedic form performed according to the Arya Samajic rites, the provisions of S. 5, Punjab Laws Act, prevail as against the Divorce Act and a decree for nullity in respect of the marriage cannot be granted by the High Court under the provisions of the Divorce Act but can only be granted by the Courts administering the Hindu law, i.e., the ordinary civil courts, while a decree for dissolution may be granted either by these Courts or by a Court acting under Native Converts' Marriage Dissolution Act, 1866. 1948 Lah 129 (135) [A I R V 35 C 44] : ILR (1947) Lah 621 (FB).

Section 6 — Note 1

[1] There is ample authority under the Act that in the absence of any law, usage or custom to the contrary, the principles of Chap. V of the Act are applicable to leases for agricultural purposes as rules of justice, equity and good conscience. 1952 Punj 52 (53) [AIR V 39].

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territory which was, at the time of the commission of such offence, subject to the [A][State Government] of the Punjab :

Saving of privileges conferred on certain Chiefs.

Provided that nothing contained in this section shall affect any privilege conferred on certain Chiefs in the Punjab by the [A][Central Government], or by the Board of Administration for the affairs of the Punjab, nor any indemnity or pardon granted by competent authority.

[a][**39A. Power to establish system of village-watchmen and municipal-watchmen, and to make rules.**

The [A][State Government] may establish a system of village-watchmen or municipal watchmen in any part of the territories under its administration, and in furtherance of this object may, from time to time, make rules to provide for the following matters:—

(a) the definition of the limits of watchmen's beats ;

(b) the determination of the several grades of watchmen, and the number of each grade to be appointed to each beat;

(c) the appointment, suspension, dismissal and resignation of watchmen of each grade;

(d) the equipment and discipline of, and the control and supervision over, such watchmen ;

(e) the conferring upon them, and the exercise by them, of any powers and the enjoyment by them of any protection or privilege, which may be exercised and enjoyed by a police-officer under any law for the time being in force ;

(f) the performance by them of such duties relating to police, sanitation or statistics, or for the benefit of the village communities or municipalities within their respective beats, as the [A][State Government] thinks fit ;

(g) the exercise of authority over, and the rendering of aid to, such watchmen by headmen of the villages or members of the Municipal Committees of the towns comprised in their respective beats ;

(h) the performance, by the headmen of villages comprised in the beat of any watchmen, of any of the duties of a village-watchman in aid of, or substitution for, such watchman ;

(i) the exercise, by such village-headmen for the purposes referred to in clauses *(g)* and *(h)*, or by members of Municipal Committees for the purposes referred to in clause *(g)* of this section, of any of the powers, and the enjoyment by such headmen or members of any privilege or protection, of a village-watchman, or a municipal watchman, as the case may be ;

(j) the determination of the rate at which, and the mode in which, watchmen shall be paid, and, in the case of village-watchmen, of the mode in which their pay, the expenses of their equipment, and other charges connected with the village-watchman-system shall be provided for, whether out of cesses or funds already leviable or available in the villages comprised in the beat, or by a special tax in money or kind to be imposed on any class of persons residing or owning property in, or resorting to, such villages, or partly in one of these ways and partly in the other ;

(k) the collection with or without the aid of the village-headmen, and by any process available for the realisation of the land-revenue, of any tax imposed under clause *(j)* of this section, and the application of, and the mode of accounting for, the same; and generally for

(l) the efficient working of the system of village-watchmen or municipal watchmen :

Provided—

first, that the rules to be made regarding the appointment of village-watchmen shall allow to the headmen of the villages comprised in the beat to which such a watchman is to be appointed a power of nomination to be exercised in such manner and subject to such reasonable conditions as may be prescribed by such rules;

secondly, that the rules to be made under clause *(j)* of this section with regard to village-watchmen shall include provisions for recording and securing due consideration of the views and opinions on the matters therein referred to of the headmen of the villages comprised in each beat.

[a] Sections 39A and 39B were *substituted* for the former Ss. 39A and 39B, by the Punjab Laws (Amendment) Act, 1881 (XXIV of 1881), S. 2.

[a]**39B. Obligation to assist watchmen and headmen.**

Every person is bound to render to a village-watchman, or municipal watchman, or village headman discharging the duties of a police-officer under the rules made hereunder, all the assistance which he is bound to render to a police-officer.

Person obstructing watchman or headman may be arrested without warrant.

Any person who obstructs such watchman or headman in the discharge of such duties may be arrested without warrant by a police-officer or by any watchman or village-headman empowered in this behalf by the State Government.]

[a] *See* Foot-note (a) under S. 39A.

[a][**39C. Power to direct local taxation for payment of police enrolled under Act 5 of 1861.**

Whenever it seems to the [A][State Government] expedient that the duties of watch-and-ward and other internal police service of any town or village not comprised within the limits of a municipality or within the limits of a village-watchman's beat as defined under the power conferred by section 39A should be performed by police-officers enrolled under [b]Act V of 1861, the [A][State Government] may direct that the said service shall be so performed, and may also [c][* * *] direct that the charges for the time being fixed by such Government on account of such service shall be defrayed by taxes to be levied in such town or village.

[a] Sections 39C to 39G were *inserted* by the Punjab Laws Amendment Act 1875 (XV of 1875), S. 2. [b] The Police Act. [c] The words "subject to the control of the Governor-General in Council" were *omitted* by A. O., 1937 [1-4-1937].

[a]**39D. Notice of taxes proposed to be levied.**

When the [A][State Government] has, under section 39C, directed that taxes shall be levied in any town or village, the Deputy Commissioner may from time to time issue a public notice in such town or village explaining the nature of the taxes he proposes to levy.

Objections to taxation.

Any inhabitant of such town or village objecting to the taxation thus proposed may, within fifteen days from the publication of such notice, send his objection in writing to the Deputy Commissioner.

Procedure thereon.

After the expiry of fifteen days from the publication of the notice, the Deputy Commissioner may submit for the information of the [A][State Government] a report of the proposal made by him. Such report shall contain specific mention of the objections (if any) urged to his proposal and his opinion on such objections.

No such tax shall be levied until it has, upon such report, been approved by the [A][State Government].

[a] *See* Foot-note (a) under S. 39C.

[a]39F. Power to fix rates of tax.

When any such tax has been so approved by the [A][State Government], the Deputy Commissioner may from time to time, subject to such rules consistent with this Act as the [A][State Government] may from time to time prescribe, determine the rates at which it is to be levied.

[a] *See* Foot-note (a) under S. 39C.

[a]39F. Power to make rules for collection of taxes.

The [A][State Government] may from time to time make rules to provide for the collection of such taxes by any process available for the realisation of the land-revenue and to regulate the application and mode of accounting for the same.

[a] *See* Foot-note (a) under S. 39C.

39G. Validation clause. *[Repealed by the Amending Act, 1891 (XII of 1891).]*

Honorary police-officers

40. State Government may confer powers of police-officer.

The [A][State Government] may, if it thinks fit, confer on any person any of the powers which may be exercised by a police officer under any Act for the time being in force, [a][and may withdraw any powers so conferred].

[a] *Inserted* by the Punjab Laws (Amendment) Act, 1878 (XII of 1878), S. 5.

Track law

41. Trackers may call for assistance in carrying on tracks.

When an offence is, has been, or may reasonably be supposed to have been committed, and the tracks of the persons who may reasonably be supposed to have committed such offence, or of any animal or other property reasonably supposed to be connected with such offence, are followed to a spot within the immediate vicinity of a village, the person following such tracks may call upon any head-man or village-watchman in such village to assist in carrying on the tracks.

42. Penalty for witholding assistance or conniving at offence or escape. Limit to fine.

If such headman or watchman do not forthwith give such assistance, or if the inhabitants of such village do not afford full opportunity for search in their houses for the offenders, or, if from the circumstances of the case, there shall appear good reason to believe that the inhabitants of such village, or any of them were conniving at the offence or at the escape of the offenders, and such offenders cannot be traced beyond the village, the Magistrate of the district may, with the previous sanction of the Commissioner of the Division inflict a fine upon such village not exceeding five hundred rupees, except in the case of stolen property over five hundred rupees in value, in which case the fine shall not exceed the value of such property.

Appeal to High Court.

An appeal against all convictions under this section shall lie to the [a][High Court] of Punjab.

Fine may be awarded to injured parties, and fee to tracker.

The Magistrate may direct that the fine imposed under this section or any part thereof shall be awarded to any persons injured by such offence in compensation for such injury; and, in the case of stolen property recovered through the agency of a tracker, may direct that such property be not restored to its owner until he has paid to such tracker such fee, not exceeding one-fourth part of the value of the stolen property, as the said Magistrate seems fit.

[a] *Substituted* for "Chief Court" by A. C. A. O., 1948 [23-3-1948].

Slaughter of kine

43. Control of slaughter of kine and sale of beef.

The slaughter of kine and the sale of beef shall not take place except [a][* * *] subject to rules to be from time to time, either generally or in any particular instance, prescribed by the [A][State Government].

[a] The words "with the consent and" were *omitted* by the Punjab Laws (Amendment) Act, 1878 (XII of 1878), S. 6.

Armed men and foreign vagrants

44. Control of entry into towns of bands of armed men.

No band of armed men shall enter into any city or town, except [a][* * *] subject to rules to be from time to time, either generally or in any particular instance, prescribed by the [A][State Government.]

[a] The words "with the consent and" were *omitted* by the Punjab Laws (Amendment) Act, 1878 (XII of 1878), S. 6.

45. Powers of Magistrate of district as to foreign vagrants.

The Magistrate of the district may, if he considers that any band of foreign vagrants is likely to occasion a breach of the peace or to commit any offence under the Indian Penal Code, prohibit such band from entering his district; or, if they are already in his district, may require them within a given time to leave it.

46. Surveillance, etc., of band failing to comply with Magistrate's order.

If any such band fail to comply with the orders of the said Magistrate within the prescribed period, he shall report the matter to the [A][State Government], and the [A][State Government] may give such directions for the surveillance, control or deportation of such band as to it seems fit.

Miscellaneous

47. Crossing of streams on buoys or skins.

No person shall cross any river or stream on a buoy or inflated skin, nor shall have in his possession or custody any buoy or skin for the purpose of being used in crossing any river or stream, except [a][* * *] subject to rules to be from time to time, either generally or in any particular instance, prescribed by the [A][State Government].

[a] The words "with the consent and" were *omitted* by the Punjab Laws (Amendment) Act, 1878 (XII of 1878), S. 6.

48. Use of pasturage or natural product of Government land.

No person shall make use of the pasturage or other natural product of any land being the property of the [A][Government], except with the consent and subject to rules to be from time to time, either generally or in any particular instance, prescribed by [a][the Government concerned].

[a] *Substituted* for "the Government for whose purposes the land is vested in His Majesty" by A. L. O., 1950 [26-1-1950].

49. Growing, selling or keeping opium. *[Repealed by the Opium Act, 1878 (I of 1878), S. 2 and Sch.]*

[a][50. Power to make rules as to matters mentioned in sections 43 to 48.

The [A][State Government] may from time to time make rules as to the matters mentioned in [b][sections 43 to 48] inclusive.

Section 43 — Note 1

[1] The prohibition in S. 43 of the Punjab Laws Act against the slaughter of cows, except subject to the rules prescribed by the Local Government, applies to the slaughter of cows for religious purposes; the prohibition is absolute and extends to the whole province, and therefore the slaughter of cows even in a village to which the rules under the Act have not been extended would be illegal. Section 43 would not, however, apply if the beef is taken not for sale but for use by the owner or owners of the slaughtered animal. ('47) 48 Cri L Jour 522 (527) (DB) (Lah).

Existing rules.

All existing rules upon such matters, which might have been made under this section had it been in force, shall be deemed to have been made hereunder.

[a] Sections 50, 50A and 50B were *substituted* for original section 50 by the Punjab Laws Amendment Act, 1875 (XV of 1875), S. 3. [b] *Substituted* for "sections forty-three to forty-nine" by the Amending Act, 1891 (XII of 1891), S. 2 and Sch. II.

50A. Conditions of validity of rules hereafter made under this Act.

[a][Rules made under this Act shall not be valid unless] :—

(a) they are consistent with the laws for the time being in force in the [b][the territories to which this Act extends] ;

(b) they are published in the Official Gazette ;

[c][* * * * * * * *]

[a] *Substituted* for "All rules hereafter made by the Local Government under any power conferred by this Act shall be subject to the control of the Governor General in Council and no such rules shall be valid unless", by A. O., 1937 [1-4-1937]. [b] *Substituted* for "States of Punjab and Delhi," by 2 A. L. O., 1956 [1-11-1956]. [c] Clause (c) was *omitted* by the Decentralization Act, 1914 (IV of 1914).

50B. Penalties for breach of such rules.

The [A][State Government] may, in making any rule under any of the powers conferred by this Act, attach to the breach of it, in addition to any other consequences that would ensue from such breach, a punishment on conviction before a Magistrate not exceeding six months' imprisonment, or three hundred rupees fine, or both.]

[a][**51. Republication of rules and orders.**

All rules which the [A][State Government] is empowered to issue under this Act, and all circulars issued by the [b][High Court] of Punjab, shall be republished from time to time by the [A][State Government], and upon such republication, shall be arranged in the order of their subject-matter, and all such alterations or amendments as may have been made since the last preceding publication thereof, or may have become necessary or advisable, shall be embodied therewith, and upon such republication all such rules and circulars previously issued shall be repealed.]

[a] *Substituted* for the original S. 51, by the Punjab Laws (Amendment) Act, 1910 (Punjab I of 1910). [b] *Substituted* for "Chief Court" by A. C. A. O., 1948 [23-3-1948].

52. Recovery of advances made by Government. *[Repealed by the Northern India Takkavi Act, 1879 (X of 1879).]*

[a]SCHEDULE I

ENACTMENTS DECLARED TO BE IN FORCE

Explanation.—This schedule does not refer to any Act which is in its terms applicable to the Punjab, or which has been extended to the Punjab by competent authority.

No. and year	Title	Extent to which the enactment is in force
[b]Reg. I of 1798	A Regulation to prevent Fraud and Injustice in Conditional Sales of Land under Deeds of bai-bil-wuffa, or other Deeds of the same nature.	The whole, except such parts as relate to interest.
[c][* * * * * * * a * * *]		
[b]Reg. XVII of 1806	A Regulation for extending to the State of Benares the Rates of Interest on future Loans and Provisions relative thereto, contained in Regulation XV, 1793; also for a general extension of the Period fixed by Regulations I, 1798, and XXXIV, 1803, for the redemption of Mortgages and Conditional	Sections 7 and 8.

No. and year	Title	Extent to which the enactment is in force
	Sales of Land, under Deeds of bai-bil-wuffa Kutcubaleb. or other similar designation.	
[d][* * *	* * * * * *	* * *]
Reg. XI of 1825 .	A Regulation for declaring the Rules to be observed in determining Claims to Lands gained by alluvion or by dereliction of a river or the sea.	The whole.
[a][* * *	* * * * * *	* * *]
	Rules for the conservancy of Forests and Jungles in the Hill Districts of the Punjab Territories, sanctioned by the Governor General in Council in letter of the Secretary to the Government of India, No. 1789, 21st May 1855.	The whole.

[a] As so much of Act IV of 1872 as related to Bengal Regulations V of 1817 and XX of 1825 and Acts XL of 1858 and XVII of 1861 was repealed by Acts VI of 1878, X of 1882, VIII of 1890 and XII of 1891, respectively, the references to those Regulations and Acts in this Schedule are *omitted*. [b] So much of Act IV of 1872 as relates to Bengal Regulation I of 1798 and XVII of 1806 will be *repealed* when the Transfer of Property Act, 1882 (IV of 1882) is extended to the Punjab. *See* the Transfer of Property Act, 1882 (IV of 1882), Ss. 1, 2 and Sch. [c] So much of the First Schedule as relates to Bengal State Offences Regulation, 1804 (X of 1804), was *repealed* by Act IV of 1922. [d] Entry relating to Bengal Regulation III of 1818 was *omitted* by Act XLII of 1953, S. 4 and Sch III.

SCHEDULE II. — Enactments Repealed. *[Repealed by the Second Repealing and Amending Act, 1914 (XVII of 1914).]*

[THE] PUNJAB LAWS (AMENDMENT) ACT, 1878

(ACT XII of 1878)

[The Act printed here is as on 1-3-1961]

CONTENTS

SECTIONS

1 to 6. *[Repealed.]*

7. Penalty for breach of rules under Act IV of 1872.

8. *[Repealed.]*

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION:

—Amended and repealed in part by Act I of 1903.

—Extended in Punjab by Punj. Act V of 1950.

—Repealed in part by Acts X of 1879; XII of 1891; I of 1938.

—Repealed in part by Punj. Acts II of 1903; II of 1905.

[THE] PUNJAB LAWS (AMENDMENT) ACT, 1878

(ACT XII OF 1878)[a]

[28th March, 1878.]

An Act for the further amendment of the Punjab Laws Act, 1872.

Preamble

For the purpose of further amending the Punjab Laws Act, 1872; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1877, Pt. V, p. 489.

Short title was given by the Amending Act, 1903 (I of 1903).

This Act has been extended to the States merged in the State of Punjab by Act V of 1950, S. 3 and Sch. I [15-4-1950].

[a]**1 to 6.** *[Sections 1 and 5 were repealed by Act I of 1938 ; S. 2 by the Punjab Act II of 1905; Ss. 3 and 4 by the Punjab Act II of 1903; and S. 6 by Act XII of 1891.]*

7. Penalty for breach of rules under Act 4 of 1872.

Whoever breaks any rule made by the [A][State Government] under the [a]same Act shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to fifty rupees, or with both. [b][* * *]

[a] That is the Punjab Laws Act, 1872 (IV of 1872). [b] The second sentence of S. 7 was *omitted* by the Amending Act, 1891 (XII of 1891), S. 2 and Sch. I.

Note :—Section 50B of the Punjab Laws Act (IV of 1872) reads : "The State Government may, in making any rule under any of the powers conferred by this Act, attach to the breach of it, in addition to any other consequences that would ensue from such breach, a punishment on conviction before a Magistrate not exceeding six months' imprisonment, or three hundred rupees fine or both."

Section 50A of Act IV of 1872 reads: "Rules made under this Act shall not be valid unless :—

(a) they are consistent with the laws for the time being in force in the territories to which this Act extends;

(b) they are published in the Official Gazette;"

8. Recovery of advances made by Government. *[Repealed by the Amending Act, 1903 (I of 1903), S. 4 and Sch. III.]*

[THE INDIAN] RAILWAY BOARD ACT, 1905

(ACT IV of 1905)

[The Act printed here is as on 15-3-1961]

CONTENTS

SECTIONS

1. Short title and construction.
2. Investment of Railway Board with powers under Indian Railways Act, 1890.
3. Mode of signifying communications from the Railway Board.
4. *[Repealed.]*

STATEMENT OF OBJECTS AND REASONS

"The object of this Bill is to provide for investing the Railway Board which has recently been constituted with (1) the powers and functions of the Governor-General in Council under the Indian Railways Act, 1890 (IX of 1890), which can, as that Act stands, be delegated only to Local Governments, and (2) the power to make general rules as to Government railways, which can, as S. 47 of the Act stands, be exercised only by an officer to be appointed by the Governor-General in Council in this behalf, and not by a Board.

This object is secured by cl. 2 of the Bill. Clauses 1 and 3 are formal. The former declares that the proposed Act shall be read with and taken as part of the Indian Railways Act, 1890, and the latter, following Ss. 139 and 144 (2) of the Indian Railways Act, 1890, prescribes the mode in which communications from the Railway Board are to be signified."

— Gaz. of Ind., 1905, Part. V, page 16.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937; A. C. A. O., 1948;
—Extended by Acts LIX of 1949; XXX of 1950.
—Extended to Berar by Act IV of 1941.

[THE INDIAN] RAILWAY BOARD ACT, 1905

(ACT IV OF 1905)[a]

[22nd March, 1905.]

An Act to provide for investing the Railway Board with certain powers or functions under the Indian Railways Act, 1890.

WHEREAS a Railway Board has been constituted for controlling the administration of railways in India, and it is expedient to provide for investing such Board with certain powers or functions under the Indian Railways Act, 1890 ; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1905, Pt. V, p. 16.

This Act has been extended to Berar by the Berar Laws Act, 1941 (IV of 1941) and has been declared to be in force in the Sonthal Parganas by notification under S. 3 *(3)(a)* of the Sonthal Parganas Settlement Regulation (III of 1872), *see* Calcutta Gazette,

1906, Pt. I, p. 334, and in the Angul District by the Angul Laws Regulation, 1936 (V of 1936), S. 3 and Sch.

It has also been extended to the new Provinces and merged States by the Merged States (Laws) Act, 1949 (LIX of 1949), S. 3 [1-1-1950] and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (XXX of 1950), S. 3 [16-4-1950].

1. Short title and construction.

(1) This Act may be called THE INDIAN RAILWAY BOARD ACT, 1905 ; and

(2) It shall be read with, and taken as part of, the Indian Railways Act, 1890.

2. Investment of Railway Board with powers under Indian Railways Act, 1890.

The [A][Central Government] may, by notification[a] in the [A][Official Gazette], invest the Railway Board, either absolutely or subject to conditions,—

(a) with all or any of the powers or functions of the [A][Central Government] under the Indian Railways Act, 1890, with respect to all or any railways and

(b) with the power of the officer referred to in section 47 of the said Act to make general rules for railways administered by the Government.

[a] For notifications *see* Gazette of India, 1905, Pt. I, p. 232; 1906, Pt. I, p. 927; 1907, Pt. I, p. 273 and 1908, Pt. I, p. 169.

3. Mode of signifying communications from the Railway Board.

Any notice, determination, direction, requisition, appointment, expression of opinion, approval or sanction, to be given or signified on the part of the Railway Board, for any of the purposes of, or in relation to, any powers or functions with which it may be invested by notification under section 2, shall be sufficient and binding if in writing signed by the Secretary to the Railway Board, or by any other person authorized by the said Railway Board to act in its behalf in respect of the matters to which such authorization may relate; and the said Railway Board shall not in any case be bound in respect of any of the matters aforesaid unless by some writing signed in manner aforesaid.

4. Cessation of Railway Board on establishment of Federal Railway Authority. *[Repealed by A. O. A. O., 1948].*

[THE INDIAN] RAILWAY COMPANIES ACT, 1895
(ACT X of 1895)

[The Act printed here is as on 15-3-1961.]

CONTENTS

SECTIONS

1. Title and extent.
2. Definition.
3. Payment of interest out of capital.
4. Provisions of section 3 applicable to additional share capital for extensions.
5. Notice in prospectus and other documents.
6. Accounts.
7. Construction of borrowing powers.

Section 2 — Note 1

[1] Section 2 authorises the Central Government to invest the Railway Board with all or any of its powers and functions under the Railways Act. In consequence the Notification of 1926 and 1958 issued by the Railway Board prescribing rules under S. 47, Railways Act, are in the eye of law Notifications of the Central Government itself and accordingly fulfil the conditions laid down by S. 47 (3). 1960 All 438 (442) [AIR V 47 C 110].

[2] The fact that the Railway Board was given certain powers and that the Railway company and the officers of the State Railway have powers to make rules for certain purposes does not imply that S. 175 of the Government of India Act, 1935, did not apply to Railways. Reference to S. 47 (l) (g) of the Railways Act and S. 2 (b) of the Railway Board Act is irrelevant in this connection. 1957 Pat 586 (603, 607) [(S) AIR V 44 C 177]: 36 Pat 633 (DB).

STATEMENT OF OBJECTS AND REASONS

"The restriction against treating any part of the subscribed capital of a Company as income during the time when it is necessarily unproductive, which applies under English law to every Company registered under the English Joint Stock Companies Acts, would probably be held by the Courts in this country to apply to a Company domiciled in India and registered under the Indian Companies Act (VI of 1882). The restriction has been removed so far as Companies domiciled in England, but formed for construction of railways in India, are concerned, by the Statute 57 and 58 Vict., c. 12 passed by Parliament in the middle of last year. The object of this Bill is to place Railway Companies domiciled in India and registered under the Indian Companies Act, 1882, in the same position in this respect as Companies registered in England."

—Gaz. of Ind., 1895, Pt. V, page 25.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937; 2 A. L. O., 1956.

—Repealed in part by Act X of 1914.

[THE INDIAN] RAILWAY COMPANIES ACT, 1895
(ACT X OF 1895)[a]

[7th March, 1895.]

An Act to provide for the payment by Railway Companies registered under the Indian Companies Act, 1882, of interest out of capital during construction.

WHEREAS it is expedient to provide for the payment by Railway Companies registered under the [b]Indian Companies Act, 1882, of interest out of capital during construction; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1895, Pt. V, p. 25.

As to application of this Act to Tramway Companies, *see* the Indian Tramways Act, 1902 (IV of 1902), S. 2.

[b] This Act has been *repealed* by the Indian Companies Act, 1913 (VII of 1913], which has also been *repealed* by the Companies Act, 1956 (I of 1956).

1. Title and extent.

(1) This Act may be called THE INDIAN RAILWAY COMPANIES ACT, 1895.

(2) It extends to the whole of India except [a][the territories which, immediately before the 1st November, 1956, were comprised in Part B States]. [b][* * *].

[b][* * * * *]

[a] *Substituted* for "Part B States" by 2 A. L. O., 1956 [1-11-1956]. Immediately before 1st November, 1956 the following were Part: B States : Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin. [b] The word "and" at the end of sub-section (2) and sub-section (3) were *omitted* by the Repealing and Amending Act, 1914 (X of 1914), S. 3 and Sch. II.

2. Definitions.

In this Act, unless there is something repugnant in the subject or context,—

(1) "railway" means a railway as defined in section 3, clause *(4)*, of the Indian Railways Act, 1890 :

(2) "the railway" means the railway in relation to the construction of which interest out of capital is permitted to be paid as hereinafter provided : and

(3) "Railway Company" means a Company registered under the [a]Indian Companies Act, 1882, and formed for the purpose of making and working, or making or working, a railway in India, whether alone or in conjunction with other purposes.

[a] *See* now the Companies Act, 1956 (I of 1956).

Note. — Under section 3 (4) of the Railways Act, 1890, "railway" means "a railway, or any portion of a railway, for the public carriage of passengers, animals or goods, and includes—

(a) all land within the ferries or other boundary-marks indicating the limits of the land appurtenant to a railway;

(b) all lines of rails. sidings, or branches worked over for the purposes of, or in connection with, a railway;

(c) all stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery and other works constructed for the purposes of or in connection with, a railway; and

(d) all ferries, ships, boats and rafts which are used on inland waters for the purposes of the traffic of a railway and belonging to or are hired or worked by the authority administering the railway."

3. Payment of interest out of capital.

A Railway Company may pay interest on its paid-up share capital out of capital, for the period, and subject to the conditions and restrictions, in this section mentioned, and may charge the same to capital as part of the cost of construction of the railway :—

(1) Such interest shall be paid only for such period as shall be determined by the [A][Central Government]; and such period shall in no case extend beyond the close of the half year next after the half-year during which the railway shall be actually completed and opened for traffic.

(2) No such payment shall be made unless the same is authorised by the Company's memorandum of association or by a special resolution of the Company.

(3) No such payment, whether authorised by the Company's memorandum of association or by special resolution as aforesaid, shall be made without the previous sanction of the [A][Central Government].

(4) The amount so paid out of capital by way of interest, in respect of any period, shall in no case exceed a sum which shall, together with the net earnings of the railway during such period, make up the rate of four per cent. per annum.

(5) No such payment of interest shall be made until such Railway Company has satisfied the [A][Central Government] that two-thirds at least of its share capital, in respect whereof interest is to be so paid, has been actually issued and accepted, and is held by shareholders who, or whose representatives, are legally liable for the same.

(6) No such interest shall accrue in favour of any shareholder for any time during which any call on any of his shares is in arrear.

(7) The payment of such interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid.

4. Provisions of section 3 applicable to additional share capital for extensions.

A railway in course of construction and intended to be made or worked by a Railway Company in addition to or by way of extension of any railway owned or worked by such Company shall be deemed to be the railway of such Company for the purposes of this Act, and all the provisions of the last preceding section shall apply to such railway and to the share capital issued for the purpose of its construction.

5. Notice in prospectus and other documents.

When a Railway Company has power to pay interest under this Act, notice to that effect shall be given in every prospectus, advertisement or other document inviting subscriptions for shares therein, and in every certificate of such shares.

6. Accounts.

When any interest has been paid by a Railway Company under this Act, the annual or other accounts of such company shall show the amount on which, and the rate at which, interest has been so paid.

7. Construction of borrowing powers.

If by any memorandum of association, articles of association or other document any power of borrowing money is conferred on a Railway Company, or

on its Directors, with or without the sanction of any meeting, and if such power of borrowing is limited to an amount bearing any proportion to the capital of such Company, the amount of capital applied or to be applied in payment of interest under this Act shall, for the purpose of ascertaining the extent of such power of borrowing, be deducted from the capital of such Company.

[THE] RAILWAY COMPANIES (EMERGENCY PROVISIONS) ACT, 1951
(ACT LI of 1951)

[The Act printed here is as on 15-3-1961.]

CONTENTS

SECTIONS

1. Short title, extent and application.
2. Definitions.
3. Power of Central Government to apply Act to any railway company and to appoint directors thereof.
4. Effect of notified order appointing directors or managing agents.
5. Powers and duties of directors.
6. Statement of affairs to be made to directors.
7. Statements by beneficial owners of shares of railway company.
8. Power of directors to institute proceedings against past directors, etc., for damages.
9. Penalties.
10. Filling up of vacancies among directors.
11. No right to compensation for termination of contract of managing agent or any other contract.
12. Cancellation of appointment of directors.
13. Application of the Companies Act.
14. Effect of Act on other laws.
15. Directors to be public servants.
16. Delegation of powers.
17. Protection of action taken under Act.
18. Power of Central Government to acquire railway or railway company.
19. Power to make rules.
20. Repeal of Ordinance 2 of 1951.

STATEMENT OF OBJECTS AND REASONS

"Although all the major Railways in the country are now under Government management. a few narrow gauge light Railways are still being managed by private companies. Government have statutory control over these Railways in respect of fares and freight rates, and may enforce safety regulations under the Indian Railways Act, 1890; but they have no power to ensure that the day to day administration of the Railways by the companies is in the best interests of the public. Of late Government have been receiving complaints regarding mismanagement by some of these companies thereby causing a great deal of inconvenience to the normal life of the community. It became imperative, therefore, that Government should, in the public interest, take powers to intervene in cases where in the opinion of Government a situation has arisen in the affairs of a Railway company which prejudicially affects the convenience of persons using the Railway or causes serious dislocation in any trade or industry using the Railway or causes serious unemployment among the persons employed on the Railway.

An Ordinance entitled the Railway Companies (Emergency Provisions) Ordinance, 1951, was accordingly promulgated on the 14th July 1951. The Ordinance was of a general nature and provided for the application thereof to a delinquent Railway company by a notified order. The result of such a notification would be that Government is enabled to appoint a new board of directors for the Railway company in supersession of the existing board of directors and any contract of management between the Railway company and any managing agent would be automatically terminated. The intention underlying these provisions is that the company should be put back into its normal position when it would be possible to restore the management of the company to its old board of directors or to a new board of directors appointed in pursuance of a resolution passed by the share holders of the company. The Ordinance contains the usual provision for delegation of powers so that in suitable cases power could be delegated to the State Government to administer the affairs of a Railway company within its jurisdiction, the management of which has to be taken over by the Government.

In the case of the Baraset Basirhat Light Railway Company which owns a narrow gauge line about 52 miles long in West Ben-

gal, the Government of West Bengal caused an investigation to be made into the affairs of the company by a high level committee who found considerable evidence of serious mismanagement in the affairs of the company which culminated in a labour strike and consequent suspension of railway service from the 14th April, 1951. The Ordinance was therefore, made applicable to this Railway Company and powers in respect of this company have been delegated to the Government of West Bengal under the Ordinance.

The present Bill seeks to replace the Ordinance and to validate all action taken thereunder."

— Gaz. of Ind., 1951, Pt. II-Sec. 2. p. 616.

[THE] RAILWAY COMPANIES (EMERGENCY PROVISIONS) ACT, 1951

(ACT LI OF 1951)[a]

[14th September, 1951.]

An Act to make provision for the proper management and administration of railway companies in certain special cases.

BE it enacted by Parliament as follows :—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1951, Pt. II-Sec. 2, p. 616.

1. Short title, extent and application.

(1) This Act may be called THE RAILWAY COMPANIES (EMERGENCY PROVISIONS) ACT, 1951.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It applies to every railway company in respect of which a notified order has been issued under section 3.

2. Definitions.

In this Act, unless the context otherwise requires,—

(a) "Companies Act" means the Indian Companies Act, 1913 ;

(b) "directors" means the directors appointed under section 3 ;

(c) "notified order" means an order notified in the Official Gazette ;

(d) "prescribed" means prescribed by rules made under this Act ;

(e) "railway company" means any company registered under the Companies Act or any law repealed thereby for the purpose of making and working or making or working a railway, whether alone or in conjunction with other purposes.

3. Power of Central Government to apply Act to any railway company and to appoint directors thereof.

(1) Where the Central Government is of opinion that a situation has arisen in the affairs of a railway company which—

(a) has prejudicially affected the convenience of persons using the railway administered by the railway company, or

(b) has caused serious dislocation in any trade or industry using the railway, or

(c) has caused serious unemployment amongst a section of the community, or when, in the opinion of the Central Government, it is necessary in the national interest the Central Government may, by notified order, apply the provisions of this Act to the railway company and appoint as many persons as it thinks fit to be directors of the railway company for the purpose of taking over its management and administration.

(2) The power to appoint directors under this section includes the power to appoint any individual, firm or company to be the managing agent of the railway company on such terms and conditions as to the Central Government may seem fit.

Note:—The result of the notification under this section is that the Government is enabled to appoint a new board of directors for the Railway company in s persession of the existing board of directors and any contract of management between the Railway Company, and any managing agent would be automatically terminated. The underlying intention is that the company should be put back into its normal position when

it would be possible to restore the management of the company to its old board of directors or to a new board of directors appointed in pursuance of a resolution passed by the share-holders of the company. *see* S. O. R. and sections 4 and 12.

4. Effect of notified order appointing directors or managing agents.

On the issue of a notified order under section 3,–

(a) all persons holding office as directors of the railway company immediately before the issue of the notified order shall be deemed to have vacated their offices as such;

(b) any contract of management between the railway company and any managing agent thereof holding office as such immediately before the issue of the notified order shall be deemed to have terminated;

(c) the managing agent, if any, appointed under this Act shall be deemed to have been duly appointed in pursuance of the Companies Act and the memorandum and articles of association of the railway company, and the provisions of the Companies Act and of the memorandum and articles shall, subject to the other provisions contained in this Act, apply accordingly, but no such managing agent shall be removed from office except with the previous consent of the Central Government;

(d) the directors shall take such steps as may be necessary to take into their custody or under their control all the property, effects and actionable claims to which the railway company is, or appears to be, entitled, and all the property and effects of the railway company shall be deemed to be in the custody of the directors as from the date of the notified order;

(e) the directors shall be for all purposes the directors of the railway company duly constituted under the Companies Act, and shall alone be entitled to exercise all the powers of the directors of the railway company, whether such powers are derived from the Companies Act or from the memorandum or articles of association of the railway company or from any other source.

5. Powers and duties of directors.

(1) Subject to the control of the Central Government, the directors shall take such steps as may be necessary for the purpose of efficiently managing the business of the railway company and, in particular, the directors shall have power, notwithstanding anything contained in the Companies Act or in the memorandum or articles of association of the railway company,—

(a) to choose one of their number to be the chairman, and to delegate to him or to any one or more of the directors all or any of their powers;

(b) with the previous approval of the Central Government and subject to such conditions as that Government may think fit to impose, to raise funds in such manner and offer such security therefor as they think fit;

(c) to carry out such repairs as may be necessary in respect of any machinery, rolling-stock, buildings, works or other property in their custody;

(d) to do all acts necessary for making, maintaining, altering or repairing and using the railway of the railway company;

(e) to employ such persons as may be necessary for enabling them to efficiently discharge their duties, and define the conditions of service of such employees.

(2) The directors may, with the previous sanction of the Central Government, cancel or vary, either unconditionally or subject to such conditions as they think fit to impose, any contract or agreement entered into between the railway company and any other person at any time before the issue of the notified order under section 3, if such contract or agreement had been entered into in bad faith and is detrimental to the interests of the railway company.

6. Statement of affairs to be made to directors.

(1) On the issue of a notified order under section 3, there shall be made out and submitted to the directors a statement as to the affairs of the railway company, verified by affidavit and containing the following particulars, namely :—

(a) the assets of the railway company, stating separately the cash balance in hand and at the bank, if any ;

(b) the debts and liabilities ;

(c) the names, residences and occupations of the creditors, stating separately the amount of secured debts and unsecured debts and, in the case of secured debts, the particulars of the securities, their value and the dates when they were given ;

(d) the debts due to the railway company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised therefrom ;

(e) such other particulars as may be prescribed.

(2) The statements shall be submitted by one or more of the persons who was or were holding office as a director or as directors of the railway company immediately before the issue of the notified order under section 3 or by the secretary, manager or other chief officer of the railway company who was holding office as such before the issue of the notified order as the directors may require in each case, and the statement shall be submitted within such time as may be so required.

(3) If any person, without any reasonable excuse, knowingly and wilfully makes default in complying with the requirements of this section, he shall be punishable with imprisonment which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

7. Statements by beneficial owners of shares of railway company.

Any person who has any interest in any share of the railway company which stands in the name of another person in the register of shareholders of the railway company shall, within such period as may be specified by the Central Government by notified order, make a declaration in such form as may be prescribed (which shall be countersigned by the person in whose name the share is registered) to the railway company declaring his interest in the share, and notwithstanding anything contained in any other law or in any contract to the contrary, a person who fails to make a declaration as aforesaid in respect of any share shall be deemed to have no right or title whatsoever in or to that share :

Provided that nothing in this section shall affect the right of any person who has an interest in any such share to establish in a Court his right thereto if the person in whose name the share is registered refuses to sign that declaration as required by this section.

8. Power of directors to institute proceedings against past directors, etc. for damages.

(1) The directors may, if they are satisfied that it is necessary in the interests of the railway company or in the public interest so to do, institute in the name of the railway company such proceedings as they think fit for the recovery of damages for any fraud, misfeasance or other misconduct in connection with the management of the affairs of the railway company committed by any person before the issue of the notified order under section 3 or for the recovery of any property of the railway company which has been misapplied or wrongfully retained by any person.

(2) No director shall be personally liable for any costs or expenses incurred in connection with any proceedings instituted by virtue of this section.

9. Penalties.

If any person wilfully destroys or fails to deliver to the directors when required any books of account, registers or any other documents in his custody relating to the business of the railway company or retains any property of the railway company, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

10. Filling up of vacancies among directors.

(1) Casual vacancies occurring in the body of directors, whether caused by death, resignation or otherwise, shall be filled by nomination by the Central Government.

(2) No act of the directors shall be called in question on the ground merely of the existence of any vacancy among the directors or any defect in the appointment of any of them.

11. No right to compensation for termination of contract of managing agent or any other contract.

(1) Notwithstanding anything contained in the Companies Act or in any other law for the time being in force, no managing agent shall be entitled to any compensation for the premature termination under this Act of any contract of management entered into by him with the railway company, and no person shall be entitled to compensation in respect of the cancellation or variation under this Act of any other contract or agreement.

(2) Nothing contained in sub-section *(1)* shall affect the right of any such managing agent or person to recover from the railway company moneys recoverable otherwise than by way of such compensation.

12. Cancellation of appointment of directors.

(1) If at any time it appears to the Central Government that the purpose of the notified order appointing the directors has been fulfilled or that for any other reason it is unnecessary that the notified order should remain in force, the Central Government may, by notified order, cancel the appointment of directors made under this Act.

(2) On the cancellation of any such appointment as is referred to in sub-section *(1)*, the Central Government may—

(a) direct that all the property, effects and actionable claims of the railway company shall revest in the persons in whom they were vested before the issue of the notified order under section 3 ; or

(b) reconstitute by fresh appointment a new body of persons to take charge of the management and administration of the whole affairs of the railway company, whether as directors or managers or in any other capacity :

Provided that no such direction or fresh appointment shall be made except in pursuance of a resolution passed by the shareholders of the railway company at a meeting called for the purpose by the directors appointed under section 3.

(3) The Central Government may, at any time before the issue of the notified order under sub-section *(1)*, take such action as may be necessary under clause *(b)* of sub-section *(2)* for the purpose of making any fresh appointments.

13. Application of the Companies Act.

(1) Notwithstanding anything contained in the Companies Act or in the memorandum or articles of association of the railway company, but subject to the other provisions contained in this Act,—

(a) it shall not be lawful for the shareholders of the railway company or

any other person to nominate or appoint any person to be a director of the railway company ;

(b) no resolution passed at any meeting of the shareholders of the railway company shall be given effect to unless approved by the Central Government ;

(c) no proceeding for the winding-up of the railway company or for the appointment of a receiver in respect thereof shall lie in any Court, unless by or with the sanction of the Central Government.

(2) Subject to the provisions contained in sub-section *(1)* and to the other provisions contained in this Act and subject to such exceptions, restrictions and limitations as the Central Government may by notified order specify, the Companies Act shall continue to apply to the railway company in the same manner as it applied thereto before the issue of the notified order under section 3.

14. Effect of Act on other laws.

The provisions of this Act and of any notified order made thereunder shall have effect notwithstanding anything inconsistent therewith in any other law for the time being in force or in the memorandum or articles of association of the railway company or in any other instrument having effect by virtue of any law other than this Act, but save as aforsaid the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to the railway company.

15. Directors to be public servants.

Every director appointed under section 3 shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

16. Delegation of powers.

The Central Government may, by notified order, direct that all or any of the powers exercisable by it under this Act, except the powers given to it under section 3 to apply the provisions of this Act to any railway company or the powers given to it under section 12 or section 18, may be exercised by any State Government, and where any powers are so delegated, they shall be exercised subject to such directions as the Central Government may issue from time to time.

17. Protection of action taken under Act.

(1) No suit, prosecution or other legal proceeding shall lie against any director in respect of anything which is in good faith done or intended to be done in pursuance of this Act.

(2) No suit or other legal proceeding shall lie against the Central Government or any State Government or any director for any damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of this Act.

18. Power of Central Government to acquire railway of railway company.

(1) Where under any instrument, having effect by virtue of any law other than this Act or by virtue of an agreement arrived at between the parties, provision is made for the purchase by a person or local authority or the State Government of a railway which is the property of a railway company on payment of the value thereof calculated in the manner and subject to the conditions specified in the instrument, the Central Government shall also have the same right to purchase the railway on the same terms and subject to the same conditions as the person, local authority or the State Government has under the instrument.

(2) If in respect of any railway the Central Government exercises its right of purchase under this section, any person, local authority or State Government,

in whom or in which a similar right is vested under the instrument, shall be deemed to have become disentitled to exercise the same.

19. Power to make rules.

(1) The Central Government may by notified order, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, any rules made under sub-section *(1)* may provide for—

(a) the manner in which or the conditions subject to which the directors or managing agents of a railway company may exercise their powers under this Act;

(b) the additional particulars which a statement under section 6 should contain;

(c) the form in which a declaration under section 7 may be made;

(d) the appointment of a Railway Local Advisory Committee;

(e) the manner in which books of account shall be maintained by the directors and audited;

(f) the submission of specified or periodical returns and reports by the directors to any specified authority in connection with the affairs of the railway company;

(g) the conduct of business of the directors appointed by notified order and for the recruitment and employment of officers and staff.

20. Repeal of Ordinance 2 of 1951.

The Railway Companies (Emergency Provisions) Ordinance, 1951 is hereby repealed :

Provided that the repeal shall not affect—

(a) the previous operation of the said Ordinance, or

(b) any penalty, forfeiture or punishment incurred in respect of any offence committed against the said Ordinance, or

(c) any investigation, legal proceeding or remedy in respect of any such penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture, or punishment may be imposed as if this Act had not been passed :

Provided further that, subject to the preceding proviso, anything done or any action taken (including any notified order issued, appointment made or direction given under the said Ordinance) shall be deemed to have been done or taken under the corresponding provision of this Act and shall continue in force accordingly, unless and until superseded by anything done or any action taken under this Act.

[THE] RAILWAY COMPANIES (SUBSTITUTION OF PARTIES IN CIVIL PROCEEDINGS) ACT, 1946

(ACT XIV of 1946)

[The Act printed here is as on 15-3-1961.]

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SECTIONS
1. Short title.
2. Interpretation.
3. Substitution of Governor-General in Council in certain civil proceedings.

STATEMENT OF OBJECTS AND REASONS

"Government acquired the Bengal-Nagpur Railway on the 1st October 1944 and assumed responsibility for the contractual obligations of the Bengal-Nagpur Railway Company while succeeding to all its rights. In order to relieve the liquidators of responsibility in a number of suits pending in Law Courts, efforts were made to secure the substitution of Governor-General in Council in place of the Company, but without success, as some of the plaintiffs objected to this course. Similar difficulty has also arisen in respect of the 'Bengal and North Western' and 'Rohilkund and Kumaon' Railways which were purchased on the 1st January 1943, but the liability in respect of which was accepted by the Government only recently as a part of the final settlement reached with the liquidators in England, through the Secretary of State after protracted negotiations. The liquidators are naturally anxious to complete the liquidation without undue delay and the Secretary of State has urged the desirability of relieving them early of the liabilities which devolve upon the Government.

The Government have been advised that the legal position is not free from difficulty as the transfer of the liability by the Company to the Government will not bind the person who is entitled to enforce such liability against the Company. It has, therefore, been considered desirable, to introduce legislation in order to enable the Governor-General in Council to be substituted in the place of the Companies and to relieve the Companies of their responsibility in the pending civil proceedings".

—Gazette of India, 1946, Part V page 170.

[THE] RAILWAY COMPANIES (SUBSTITUTION OF PARTIES IN CIVIL PROCEEDINGS) ACT, 1946
(ACT XIV OF 1946)[a]

[18th April, 1946.]

An Act to provide for the substitution of the Governor-General in Council for certain Railway Companies in certain civil proceedings.

WHEREAS under certain arrangements made by the Central Government with the Bengal-Nagpur Railway Company, Limited, the Bombay, Baroda and Central India Railway Company, the Bengal and North Western Railway Company, Limited, and the Rohilkhand and Kumaon Railway Company, Limited, certain rights and liabilities of the said Companies have been assumed by the Central Government;

AND WHEREAS it is expedient to provide for the substitution of the Governor General in Council in the place and stead of the said Companies in all pending civil proceedings founded on any right or liability so assumed by the Central Government :

It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind, 1946, Pt. V, p. 170.

1. Short title.

This Act may be called THE RAILWAY COMPANIES (SUBSTITUTION OF PARTIES IN CIVIL PROCEEDINGS) ACT, 1946.

2. Interpretation.

In this Act, "civil proceeding" includes an appeal or execution proceeding.

3. Substitution of Governor-General in Council in certain civil proceedings.

(1) In every civil proceeding pending at the commencement of this Act to which the Bengal-Nagpur Railway Company, Limited, or the Bombay, Baroda and Central India Railway Company, or the Bengal and North Western Railway Company, Limited, or the Rohilkhand and Kumaon Railway Company, Limited, is a party, and which is founded on any right or liability assumed by the Central Government under certain arrangements made by the Central Government with the said Companies, the Governor-General in Council shall, notwithstanding anything to the contrary in the Code of Civil Procedure, 1908, be deemed to be substituted in the place and stead of the Company; and every such proceeding may be continued by or against the Governor-General in Council accordingly, and the Company shall be discharged from all liability in connection with the proceeding.

(2) References in sub-section *(1)* to any Company shall be construed as including references to the liquidators of that Company.

Note :—Since the transfer of all their liabilities by the company to the Government of India did not bind the persons who were entitled to enforce such liabilities against the companies, the legal position was not free from difficulty. This section enables the Governor-General in Council to be substituted in the place of Companies in pending civil litigations and relieve the Companies of their responsibility.

[THE] RAILWAY PASSENGER FARES (REPEAL) ACT, 1961

(ACT VIII OF 1961)

[Act printed here is as on 15-3-1961.]

STATEMENT OF OBJECTS AND REASONS

"The Railway Convention Committee, 1960 recommended inter alia that from the 1st of April, 1961 the tax on Railway Passenger Fares at the existing rates should be merged with railway fares and that in lieu of the net proceeds of the tax assignable to States, a fixed annual amount should be made available for distribution among them. The recommendations of the Committee have been accepted by the Government and a resolution to that effect has also been passed by Parliament. The present Bill seeks to abolish the Railway Passenger Fares Tax and also to make consequential amendments in the Estate Duty and Tax on Railway Passenger Fares (Distribution) Act, 1957."

—Gaz. Ind., 1961, Extra., Pt. II, sec. 2, page 48.

[THE] RAILWAY PASSENGER FARES (REPEAL) ACT, 1961

(ACT VIII OF 1961)

[24th March, 1961.]

An Act to repeal the Railway Passenger Fares Act, 1957, and to make certain provisions consequential thereto.

BE it enacted by Parliament in the Twelfth Year of the Republic of India as follows :—

1. Short title and commencement.

(1) This Act may be called THE RAILWAY PASSENGER FARES (REPEAL) ACT, 1961.

(2) It shall come into force on the 1st day of April, 1961.

2. Repeal of Act XXV of 1957.

The Railway Passenger Fares Act, 1957, is hereby repealed.

3. Amendment of Act LVII of 1957.

In the Estate Duty and Tax on Railway Passenger Fares (Distribution) Act, 1957,—

(a) in the long title, the words "and the tax on railway passenger fares" shall be omitted;

(b) in section 1, the words "and Tax on Railway Passenger Fares" shall be omitted;

(c) in section 2, clause *(c)* shall be omitted; and

(d) section 5 shall be omitted.

Note. — For the reasons for the repeal of Act XXV of 1957 and amendment of Act LVII of 1957, *see* S. O. R.

[THE] RAILWAY PROTECTION FORCE ACT, 1957

(Act XXIII of 1957)

[The Act printed here is as on 15-3-1961.]

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THE SCHEDULE

STATEMENT OF OBJECTS AND REASONS

"The Watch and Ward Departments functioning on the Railways have hitherto been handicapped by lack of adequate powers and well defined status as also of a proper sense of discipline to fulfil their primary functions of protecting railway property and of property entrusted to Railways for transport. The Railways have during these years incurred heavy losses on account of theft and pilferage of railway property and of payment of quite a large number of compensation claims preferred against them.

2. The proposed legislation is designed to bring about a radical change in the functioning of this Department, which is being redesignated as the Railway Protection Force, so as to achieve quick and effective results. It enables the personnel of the Force to be brought under a special set of disciplinary rules and confers on them, under certain conditions powers of arrest and search without warrant. Moreover, the Railway Protection Force thus reorganised could provide, in times of need, suitable assistance to the Railway Police who are charged mainly with the responsibility for overall maintenance of law and order in railway premises."

—Gaz. of Ind., 1956, Extra., Pt. II, Sec. 2, p. 1028.

[THE] RAILWAY PROTECTION FORCE ACT, 1957

(ACT XXIII OF 1957)[a]

[29th August, 1957.]

An Act to provide for the constitution and regulation of a Force called the Railway Protection Force for the better protection and security of railway property.

BE it enacted by Parliament in the Eighth Year of the Republic of India as follows:—

[a] For Statement of Objects and Reasons, *see* Gaz. of Ind., 1956, Extra., Pt. II, Sec. 2, p. 1028.

1. Short title, extent and commencement.

(1) This Act may be called THE RAILWAY PROTECTION FORCE ACT, 1957.

(2) It extends to the whole of India.

(3) It shall come into force on such date[a] as the Central Government may, by notification in the Official Gazette, appoint.

[a] The Act came into force on 10-9-1959 ; *see* Notfn. No. 58—Security /16/9 D/- 10-9-59, published in Gaz. of Ind.,1959 Extra., Pt. II—Sec. 1, p. 291.

2. Definitions.

In this Act, unless the context otherwise requires,—

(a) "Force" means the Railway Protection Force constituted under section 3;

(b) "Inspector-General" means the Inspector-General of the Force appointed under section 4 ;

(c) "member of the Force" means a person appointed to the Force under this Act other than a superior officer ;

(d) "prescribed" means prescribed by rules made under this Act ;

(e) "railway property" includes any goods, money or valuable security, or animal, belonging to, or in the charge or possession of, a railway administration ;

(f) "superior officer" means any of the officers appointed under section 4 and includes any other officer appointed by the Central Government as a superior officer of the Force ;

(g) words and expressions used but not defined in this Act and defined in the Indian Railways Act, 1890, shall have the meanings respectively assigned to them under that Act.

3. Constitution of the Force.

(1) There shall be constituted and maintained by the Central Government a Force to be called the Railway Protection Force for the better protection and security of railway property.

(2) The Force shall be constituted in such manner, shall consist of such number of superior officers and members of the Force and shall receive such pay and other remuneration as may be prescribed.

4. Appointment and powers of superior officers.

(1) The Central Government may appoint a person to be the Inspector-General of the Force and may appoint other persons to be Chief Security Officers, Security Officers or Assistant Security Officers of the Force.

(2) The Inspector-General and every other superior officer so appointed shall possess and exercise such powers and authority over the members of the Force under their respective commands as is provided by or under this Act.

5. Classes and ranks among members of the Force.

There shall be the following classes of officers and other ranks among the members of the Force, who shall take rank in the order mentioned, namely :—

A. Classes of officers—

(i) Inspector,

(ii) Sub-Inspector,

(iii) Assistant Sub-Inspector.

B. Classes of other ranks —

(i) Head Rakshak,

(ii) Senior Rakshak,

(iii) Rakshak.

6. Appointment of members of the Force.

The appointment of members of the Force shall rest with the Chief Security Officers who shall exercise that power in accordance with rules made under this Act :

Provided that the power of appointment under this section may also be exercised by such other superior officer as the Chief Security Officer concerned may by order specify in this behalf.

7. Certificates to members of the Force.

(1) Every member of the Force shall receive on his appointment a certificate in the form specified in the Schedule, under the seal of the Chief Security Officer or such other superior officer as the Chief Security Officer may specify in this behalf by virtue of which the person holding such certificate shall be vested with the powers of a member of the Force.

(2) Such certificate shall cease to have effect whenever the person named in it ceases for any reason to be a member of the Force, and, on his ceasing to be a member of the Force, shall be forthwith surrendered by him to any superior officer empowered to receive the same.

Note : Failure to surrender the certificate of appointment by a member of the force upon his ceasing to be such a member is made punishable under S. 17 of the Act by Rule 65 of the Railway Protection Force Rules, 1959.

8. Superintendence and administration of the Force.

(1) The superintendence of the Force shall vest in the Central Government, and subject thereto the administration of the Force shall vest in the Inspector-General and shall be carried on by him in accordance with the provisions of this Act and of any rules made thereunder.

(2) Subject to the provisions of sub-section *(1)*, the administration of the Force within such local limits in relation to a railway as may be prescribed shall be carried on by the Chief Security Officer in accordance with the provisions of this Act and of any rules made thereunder, and he shall discharge his functions under the general supervision of the General Manager of the Railway.

9. Dismissal, removal, etc., of members of the Force.

(1) Subject to the provisions of article 311 of the Constitution and to such rules as the Central Government may make under this Act, any superior officer may—

(i) dismiss, suspend or reduce in rank any member of the Force whom he shall think remiss or negligent in the discharge of his duty, or unfit for the same; or

(ii) award any one or more of the following punishments to any member of the Force who discharges his duty in a careless or negligent manner, or who by any act of his own renders himself unfit for the discharge thereof, namely :—

(a) fine to any amount not exceeding seven days' pay or reduction in pay scale;

(b) confinement to quarters for a period not exceeding fourteen days with or without punishment, drill, extra guard, fatigue or other duty;

(c) removal from any office of distinction or deprivation of any special emolument.

(2) Any member of the Force aggrieved by an order made under sub-section *(1)* may appeal against the order to such authority as may be prescribed, and the decision of the said authority thereon shall be final.

10. Officers and members of the Force to be deemed to be railway servants.

The Inspector-General and every other superior officer and every member of the Force shall for all purposes be regarded as railway servants within the meaning of the Indian Railways Act, 1890, other than Chapter VIA thereof, and shall be entitled to exercise the powers conferred on railway servants by or under that Act.

11. Duties of members of the Force.

It shall be the duty of every superior officer and member of the Force—

(a) promptly to execute all orders lawfully issued to him by his superior authority;

(b) to protect and safeguard railway property;

(c) to remove any obstruction in the movement of railway property; and

(d) to do any other act conducive to the better protection and security of railway property.

12. Power to arrest without warrant.

Any superior officer or member of the Force may, without an order from a Magistrate and without a warrant, arrest—

(a) any person who has been concerned in an offence relating to railway property punishable with imprisonment for a term exceeding six months, or against whom a reasonable suspicion exists of his having been so concerned; or

(b) any person found taking precautions to conceal his presence within railway limits under circumstances which afford reason to believe that he is taking such precautions with a view to committing theft of, or damage to, railway property.

13. Power to search without warrant.

(1) Whenever any superior officer, or any member of the Force, not below the rank of a Senior Rakshak, has reason to believe that any such offence as is referred to in section 12 has been or is being committed and that a search-warrant cannot be obtained without affording the offender an opportunity of escaping or of concealing evidence of the offence, he may detain him and search his person and belongings forthwith and, if he thinks proper, arrest any person whom he has reason to believe to have committed the offence.

(2) The provisions of the Code of Criminal Procedure, 1898, relating to searches under that Code shall, so far as may be, apply to searches under this section.

14. Procedure to be followed after arrest.

Any superior officer or member of the Force making an arrest under this Act, shall, without unnecessary delay, make over the person so arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken to the nearest police station.

15. Officers and members of the force to be considered always on duty and liable to be employed in any part of the Railways.

(1) Every superior officer and member of the Force shall, for the purpose of this Act, be considered to be always on duty, and shall, at any time, be liable to be employed in any part of the railways throughout India.

(2) No superior officer or member of the Force shall engage himself in any employment or office other than his duties under this Act.

16. Responsibilities of members of the Force during suspension.

A member of the Force shall not by reason of his suspension from office cease to be a member of the Force; and he shall, during that period, be subject to the same responsibilities, discipline and penalties to which he would have been subject if he were on duty.

17. Penalties for neglect of duty, etc.

(1) Without prejudice to the provisions contained in section 9, every member of the Force who shall be guilty of any violation of duty or wilful breach or neglect of any rule or regulation of lawful order made by a superior officer, or who shall withdraw from the duties of his office without permission, or

who, being absent on leave, fails, without reasonable cause, to report himself for duty on the expiration of the leave, or who engages himself without authority in any employment other than his duty as a member of the Force, or who shall be guilty of cowardice, shall be liable, on conviction before a Magistrate, to imprisonment for a period not exceeding six months.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence punishable under this section shall be cognizable.

18. Application of Act XXII of 1922 to members of the Force.

The Police (Incitement to Disaffection) Act, 1922, shall apply to members of the Force as it applies to members of a police force.

19. Certain Acts not to apply to members of the Force.

Nothing contained in the Payment of Wages Act, 1936, or the Industrial Disputes Act, 1947, or the Factories Act, 1948, shall apply to members of the Force.

20. Protection of Acts of members of the Force.

(1) In any suit or proceeding against any superior officer or member of the Force for any act done by him in the discharge of his duties, it shall be lawful for him to plead that such act was done by him under the orders of a competent authority.

(2) Any such plea may be proved by the production of the order directing the act, and if it is so proved, the superior officer or member of the Force shall thereupon be discharged from any liability in respect of the act so done by him, notwithstanding any defect in the jurisdiction of the authority which issued such order.

(3) Notwithstanding anything contained in any other law for the time being in force, any legal proceeding, whether civil or criminal, which may lawfully be brought against any superior officer or member of the Force for anything done or intended to be done under the powers conferred by, or in pursuance of, any provision of this Act or the rules thereunder shall be commenced within three months after the act complained of shall have been committed and not otherwise; and notice in writing of such proceeding and of the cause thereof shall be given to the person concerned and his superior officer at least one month before the commencement of such proceeding.

21. Power to make rules.

(1) The Central Government may, by notification in the Official Gazette, make rules[a] for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for —

(a) regulating the classes and grades and the pay and remuneration of superior officers and members of the Force and their conditions of service in the Force;

(b) regulating the powers and duties of superior officers and members of the Force authorised to exercise any functions by or under this Act;

(c) fixing the period of service for superior officers and members of the Force;

(d) regulating the punishments and providing for appeals from, or the revision of, orders of punishment, or the remission of fines or other punishments;

(e) any other matter which has to be, or may be, prescribed.

(3) All rules made under this section shall be laid for not less than thirty days before both Houses of Parliament as soon as possible after they are made and shall be subject to such modifications as Parliament may make during the session in which they are so laid or the session immediately following.

[a] For Railway Protection Force Rules, 1959, *See* G. S. R. 1051, published in Gaz. of Ind., 1959, Extra., Pt. II-Sec. 3 (i), p. 691.

THE SCHEDULE

(See section 7)

A. B. has been appointed a member of the Railway Protection Force under the Railway Protection Force Act, 1957, and is vested with the powers, functions and privileges of a member of the Force.

[THE INDIAN] RAILWAYS ACT, 1890

(Act IX of 1890)

[The Act printed here is as on 15-9-1961.]

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PREVIOUS LEGISLATION

Railways Act, XVIII of 1854—*Repealed* by Act IV of 1879.
Railway Servants Act, XXXI of 1867—*Repealed* by Act IV of 1879.
State Railways Act, XIII of 1870 — *Repealed* by Act IV of 1879.
Railway Act Amending Act, XXV of 1871 — *Repealed* by Act IV of 1879.
Indian Railways Act, IV of 1879 — *Repealed* by the Indian Railways Act, IX of 1890.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts XVIII of 1919; XXXII of 1925; X of 1927; XIV of 1930; XIX of 1933; XXXV of 1934; XXXIII of 1939; XXXIV of 1939; VI of 1941; III of 1943; VI of 1945; VI of 1947; XXI of 1948; LXV of 1948; LVI of 1949; XI of 1950; III of 1951; XLVIII of 1952; XLII of 1953; XXII of 1954; XVII of 1955; LIX of 1956, LIII of 1957; XIII of 1959; LVIII of 1960; XXXIX of 1961.

—Adapted by A. O., 1937; I. R. A. (Adap.) O., 1948 A. L. O., 1950; 2 A. L. O., 1956.

—Supplemented by Act IV of 1905 and by Ordinance LIII of 1942.

—Extended by Acts IV of 1941.

—Extended in Madhya Pradesh by M. P. Act XII of 1950.

—Repealed and amended by Acts IX of 1896; XI of 1923.

—Repealed in part by Act I of 1938.

COGNATE ACTS AND PROVISIONS

1. CARRIAGE BY AIR ACT, XX OF 1934.
2. CARRIERS ACT, III of 1865.
3. COTTON TRANSPORT ACT, III OF 1923, SS. 4, 5.
4. CRIMINAL P. C., 1898, S. 184.
5. EMPLOYMENT OF CHILDREN ACT, XXVI OF 1938, SS. 3 AND 4.
6. LAND ACQUISITION ACT, I OF 1894, SS. 43 AND 44.
7. METAL TOKENS ACT, I OF 1889, S. 8.
8. RAILWAY BOARD ACT, IV OF 1905.
9. RAILWAY COMPANIES ACT, X OF 1895.
10. RAILWAY COMPANIES (EMERGENCY PROVISIONS) ACT, LI OF 1951.
11. RAILWAY PROTECTION FORCE ACT, XXIII OF 1957.
12. RAILWAYS (LOCAL AUTHORITIES TAXATION) ACT, XXV OF 1941.
13. RAILWAYS STORES UNLAWFUL POSSESSION) ACT, LI OF 1955.
14. TELEGRAPH ACT. XIII OF 1885, S. 6.

[THE INDIAN] RAILWAYS ACT, 1890
(ACT IX OF 1890)[a]

[21st March, 1890.]

An Act to consolidate, amend and add to the law relating to Railways in India.

WHEREAS it is expedient to consolidate, amend and add to the law relating to railways in India ; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons *see* Gaz. of Ind., 1888, Pt. V, p. 133; for Report of the Select Committee, *see*, *ibid*, 1890, Pt. V, p. 23.

This Act has been declared to be in force by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (XIV of 1874), in the following Scheduled Districts, namely :—

Tarai Parganas, Province of Agra, *see* Gazette of India, 1890, Pt. I, p. 506; the Districts of Hazaribagh, Lohardaga (including at this time the present District of Palamau which was separated in 1894) and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum, *see ibid.*, p. 859.

The District of Lohardaga is now called the Ranchi District, *see* Calcutta Gazette, 1889, Pt. I, p. 44.

It has been applied to the Sonthal Parganas by the Sonthal Parganas Settlement Regulation 1872 (III of 1872), S. 3, as amended by the Sonthal Parganas Justice and Laws Regulation, 1899 (III of 1899). *See* Pt. II of the Schedule to the last named Regulation.

It has been partially extended to Berar by the Berar Laws Act, 1941 (IV of 1941).

The Act has been partially extended to the States merged in the State of Madhya Pradesh by M. P. Act XII of 1950, S. 3 and Sch. II [3-4-1950].

The Railway Board Act, 1905 (IV of 1905), is to be read with, and taken as part of, this Act, *see* S. 1 (2) of that Act.

CHAPTER I
PRELIMINARY

1. Title, extent and commencement.

(1) This Act may be called THE INDIAN RAILWAYS ACT, 1890.

[a][*(2)* It extends to the whole of India [b][* * *].]

Preamble — Note 1

[1] The Railways Act is a Central Act and in a matter of erecting warehouses, the Local Legislature has no authority to enact provisions relating to railways which are inconsistent with those of the Central Act. 1941 Cal 319 (325) [AIR V 28] : ILR (1941) 1 Cal 345 : 42 Cri L Jour 855

[2] In interpreting the provisions of the Railways Act the Courts should have strict regard to the language of that Act and it is dangerous to rely on decisions of English Courts given with reference to a similar statute the language of which is by no means identical. 1949 P C 39 (43) [AIR V 36 C 14].

(3) It shall come into force on the first day of May, 1890.

[a] *Substituted* for the former sub-section *(3)*, by the Indian Railways (Amendment) Act, 1948 (XXI of 1948), S. 2 [3-4-1948]. [b] The words "except the State of Hyderabad" *added* by A.L.O., 1950 were *omitted* by the Part B States (Laws) Act, 1951 (III of 1951), S. 3 and Sch. [1-4-1951].

2. Repeal. *Repealed by the Repealing Act, 1938 (I of 1938), S. 2 and Sch.*

3. Definitions.

In this Act, unless there is something repugnant in the subject or context, —

(1) "tramway" means a tramway constructed under the Indian Tramways Act, 1886, or any special Act relating to tramways :

(2) "ferry" includes a bridge of boats, pontoons or rafts, a swing-bridge, a flying bridge and a temporary bridge, and the approaches to, and landing-places of, a ferry.

(3) "inland water" means any canal, river, lake or navigable water [a][* * *];

[a] The words "in British India" were *omitted* by the Indian Railways Act (Adaptation) Order, 1948 [11-2-1948].

(4) "railway" means a railway, or any portion of a railway, for the public carriage of passengers, animals or goods, and includes[a]—

(a) all land within the fences or other boundary-marks indicating the limits of the land appurtenant to a railway ;

(b) all lines of rails, sidings or branches worked over for the purposes of, or in connection with, a railway ;

(c) all stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery and other works constructed for the purposes of, or in connection with, a railway ; and

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SECTION 3 — SYNOPSIS

1. Clause (4)—"Railway."
2. Clause (6)—"Railway administration."
3. Clause (7)—"Railway servant."
4. Clause (11)—"Traffic."
5. Clause (14)—"Terminals."

1. Clause (4) — "Railway." — [1] Staff quarters or any building of a residential character cannot be deemed to be part of a railway, and the fact that the place happens to be between two lines makes no difference if the lines by themselves are so quite apart that there can be even private lands between the lines. 1927 All 646 (646) [AIR V 14] : 50 All 34 : 28 Cri L Jour 648 ✣ 1914 Mad 196 (197) [AIR V 1] : 15 Cri L Jour 225 (DB).

[2] Navigation company which undertakes to carry goods despatched by Railway to other places is "Railway." ('12) 1912 Punj L R No. 233, p. 736 (738, 739) : 1912 Punj Re No. 111 (DB).

[See however 1931 Mad 115 (117) [AIR V 18]. (Canal Company by general contract with the Railway undertaking the work of carrying boats on the backwater—Back water is not a Railway within the meaning of S. 4 (d).)]

[3] All lands comprised within the Railway boundary being included within the definition of Railway in S. 3 (4), the Provincial Government cannot bring those lands within a Municipal area by notification. Godowns built by licensees on such lands cannot come under Municipal area so as to attract the application of the Rent Control legislation. ('49) 15 Cut L T 59 (61).

[4] Railway employed in clearing city's refuse does not come within the definition, because the definition contemplates a Railway which is employed in the transport of goods, animals or passengers on behalf of and for the public and which must cater to the public. 1955 Cal 307 (308, 309) [AIR V 42 C 88] (DB).

2. Clause 6) — "Railway administration." — [1] The definition of Railway administration is wide enough to include the Government administering the Railways. 1957 Madh Pra 157 (158) [AIR V 44 C 66].

[2] The Manager of the Railway is the administration and he is equated to the Government under the definition. 1960 All 362 (365) [AIR V 47 C 79] : ILR (1959) 2 All 609.

[3] Section 3 (6) means that the manager of a State Railway will represent that railway to the same extent as the company represents a railway administered by that company. It would, therefore, follow that, as in suitable cases it would be possible to prosecute a railway company, it would also be legal to prosecute a manager as representing a railway administered by the Government. Hence, the prosecution of the manager of the State Railway in a representative capacity for any offence under S. 14 of Bengal Licensed Warehouse and Fire Brigade Act, cannot be said to be misconceived by reason merely of the form of the complaint. Section 197, Criminal P. C. and S. 270, Government of India Act, have no application to such a case. 1941 Cal 319 (322) [AIR V 28] : ILR (1941) 1 Cal 345 : 42 Cri L Jour 855.

[4] In a case where the railway is administered by a Government or State, a suit under